

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30190

CODY P STURZENBECHER and JUDITH ANN STURZENBECHER, APPELLEES
v.
SIOUX COUNTY RANCH, LLC, APPELLANT

APPELLANT'S BRIEF

Appeal from the Circuit Court
First Judicial Circuit
Turner County, South Dakota

The Honorable David Knoff
Circuit Court Judge

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JURISDICTIONAL STATEMENT

The Circuit Court's Order Denying Defendant's Motions and Granting Plaintiffs' Motion for Preliminary Injunction ("the Order") was entered on November 10, 2022. Notice of Entry of the Order was filed and served on December 8, 2022. The Notice of Appeal and Certificate of Service were filed and served by Appellant Sioux County Ranch, LLC, on December 9, 2022.

The Court has jurisdiction under SDCL § 15-26A-3(5) because the Order granted injunctive relief.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred by denying Sioux County Ranch's Motion for Judgment on the Pleadings.

Circuit Court denied Sioux County Ranch's Motion for Judgment on the Pleadings.

A. Whether the Sturzenbechers' equitable mortgage claim is barred by the unambiguous and complete written agreement expressly stating the parties' intent that the disputed deed be an absolute conveyance.

Circuit Court held the written agreement did not control the parties' intent.

B. Whether the Sturzenbechers' unconscionability claim is precluded by the facts set forth in the pleadings and accompanying documents.

Circuit Court held the Sturzenbechers pleaded sufficient facts to support a claim for unconscionability.

II. Whether the Circuit Court erred by granting the Sturzenbechers' Motion for Preliminary Injunction after finding they were likely to succeed on the merits of their equitable mortgage claim.

Circuit Court granted the Sturzenbechers' motion for a preliminary injunction.

A. Whether the Circuit Court erred by relying on evidence outside the four corners of the written agreement, contrary to SDCL § 53-8-5 and decades of controlling precedent from this Court, to determine the intent of the parties when interpreting a written agreement.

Circuit Court found extrinsic evidence may be used to contradict the unambiguous terms of a written agreement.

B. Whether the Circuit Court abused its discretion by finding the parties intended a warranty deed to act as security for a debt rather than an absolute sale, despite the only evidence supporting such a finding was the self-serving, after-the-fact statements made by Plaintiffs.

Circuit Court found the parties intended the warranty deed in dispute to be security for a loan rather than an absolute conveyance.

STATEMENT OF THE CASE

The Sturzenbechers commenced this action on July 18, 2022, requesting the Circuit Court declare Defendant Sioux County Ranch, LLC an equitable mortgage holder, rather than the owner of certain real property in Turner County, South Dakota, or, in the alternative, declaring that a real estate purchase agreement through which Sioux County Ranch, LLC obtained title to the property

is void as unconscionable. The Sturzenbechers further sought a preliminary injunction preventing Sioux County Ranch from selling the real property in dispute.

Defendant Sioux County Ranch, LLC, moved for Judgment on the Pleadings and opposed the motion for a Preliminary Injunction.

The Circuit Court for the First Judicial Circuit, Turner County, the Honorable David Knoff, presiding, denied Sioux County Ranch's Motion for Judgment on the Pleadings and Granted the Sturzenbechers' Motion for a Preliminary Injunction.

STATEMENT OF FACTS¹

The Property at issue in this case is approximately 1041 acres of agricultural property situated west of Hurley, South Dakota. Complaint ¶ 18; Exhibit 9 (Record 532). Arnold and Clara Wollmann purchased the property in the 1950s and farmed it for decades. In 1993, they transferred the Property to the Arnold and Clara Wollmann Living Trust ("Trust"), which was set up for the benefit and support of the Wollmanns for their lives. Exhibit 12 (Record 547). After the Wollmanns' deaths, the Trust property was to be disbursed to the remainder beneficiaries, the Wollmanns' four daughters, one of which is

¹ Citations to testimony will be referred to as "Transcript" followed by the page and line numbers separated by a colon, e.g. "Transcript 10:15–20" refers to page 10, lines 15 through 20 of the testimony. Exhibits will be referred to by the exhibit numbers used in the preliminary injunction hearing, with reference to location in the record in the first time each is cited. References to Appellant's Appendix will be denoted "App'x" with the page number of the appendix immediately following, e.g. "App'x 15."

Plaintiff–Appellee Judy Sturzenbecher (“Judy”). Plaintiff–Appellee Cody Sturzenbecher (“Cody”) is Judy’s son.

Arnold Wollmann died in 2011, and the Trust remained for the “primary benefit” and support of Clara and “not to preserve principal for the remaindermen.” Exhibit 12 § 6.1. In 2019, Judy and the other beneficiaries agreed to an amendment of the Trust, which removed a provision assigning particular parcels of real property to individual beneficiaries. Transcript 313:17–315:16; Exhibit 12 § 6.2. Instead, the amendment granted each daughter (or her descendants) a one-fourth share in the Trust property at Clara’s death, which allowed the Trustee to sell property to cover Clara’s living expenses without the burden of those costs falling more heavily on some daughters’ expected benefits more than others. Transcript 313:17–315:16; Exhibit 12 § 6.2. Upon the death of Clara, the Trustee was empowered by the terms of the Trust and state law to liquidate the Trust assets and distribute the proceeds. Exhibit 12 § 6.2; SDCL § 55-1A-11.

Clara died in June 2020. Following her death, the Trustee began taking steps to sell the Property and contacted the beneficiaries of the Trust to inform them of the plan. Transcript 308:5–23. The Trust valued the Property at approximately \$4.5 million dollars; so as a one-fourth beneficiary of the Trust, Judy expected to receive in excess of \$1 million from the sale of the Property without taking any further action on her own. Transcript at 34:21–23, 41:1–19. At the same time, Cody was renting a 70-acre portion of the Property from the Trust. Complaint ¶ 13; Transcript 318:3–21; Exhibit 21 at 4.

Cody and Judy did not want the Property sold at public auction and began looking for ways to purchase the Property. Transcript 36:14–23. Cody had “no credit score,” and the “couple of banks” through which he sought financing were unwilling to lend him the money to purchase the Property. Transcript 39:20–40:6. Likewise, Judy was unable to obtain financing to purchase the Property. Transcript 308:24–309:8. Thus, it seemed Judy and Cody would be unable to purchase the Property, and Judy would take her one-fourth share (more than \$1 million) of the proceeds from the sale of the Property.

Cody and his brother Kyle Sturzenbecher then sought out Defendant–Appellant Sioux County Ranch (“Sioux County”) for assistance. Transcript 41:24–42:8, 364:20–25. Kyle initially contacted Sioux County member John Koerselman (“Koerselman”), but Cody took over the discussions. Transcript 42:7–8, 367:5–10. Cody, Kyle, and eventually Judy had multiple discussions with Sioux County about the Property.

In the fall of 2020, the parties came up with the structure of a transaction that could avoid a public sale of the Property from the Trust and allow Cody an opportunity to purchase the Property. Sioux County would purchase the Property and rent it to Cody for five years under a lease agreement. Transcript 372:2–16. The lease would grant Cody an option to purchase the Property for a set price. *Id.* To be affordable for Cody, his option price needed to be below the value of the Property so after obtaining a loan for the option price, there would be equity in the Property. Transcript 372:2–16. Thus, Sioux County was only willing to purchase the Property for an amount below its market value.

The Property would first need to be purchased out of the Trust for a price agreeable to the Trustee. Transcript 374:1–375:10. Sioux County agreed to make a short term loan to Judy to purchase the Property from the Trust. *Id.* Judy would then transfer the Property to Sioux County in partial satisfaction of the loan. *Id.* The balance of the loan would be paid largely by her share of the proceeds distributed to her from the Trust. Transcript 379:4–6, 386:19–22. Through this structure, Judy and Cody avoided a public sale of the Property from the Trust and put the Property into the hands of an owner who was willing to sell it to Cody for a set price (which the parties assumed would be below market value), giving Cody time to arrange financing to eventually buy the Property.

In December 2020 and January 2021, Sioux County, Judy, and Cody went to work memorializing their deal in writing. McCook County State’s Attorney Mike Fink represented Judy, and Cody testified he believed Attorney Fink also represented his interests. Transcript 329:9–14, 350:5–10; Exhibit 17 (Record 565); Exhibit 102 (Record 399); Exhibit 103 (Record 404); Exhibit 104 (Record 409); Exhibit 105 (Record 412); Exhibit 119² (App’x 55). Several emails were exchanged by Attorney Fink on behalf of Judy and Cody in the course of memorializing the deal in writing. Exhibit 17; Exhibit 18 (Record 577); Exhibit 24 (Record 593); Exhibit 25 (Record 594); Exhibit 26 (Record 617); Exhibit 28

² Exhibit 119 was offered and admitted without objection. Transcript 350:15–351:21. During drafting of this brief, Appellant’s counsel learned that Exhibits 119, 120, and 121 had not been included in the record. Counsel has contacted the Turner County Clerk of Court requesting those exhibits be included in the record, and the Clerk has indicated they will be. At the time of this brief, however, the

(Record 637); Exhibit 31 (Record 700); Exhibit 45 (Record 68); Exhibit 118 (Record 446); Exhibit 119.

The parties, with the help of their attorneys, were able to reach agreement on the written agreements, and they signed the written agreements on January 14, 2021. Those written agreements included the Lease Agreement (“Lease”) between Sioux County and Cody, which included Cody’s option to purchase the Property, a Real Estate Purchase Agreement (“Purchase Agreement”) between Judy and Sioux County, and loan documents relating to the short-term loan Sioux County made to Judy to purchase the Property from the Trust. Transcript 279:1–3, 378:16–379:25, 380:25–382:3; Exhibit 3 (Record 483); Exhibit 4 (Record 485); Exhibit 6 (Record 504, App’x 78); Exhibit 7 (Record 517, App’x 41). Under the plain and unambiguous terms of the documents, Judy agreed to sell the Property to Sioux County for \$3,187,500.00. Exhibit 7. Under the Lease, once conveyed to Sioux County, the Property would be encumbered by a five-year lease, during which, Cody could purchase the Property for \$3,825,000.00. Exhibit 6 at 1, 9–10.

On March 25, 2021, the parties closed on the sales. Judy first purchased the Property from the Trust, using money lent to her by Sioux County. Exhibit 101 (Record 497). Later that day, Judy conveyed the Property by warranty deed to Sioux County, Exhibit 100 (Record 395) (the “Warranty Deed”), in exchange for Sioux County reducing her debt by \$3,187,500.00. Exhibit 7 ¶ 2; Transcript 386:19–22; Exhibit 35 (Record 721). Cody began leasing the Property from

record index has not been updated, so Exhibit 119 is included in Appellant’s Appendix.

Sioux County, but he ultimately needed to sublet a portion of the Property to a third party. Exhibit 106 (Record 415). Cody sought and obtained Sioux County's consent to do so in March 2021. *Id.*

Judy paid the balance of the loan from Sioux County for her purchase of the Property from the Trust through a payment of \$1 million on March 31, 2021, and a payment of \$69,036.00, on November 5, 2021, after receiving proceeds from the Trust. Transcript 287:22–288:21; Exhibit 10 (Record 540). Judy's indebtedness under the Loan was completely extinguished at that time. Transcript 387:5–15.

In early 2022, Sioux County contacted Cody Sturzenbecher reminding him of the March 1, 2022 due date for the rent payment. Exhibit 37 (Record 723). Cody failed to pay the rent by that date, and Sioux County exchanged emails and text messages with him regarding the rent in the week following. Exhibit 38 (Record 724); Exhibit 109 (Record 420); Exhibit 110 (Record 422); Exhibit 111 (Record 424). In those communications, Sioux County provided notice of default to Cody on March 3, 2022, and requested Cody cure the default within ten days (as required under the Lease). *E.g.*, Exhibit 38. On March 16, 2022, with Cody still in default, Sioux County's attorney sent correspondence again to Cody, providing additional notice of the default and giving Cody another ten days to pay. Exhibit 42 (Record 736). Cody again failed to pay, and Sioux County terminated the Lease. Exhibit 42. Pursuant to the terms of the Lease, the option to purchase the Property was terminated with the Lease. Exhibit 7, Art. 17.

Following termination of the Lease through early June 2022, the Sturzenbechers attempted to negotiate with Sioux County to either enter into a new lease or to purchase the Property. Exhibit 39 (Record 726); Exhibit 41 (Record 729); Exhibit 48 (Record 820); Exhibit 113 (Record 425); Exhibit 115 (Record 429); Exhibit 116 (Record 430). Those negotiations did not lead to an agreement, and Sioux County put the Property up for sale by a public auction scheduled for July 25 and 26, 2022. Exhibit 9.

Cody and Judy filed this action in Circuit Court on July 18, 2022. For the first time, Judy and Cody claimed the Warranty Deed to Sioux County was intended as security for Judy's loan—an equitable mortgage—not an absolute conveyance. *See generally*, Complaint (Record 3, App'x 19). In addition, they alleged the Purchase Agreement was unconscionable. *Id.* The Sturzenbechers requested a temporary restraining order ("TRO") and preliminary injunction under SDCL § 15-6-65, preventing Sioux County from selling the Property. Motion for Temporary Restraining Order (Record 11). Judge Cheryl Gehring presided over an initial TRO hearing, granting the TRO, and required the Sturzenbechers to pledge an undertaking of \$500.00. Temporary Restraining Order, Record 119. The TRO was in place until Judge Knoff could take up the matter. *Id.* In an initial hearing, Judge Knoff increased the Sturzenbechers' undertaking to \$10,000.00 and scheduled a full preliminary injunction hearing. Order Amending Temporary Restraining Order (Record 257).

Prior to the preliminary injunction hearing, Sioux County moved for judgment on the pleadings, arguing the equitable mortgage claim is barred by

SDCL § 53-8-5. *See generally*, Motion for Judgment on the Pleadings (Record 323); Defendant's Brief in Support of Motion for Judgment on the Pleadings (Record 325) ("Brief in Support of Judgment"). Sioux County also asserted the Sturzenbechers' unconscionability claim failed as a matter of law. Brief in Support of Judgment (Record 333–35).

On September 7, 2022, the Circuit Court heard argument on the Motion for Judgment on the Pleadings and took it under advisement. The Court then moved forward with a day and a half hearing on the Motion for Preliminary Injunction on September 7 and 8, 2022. Judy and Cody testified at the hearing, along with Koerselman and auctioneer Marshall Hansen. In addition, the parties stipulated to written testimony of Attorney Fink. Transcript 350:15–351:21; Exhibit 119.

In addition to the testimony cited above, Judy and Cody testified that, notwithstanding the language of the Warranty Deed, Purchase Agreement, and Lease, Judy did not intend the Warranty Deed to transfer ownership to Sioux County. Transcript 44:12–18, 279:4–19. Judy and Cody acknowledged Sioux County obtained a loan to purchase the Property and at the time of the conveyance, they knew Sioux County must "hold title" to the Property. Transcript 51:2–17, 103:10–25, 279:14–19, 319:1–22, 344:23–25. Judy admitted she signed the Purchase Agreement on January 14, 2023; initialed it on every page on the line for "Seller's Initials"; and understood the meaning of the terms "seller" and "purchase." Transcript 323:21–325:4.

Koerselman testified he explained the nature of the transaction and that Sioux County would own the Property. Transcript 375:11–376:13; 397:6–19. He testified Sioux County does not typically lend money to individuals, Sioux County is not in the business of lending money, and he informed the Sturzenbechers of that fact. Transcript 363:23–364:2; 368:3–12; 369:1–9. Koerselman testified Sioux County typically owns property and leases it to a farmer with an option for the farmer to purchase the property when they are able to obtain a loan for the property. Transcript 362:17–363:10. Koerselman testified in no uncertain terms that Sioux County’s intent—as expressed to all involved—was to own the Property when Judy conveyed the Warranty Deed to Sioux County. Transcript 184:2–21, 192:23–193:1, 384:23–386:8.

Attorney Fink submitted an affidavit, which was admitted as evidence as Exhibit 119 by stipulation of the parties. Transcript 350:15–351:15; Exhibit 119. Attorney Fink’s testimony stated he “was hired by Judy Sturzenbecher to represent her . . . regarding the deal between Judy Sturzenbecher and Sioux County Ranch,” and that to his knowledge, “the only deal between the Sturzenbechers (Judy and/or Cody) and Sioux County Ranch, LLC, is that which is reflected in the agreements that were signed by the parties.” Exhibit 119.

The Circuit Court issued its Memorandum Decision on November 2, 2022, denying Sioux County’s motion for judgment on the pleadings and granting the Sturzenbechers’ motion for a preliminary injunction. Memorandum Decision (Record 833, App’x 5). The Circuit Court found the Sturzenbechers were likely to succeed on their equitable mortgage claim. *Id.* at 12 (App’x 16).

ARGUMENT

I. Introduction

How does a court determine the intent of the parties to a written agreement? “This Court need only look to the language that the parties used in the contract to determine their intention.” *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 16, 709 N.W.2d 350, 355; *see also, e.g., Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 37, 736 N.W.2d 824, 835 (“When contract language is unambiguous, extrinsic evidence is not considered because the intent of the parties can be derived from within the four corners of the contract.”); *Singpiel v. Morris*, 1998 S.D. 86, ¶ 10, 582 N.W.2d 715, 718 (“In determining the intention of the parties, a court must look to the language that the parties used.”). Indeed, under state law “the execution of a contract in writing” supersedes the oral negotiations that may have preceded it. SDCL § 53-8-5. The primary question presented in this appeal is whether that foundational legal principle is still good law in South Dakota, or whether a court, once a party invokes an equitable doctrine, can toss aside an unambiguous written agreement and impose other terms on the parties using extrinsic evidence not found in the written agreement.

At the Sturzenbechers’ urging, the Circuit Court completely disregarded the unambiguous terms of a lawful written agreement for the sale of real property—an agreement Judy entered into with the assistance of counsel—in favor of an equitable theory directly contradicting the written agreement. On that basis, the Circuit Court enjoined Sioux County from exercising its right to sell its

property, in a time of high land prices and low interest rates, to allow the Sturzenbechers to pursue their theory that, despite the numerous signed documents to the contrary, they are (or perhaps just Judy is) the true owner of the Property.

For the Circuit Court to go outside the writing to determine the parties' intent was a clear legal error that contradicts state statute and this Court's long line of precedent. For it to then grant a preliminary injunction without sufficient evidence to find in the Sturzenbechers' favor, was another error. For these reasons, and all the reasons discussed herein, Sioux County respectfully requests the Court vacate the Circuit Court's Order Denying Defendant's Motions and Granting Plaintiffs' Motion for Preliminary Injunction and direct the Circuit Court to enter Judgment in favor of Sioux County.

I. THE CIRCUIT COURT ERRED BY DENYING SIOUX COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. The Sturzenbechers' Equitable Mortgage Claim is Barred by the Purchase Agreement and Controlling State Law

Sioux County and Judy expressed their intent that the Warranty Deed be an absolute sale from Judy to Sioux County through the terms of the unambiguous and complete Purchase Agreement. The equitable mortgage doctrine and the case law describing it do not create an exception to SDCL § 53-8-5 that would allow the Circuit Court to ignore the parties' clearly expressed intent.

This Court has repeatedly held that, when an agreement is reduced to an unambiguous writing, the parties' intent should be gleaned from the four corners

of the agreement. *E.g., Ziegler Furniture*, 2006 S.D. 6, ¶ 16, 709 N.W.2d at 355.

That rule is consistent with statute:

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

SDCL § 53-8-5. The statute does not contain an exception for equitable mortgages.

The equitable mortgage doctrine, on the other hand, allows a court to declare that a deed, though facially an absolute conveyance of real property, is in fact a mortgage. *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 11, 639 N.W.2d 529, 533. Whether such an instrument is in fact a mortgage and not an absolute conveyance “depends on the intent of the parties.” *Id.* “One claiming such a document to be in fact a mortgage” must prove it was intended to be a mortgage by “clear and convincing evidence.” *Id.*

The parties in this case executed the Purchase Agreement, which is a complete writing expressing their intent that delivery of the Warranty Deed from Judy to Sioux County was an absolute conveyance. *See generally* Exhibit 7. For example, the Purchase Agreement explicitly stated “Seller [Judy] agrees to *sell* to Purchaser [Sioux County], and Purchaser agrees to *buy* from Seller” the Property. Exhibit 7, ¶ 1, Record 517; *see also id.* ¶ 2 (stating the “Purchase Price”); *id.* ¶ 7(g) (“The performance of this Agreement will not . . . result in the imposition of, any lien or encumbrance upon the Property”); *id.* ¶ 10(d)(ii) (“[Judy] agrees to furnish the following items to [Sioux County] at closing: . . . (ii) A good and sufficient warranty deed executed by [Judy] and which will convey fee simple,

indefeasible title of the Property to [Sioux County]”). Judy did in fact execute and deliver the Warranty Deed to Sioux County, as agreed in the Purchase Agreement. Exhibit 100. Importantly, the Purchase Agreement distinguishes this case from every other case in which this Court has found an equitable mortgage. Nonetheless, the Circuit Court disregarded the Purchase Agreement, along with SDCL § 53-8-5 and this Court’s long line of precedent regarding contract interpretation, when it allowed the Sturzenbechers’ to pursue their equitable mortgage claim in the face of the unambiguous written contract.

An equitable mortgage contemplates two conveyances. The first conveyance is from the grantor–mortgagor to the grantee–mortgagee. *See, e.g., Myers v. Eich*, 2006 S.D. 69, ¶¶ 4–5, 720 N.W.2d 76, 78–79. The conveyance is in exchange for a sum of money, but at the same time the grantor–mortgagor agrees to pay the sum (plus interest, fees, or both) to the grantee–mortgagee over time in exchange for the grantee–mortgagee’s agreement to make a second conveyance of the property *back* to the grantor–mortgagor. *Id.* If the “written memorials and all the surrounding circumstances” reveal both parties intended the first conveyance to in fact be security for the debt rather than an absolute conveyance, then a court may declare it an equitable mortgage. *Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533.

This Court has not found an equitable mortgage in a case such as this where a complete writing expressly stated the parties intended the first conveyance to be an absolute sale. In previous equitable mortgage cases, only bare deeds or partial writings existed, so the Court was allowed to examine the

surrounding circumstances to glean the parties' intent. *Myers*, 2006 S.D. 69, ¶ 4, 720 N.W.2d at 78 (a deed and a letter from the grantee described first conveyance as security for his loan to grantors); *Adrian*, 2002 S.D. 10, ¶ 5, 639 N.W.2d at 532 (only a bare deed for the first conveyance, with a lease and option describing the second conveyance); *Fuller v. Middaugh*, 77 N.W.2d 841 (S.D. 1956) (bare deed and agreement to reconvey to grantor upon payment of a debt); *Stotts v. Swallow*, 12 N.W.2d 808 (S.D. 1944) (deed with instructions to escrow agent that did not reflect a complete agreement). Because no written agreement completely set forth the parties' intent with respect to the challenged conveyance (i.e., the transfer of the first deed) in those cases, the Court was free to look at extrinsic evidence in order to ascertain intent without running afoul of SDCL § 53-8-5 or controlling precedent. Nothing in those cases suggests the Court intended the equitable mortgage doctrine to supersede state statute and decades of case law requiring Courts to honor the terms agreed to by parties in unambiguous written agreements.

Other courts have explicitly held the parol evidence rule bars extrinsic evidence when a party attempts to reform a deed as an equitable mortgage. *E.g.*, *Munster Steel Co., Inc. v. CPV Partners, LLC*, 186 N.E.3d 143, 149 (Ind. Ct. App. 2022) (noting that “[w]hile it is true that parol evidence is generally admissible to determine whether an absolute deed was intended as a mortgage, *when a contract is unambiguous, the intent of the parties should be determined by the language employed in the document*” (emphasis added)); *see also BMBT, LLC v. Miller*, 322 P.3d 1172, 1175 (Utah App. 2014); *Glauser Storage, L.L.C. v. Smedley*, 27

P.3d 565, 569 (Utah App. 2001); *Gajewski v. Bratcher*, 221 N.W.2d 614, 643 (N.D. 1974). The equitable mortgage doctrine “must co-exist with other important rules of construction,” especially the preference that the parties’ intent be gleaned “whenever possible, from written agreements rather than from self-serving testimony.” *Glauser Storage*, 27 P.3d at 571; *see also Ziegler Furniture*, 2006 S.D. 6, ¶ 16, 709 N.W.2d at 355.

Furthermore, it makes little sense to require a real property contract to be in writing, *see* SDCL § 53-8-2(3), only to toss the writing aside in favor of oral testimony whenever a party cries “equity.”

In this case, like any other contract case, SDCL § 53-8-5 and this Court’s precedent required the Circuit Court to glean the parties’ intent from the unambiguous, written agreement between the parties. The Purchase Agreement clearly shows the parties intended the Warranty Deed to be an absolute conveyance. Exhibit 7. Therefore, the Circuit Court erred when it considered extrinsic evidence contrary to the plain terms of the Purchase Agreement and denied Sioux County’s motion for judgment on the pleadings.

B. The Sturzenbechers’ Unconscionability Claim Fails as a Matter of Law

The Sturzenbechers’ second claim requests, in the alternative to its equitable mortgage claim, that the Purchase Agreement be declared “void and unenforceable” because, they claim, it is unconscionable. Complaint ¶ 51 at 7. The unconscionability claim fails as a matter of law, and the Circuit Court erred by denying Sioux County’s motion for judgment on the pleadings.

1. *Unconscionability is not a Cause of Action*

Unconscionability is not a claim for relief that provides a remedy for the Sturzenbechers. “Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause.” *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 29, 731 N.W.2d 184, 195. Unconscionability is a defense—a shield, not a sword—that protects parties from enforcement of unconscionable contracts against them. *Id.* It is not an affirmative claim for relief. *Id.* ¶ 30, 731 N.W.2d at 196; *see also*, *e.g.*, *AIDS Healthcare Found. v. Express Scripts, Inc.*, __ F. Supp. 3d __, 2023 WL 2263183, at *8 (E.D. Mo. Feb. 28, 2023) (noting Missouri has not recognized unconscionability as an independent claim for relief and doubts it would); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 39 (Neb. 2004) (holding the unconscionability provision of the UCC “was not intended to create a cause of action”).

Both parties have fully performed their obligations under the Purchase Agreement. Judy conveyed the Property to Sioux County, and Sioux County paid for the Property. There is no executory obligation under the Purchase Agreement for a court to refuse to enforce. *Nygaard*, 2007 S.D. 34, ¶ 29, 731 N.W.2d at 195. Therefore, the Sturzenbechers have no claim for relief under the theory of unconscionability, and the Circuit Court erred by denying Sioux County’s motion for judgment on the pleadings.

2. *The Allegations in the Sturzenbechers' Complaint Show the Purchase Agreement Was Not Unconscionable*

Even if the Sturzenbechers' unconscionability claim did constitute an affirmative claim for relief, the Sturzenbechers' pleadings and referenced documents show there is no unconscionability claim.

Whether a contract or contractual term is unconscionable is a question of law for a court to decide. *Johnson v. John Deere Co.*, 306 N.W.2d 231, 237–38 (S.D. 1981). Unconscionability is determined at the time of formation of the contract. *Id.* This Court has defined unconscionable contracts to be: “One-sided agreements whereby one party is left without a remedy for another party’s breach.” *Baldwin v. Nat’l Coll., a Div. of Dlorah, Inc.*, 537 N.W.2d 14, 17 (S.D. 1995). When determining “whether a contract is an unenforceable contract of adhesion, this Court looks not only at the bargaining power between the parties but also at the specific terms of the agreement.” *Nygaard*, 2007 S.D. 34, ¶ 25, 731 N.W.2d at 194. The focus is on whether there are “overly harsh or one-sided terms” (*i.e.* substantive unconscionability) and on how the contract was made, including whether there was a meaningful choice (*i.e.* procedural unconscionability). *Id.* ¶ 25, 731 N.W.2d at 195.

The facts alleged in the Sturzenbechers’ complaint, and the documents incorporated by it, establish the Purchase Agreement was not unconscionable, either procedurally or substantively. The Sturzenbechers were represented by attorney Mike Fink in the course of drafting and signing the Purchase Agreement. Exhibit 7, at 7–8, ¶¶ 12–13 (acknowledging representation by counsel in the formation of the agreement and providing for notice to attorneys representing

each party); *id.* at 11 (showing Judy's signature was notarized by attorney Mike Fink). Further, the pleadings establish Judy had a meaningful choice with respect to the agreement—she could do nothing and receive proceeds from the Trust in excess of \$1 million. Complaint ¶¶ 14–16. Judy received millions of dollars in consideration for the Property from a buyer who also granted an option for Cody to purchase the Property at a below market rate. Complaint ¶¶ 26, 29. Moreover, there is no claim Judy lacked a remedy in the event Sioux County breached (indeed, she could have not deeded over the Property).

The Pleadings show the Sturzenbechers' claims fail as a matter of law, and therefore Sioux County's motion for judgment on the pleadings should have been granted. Had the Circuit Court done so, there would have been no need for the Preliminary Injunction hearing or the presentation of any evidence. Similarly, this Court can vacate the Circuit Court's decision below and direct judgment in favor of Sioux County without even addressing the evidence presented at the Preliminary Injunction hearing. If this Court does address the evidence presented in favor of the Motion for a Preliminary Injunction, it will find even more reason to find in Sioux County's favor.

II. THE CIRCUIT COURT ERRONEOUSLY GRANTED THE PRELIMINARY INJUNCTION

The circuit court's granting of the preliminary injunction relied on an erroneous conclusion of law and was granted against reason and the evidence. First, the circuit court erroneously considered evidence beyond the Purchase Agreement to determine the Sturzenbechers were likely to succeed on the merits of their equitable mortgage claim. Second, the Court found, contrary to the

evidence of record, that the parties intended the disputed transaction to be an equitable mortgage, even though the Sturzenbechers failed to present clear and convincing evidence the parties intended the Warranty Deed to be an equitable mortgage instead of an absolute conveyance as it appears on its face.

The standard of review for a ruling on injunctive relief is abuse of discretion. *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138. “An abuse of discretion can simply be an error of law, or it might denote a discretion exercised to an unjustified purpose, against reason and evidence.” *Id.* (quoting *Halls v. White*, 2006 S.D. 47, ¶ 4, 715 N.W.2d 577, 579). The Circuit Court’s findings of fact are reviewed under a clearly erroneous standard, but the Supreme Court gives “no deference to the circuit court’s conclusions of law.” *Id.* (brackets removed) (quoting *Halls*, 2006 S.D. 47, ¶ 4, 715 N.W.2d at 579).

When determining whether to grant a request for a preliminary injunction, courts consider four factors:

- (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that the movant will succeed on the merits; and (4) the public interest.

Strong, 2014 S.D. 69, ¶ 11, 855 N.W.2d at 138–39 (quoting *Dacy v. Gors*, 471 N.W.2d 576, 579 (S.D. 1991)). Of those factors, likelihood of success on the merits is necessary for injunctive relief to be granted. *Id.* ¶ 12, 855 N.W.2d at 139. The Circuit Court erroneously found the Sturzenbechers were likely to succeed on the merits of the equitable mortgage claim by relying on extrinsic

evidence contradicting the Purchase Agreement. Moreover, that finding was reached by the Circuit Court contrary to reason and evidence.

**A. The Circuit Court's Order Granting of a Preliminary Injunction
Rests on an Erroneous Conclusion of Law That it Was Not
Bound by SDCL § 53-8-5**

The doctrine of equitable mortgage allows a court to reform an instrument reflecting an absolute conveyance into a security agreement if the parties to the transaction intended the transfer as security for a debt. *See Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533. In order to overcome the presumption that an instrument reflecting an absolute conveyance is what it purports to be, the party seeking to reform the transaction must prove by *clear and convincing* evidence that the parties actually intended the instrument as a security. *Myers*, 2006 S.D. 69, ¶ 21, 720 N.W.2d at 83. The parties' intention is "gleaned from the written memorials and all the surrounding circumstances." *Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533.

The evidence presented to the Circuit Court showed that after months of conversations and negotiations, Sioux County and the Sturzenbechers executed several writings outlining the terms of their agreement. Transcript at 98:10–99:5, 323:19–325:10, 378:21–380:5; Exhibit 119; *see also* Exhibit 6; Exhibit 7. The written agreements unequivocally and expressly described the Warranty Deed from Judy to Sioux County as an absolute conveyance to Sioux County, intending Sioux County to be the owner of the Property. *See, e.g.*, Exhibit 7 ¶ 1 ("Seller agrees to sell to Purchaser, and Purchaser agrees to buy from seller, a parcel of real property approximately 1041 acres in size . . ."); Exhibit 7 ¶ 2 (outlining the

“*purchase price*” and the form of payment, including reduction of indebtedness owed by Judy); Exhibit 7 ¶ 4 (requiring a seller to obtain and deliver a title commitment to purchaser insuring marketable fee simple title); Exhibit 6, Art. 1 § 4 (making the Lease Agreement contingent upon Sioux County acquiring “good and marketable title” to the Property); Exhibit 6, Art. 3 § 1 (making “rent” payable by tenant Cody Sturzenbecher to landlord Sioux County). The terms of those agreements were negotiated and drafted with the input and assistance of attorney Mike Fink representing the Sturzenbechers, and they reflect the actual agreement between the parties. Transcript at 99:21–23, 102:2–23, 273:17–20, 329:4–14, 349:7–24, 379:4–25; Exhibit 119.

The above evidence establishes conclusively that the Purchase Agreement stated the parties’ intent with respect to the Warranty Deed from Judy. The Circuit Court need not, in fact, could not, consider evidence of oral negotiations contradicting the parties’ written intent. SDCL § 53-8-5; *Ziegler Furniture*, 2006 S.D. 6, ¶ 16, 709 N.W.2d at 355. The Circuit Court erroneously held that using the parties’ mutually agreed upon Purchase Agreement—an agreement negotiated and drafted with the aid of attorneys for both sides—would place “form over substance.” Memorandum Decision at 3. That conclusion ignores SDCL § 53-8-5 and the long line of precedent from this Court holding that terms of an agreement committed to writing are the substance of that agreement. SDCL § 53-8-5; *Ziegler Furniture*, 2006 S.D. 6, ¶ 16, 709 N.W.2d at 355. In fact, the Circuit Court then went on to completely disregard the Purchase Agreement, despite equitable mortgage case law directing it to consider the “written memorials” in

addition to the circumstances surrounding them. *Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533. The Circuit Court's findings were based on an error of law for which reversal is warranted.

B. The Court's Finding That the Parties Intended the Warranty Deed to be Security for a Debt was Clearly Erroneous.

Even if this Court finds that the Circuit Court did not err when it disregarded SDCL § 53-8-5 and considered evidence beyond the four corners of the Purchase Agreement to ascertain the parties' intent, the Circuit Court abused its discretion by finding the parties intended the Warranty Deed as security for a loan rather than an absolute conveyance, because it made its finding against reason and evidence.

Because the Warranty Deed is an absolute conveyance on its face, the Sturzenbechers must show by "*clear and convincing* evidence" that the parties actually intended another agreement in which the Warranty Deed was security for a debt. *Myers*, 2006 S.D. 69, ¶ 21, 720 N.W.2d at 83 (emphasis added). Courts are instructed to consider the "written memorials and all the surrounding circumstances." *Adrian*, 2002. S.D. 10, ¶ 11, 639 N.W.2d at 533. The Court considers several factors that, if present, "favor a finding that a conveyance, absolute on its face, constitutes an equitable mortgage." *Myers*, 2006 S.D. 69, ¶ 25, 720 N.W.2d at 83–84. Those factors include:

- (1) pre-existing debt not extinguished with conveyance;
- (2) conveyance made with agreement to reconvey;
- (3) property value considerably more than debt;
- (4) property in original transaction not appraised and no discussion of its value in relation to sale price; and

(5) dealings between the parties akin to that of creditor-debtor.

Id. The evidence presented at the preliminary injunction hearing shows the *Myers* factors do not favor finding an equitable mortgage in this case.

Perhaps the most compelling piece of evidence was the sworn written testimony from Attorney Fink. The Sturzenbechers' own attorney testified that "[t]o [his] knowledge, the only deal between the Sturzenbechers (Judy and/or Cody) and Sioux County Ranch, LLC is that which is reflected in the agreements that were signed by the parties." Exhibit 119. This fact alone should preclude any finding that an equitable mortgage exists here. Nonetheless, Sioux County will analyze the factors set forth in *Myers*.

1. A Pre-Existing Debt was Extinguished With the Conveyance

The Warranty Deed was applied to and reduced Judy's debt to Sioux County, so the first factor is not met.

Sioux County loaned Judy \$4.25 million to buy the Property from the Trust. That loan necessarily pre-existed the deed from Judy to Sioux County. The loan was secured by a *written* mortgage executed by Judy to Sioux County. Exhibit 4. When Judy later conveyed the Property to Sioux County, the majority of the loan—\$3,187,500.00—was extinguished. Exhibit 7 § 2(b); Exhibit 35. The balance of the loan was paid by November 5, 2021. *E.g.*, Exhibit 10. Thus, by that time, there was no remaining debt to secure. Without a debt to secure, there can be no equitable mortgage. *Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533 ("One of the essential elements of mortgage is a debt to be secured . . .").

This factor shows the parties did not intend the Warranty Deed to be a security interest.

The Circuit Court acknowledged this was not the “typical equitable mortgage situation,” where the grantor pays off one debt and incurs a debt to the alleged mortgagee, but then brushed that aside with the unsupported conclusion that “it has the same effect” because the transaction was “characterized as a means to *preserve the family farm for the Sturzenbechers*.” Memorandum Decision at 10 (App’x 14). That analysis assumed the conclusion the Circuit Court was trying to reach.

The transfer of the deed did not have the “same effect” as a typical equitable mortgage. Judy owed money to Sioux County—not a third party. Judy paid back a portion of her debt by transferring the Property to Sioux County. If it were functionally the same thing, then her transfer would not have reduced the debt—a mortgage secures a debt, it does not reduce it. The Circuit Court’s conclusion that the transaction has the same effect as a security is contrary to reason and evidence and entitled to no deference from the Court. Because a debt to be secured is an essential element of an equitable mortgage, *see Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533, the reduction and subsequent extinguishment of Judy’s debt is fatal to the Sturzenbechers’ equitable mortgage claim and shows the clear error in the Circuit Court’s ruling.

2. *There Was No Agreement to Reconvey the Property to Judy, the Claimed “Mortgagor”*

The Lease contained an option through which Cody could purchase the Property for a fixed price of \$3,825,000.00 in the five years following

commencement of the Lease if other conditions were also met. Exhibit 6 Art. 17 at 9–10. Cody’s option, though an intentional part of the overall transaction between the parties, is not an agreement to *reconvey* the Property.

The reason an agreement to *reconvey* the property is important is because of its similarity to a security. *See Myers*, 2006 S.D. 69, ¶ 26, 720 N.W.2d at 84; *see also* MORTGAGE, Black’s Law Dictionary (11th Ed. 2019) (defining mortgage as an interest in property that “will become void upon payment” of a debt or “performance according to the stipulated terms,” or a lien granted to secure an obligation “that is extinguished upon payment”). If the Warranty Deed was truly intended only as a security, then Sioux County would have agreed to reconvey the Property back to Judy, the grantor, effectively extinguishing the security. In this transaction, as the Court recognized, Cody—not Judy—held an option to purchase the Property. Memorandum Decision at 10 (App’x 14). When Judy conveyed the Property to Sioux County, she had no right to reconveyance of the Property under any circumstances. Thus, this factor does not favor an equitable mortgage.

The Circuit Court justified ignoring that distinction by stating:

There is no rational reason Judy would simultaneously buy property for over four million dollars and sell the same property for roughly three million dollars, no strings attached.

Memorandum Decision at 11 (App’x 15). That statement is not an accurate statement of the circumstances surrounding the transaction and is another example of the Circuit Court assuming its conclusion rather than using the writings and

circumstances to determine the parties' intent. There were "strings attached" to the Property—Cody's lease and option.

Judy desired an opportunity for Cody to purchase the Property but neither Judy nor Cody could afford to buy it from the Trust. Without this transaction, the Property would have been sold by the Trustee at an auction and neither Judy nor Cody could control who would buy it. By entering into this transaction, Judy was able to direct the Property to Sioux County, which was willing to give Cody an option to purchase it at a later date when he might be able to get financing for a set price below expected market value. Exhibit 6; Exhibit 7. The Purchase Agreement and the Lease, both of which were acknowledged by the Circuit Court, along with Judy's and Cody's testimony, are consistent with the intent of allowing Cody an opportunity to own the Property some day and show the Court's conclusion to be contrary to reason and evidence. Judy, with the advice of counsel, parlayed her proceeds from the Trust to ensure Cody would have an opportunity to buy the Property at an affordable price. Cody squandered that opportunity and his mother's inheritance, but that does not make Judy's choice irrational or convert the Warranty Deed into an equitable mortgage. *See In re Ricard Family Trust*, 2016 S.D. 64, ¶ 20, 886 N.W.2d 326, 331 (noting one is not "relieved of a contract merely because [she] may have made a bad bargain") (quoting *Olson v. Opp*, 182 N.W.2d 220, 222 (S.D. 1970)).

3. *The Property Value is not Considerably More Than the Debt*

This factor illustrates how the transaction fundamentally is not an equitable mortgage. Judy did not own the Property when this transaction was

conceived. Judy, with the assistance of her attorney, negotiated a purchase price to buy the Property from the Trust in an arm's length transaction. Sioux County loaned Judy the full purchase price, so the property value at the time of the transaction was not "considerably more than the debt." *Myers*, 2006 S.D. 69, ¶ 25, 720 N.W.2d at 84. That loan was secured by a written mortgage and was fully repaid prior to the commencement of this action. Thus, this factor does not favor finding an equitable mortgage.

Instead of applying this factor, the Circuit Court focused on the purchase price Sioux County paid for the Property as compared to the value the Trust placed on the Property. Sioux County's purchase price was less than the value placed on the Property by the Trust. The Circuit Court erroneously states Sioux County was able to purchase the Property "at over a one-million-dollar discount" from Judy's price "without any explanation" for the difference. Memorandum Decision at 11 (App'x 15). The Court failed to consider the detailed explanation given by both Koerselman and Cody that Sioux County's purchase price was below what it perceived to be market value *to ensure that Cody's option also could be below market value*. Transcript 75:11–15, 171:17–172: 3, 372:8–16.

To the extent there was a loan between Judy and Sioux County, it was roughly the same as the value of the Property, and it was extended prior to the Warranty Deed that is being challenged. As such, this factor does not favor finding an equitable mortgage.

4. *The Property Value Was Considered by the Parties*

The Circuit Court did not address the fourth *Myers* factor of whether the Property was appraised or whether there was discussion of its value with respect to its purchase price. The evidence shows the parties were aware of the value placed on the Property by the Trust since Judy, again with the assistance of counsel, negotiated that purchase in an arm's length transaction. *E.g.*, Exhibit 2; Exhibit 21. The price Sioux County was willing to pay was also based on the value of the Property. Transcript 372:2–16, 374:1–375:10. This factor does not favor finding an equitable mortgage.

5. *The Parties Did Not Maintain a Debtor–Creditor Relationship*

Judy satisfied her debt to Sioux County in 2021, at which time Sioux County's business relationship with Judy ended. Cody never had a debtor–creditor relationship with Sioux County. The Circuit Court erroneously found, based on Sioux County's typical transactions and the “purpose of the relationship,” rather than the documents and the circumstances, that the “transaction was set up as a debtor–creditor relationship.” Memorandum Decision at 11 (App'x 15).

Sioux County did in fact loan Judy \$4.25 million dollars, which loan was secured by a written mortgage and assignment. Exhibit 3; Exhibit 4; Exhibit 5. That debt was extinguished in large part when Judy deeded the Property to Sioux County and was completely repaid on November 5, 2021. Exhibit 7 ¶ 2(b) (Record at 517); *see also* Exhibit 35; Exhibit 10; Exhibit 35; Exhibit 36 (Record 722) (acknowledging Judy's debt had been paid in its entirety); Transcript 387:2–

16. A party may pay indebtedness by transferring property without it being considered an equitable mortgage—especially when the creditor was already secured by a written mortgage. *Ravnaas v. Andrich*, 244 N.W. 361, 362 (S.D. 1932). Sioux County and Cody never had a debtor-creditor relationship. This factor does not favor finding an equitable mortgage in this case.

6. *The Circuit Court Erroneously Relied on Plaintiffs' Self-Serving Testimony and Ignored the Contemporaneous Documentary Record*

The Court's analysis of the above factors placed a significant emphasis on the testimony about the general purpose of the transaction—begging the question rather than evaluating the factors to determine parties' intent regarding the Warranty Deed. *E.g.*, Memorandum Decision at 11 (App'x 15). Sioux County acknowledged that the overall transaction was set up to allow Cody to have the *opportunity* to own the Property, Transcript 149:15–20, 368:3–9, 372:21–25, but that generalized intent is not the material question. The issue is whether Judy and Sioux County intended the Warranty Deed as an absolute conveyance, as it appears on its face. *Myers*, 2006 S.D. 69, ¶ 21, 720 N.W.2d at 83. A sale with a subsequent lease and option—even if it were a lease back to the grantor (which is not the case here)—is not illegal. Nor is a deed with an agreement to reconvey automatically presumed to be an equitable mortgage. *Stotts*, 12 N.W.2d at 810.

The Circuit Court erred by emphasizing the parties' testimony about the general purpose of the overall transaction, rather than the contemporaneous record reflecting the parties' intent with respect to the Warranty Deed. It further erred by disregarding the contemporaneous documents in favor of the Sturzenbechers'

self-serving testimony. An examination of the written record from the time leading up to the transaction through the following year shows all parties intended the Warranty Deed as an absolute conveyance, and the Sturzenbechers only began claiming it was an equitable mortgage when they commenced this action.

As discussed above, the Purchase Agreement and the other written agreements show the parties intended the transfer from Judy to Sioux County as an absolute conveyance. In addition, every informal contemporaneous writing is consistent with an absolute conveyance as well. The contemporaneous communications between the Sturzenbechers and Sioux County make clear the intent of the parties was for Judy to convey the property to Sioux County. *See, e.g.,* Exhibit 14 (Record 561) (Oct. 31, 2020 text message describing a transaction in which Judy purchases the Property from trust and then enters into a purchase agreement with Sioux County); Exhibit 29 (Record 685) (email from Attorney Mike Fink requesting copies of the executed purchase agreement between Judy and Sioux County and the Lease Agreement between Cody and Sioux County).

Likewise, communications from the time of the conveyance until immediately before the lawsuit are consistent with an absolute conveyance. On March 4, 2021, between signing the Purchase Agreement and the closing on the Property, Sioux County, Judy, and Cody Sturzenbecher exchanged text messages regarding Sioux County's consent, as *landlord* of the Property, for Cody to sublet a portion of the Property to a third party. Exhibit 34 (Record 720). In August and September 2021, Sioux County, Judy, and Cody again exchanged text messages in which Sioux County reminded the Sturzenbechers that Judy owed (only) the

remaining \$62,500.00 plus interest, following transfer of the Property to Sioux County, and Cody owed the balance of *rent* for the Property. Exhibit 35; Exhibit 107 (Record 417); Exhibit 108 (Record 418). In November 2021, Sioux County followed up, noting that Judy had paid off her entire loan, but Cody still owed *rent*. Exhibit 36 (Record 722). In none of those communications did either of the Sturzenbechers attempt to clarify or correct those characterizations because, in 2021 and early 2022, the Sturzenbechers understood that Sioux County was the owner of the Property. *See also* Exhibit 39 (text messages between Cody and Sioux County discussing possible purchase of the property); Exhibit 41 (Cody referring to annual payment as “rent,” on April 13, 2022). No written communication from prior to the commencement of this lawsuit indicates the parties intended the Warranty Deed to be security for a debt.

The only evidence presented indicating the Warranty Deed was intended as a security is the self-serving testimony of the Sturzenbechers. That testimony, however, buckles under the weight of even light scrutiny.

Although the Sturzenbechers took pains to testify that they did not intend Sioux County to own the Property, that testimony flies in the face of all the formal and informal writings from the time of the transaction through the first half of 2022. *See Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 534. Further, they acknowledged on multiple occasions that they understood Sioux County intended to “hold title” to the Property. *E.g.*, Transcript 53:12–13, 283:8–11. Although they took pains not to say Sioux County owned the Property, what, if not that, does it mean to hold title? *See Plocek v. Simpson*, 63 N.W.2d 262 (S.D. 1954)

(noting that “[t]he owner of record is the person who has acquired and *holds title* to that land by a valid conveyance . . .” (emphasis added)); *see also* SDCL § 43-4-1 (defining a transfer of property as an act “by which the title to property is conveyed”); Black’s Law Dictionary (11th Ed. 2019) (defining “title” as “[t]he unition of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property”); *see also* <https://www.merriam-webster.com/dictionary/title> (last visited April 14, 2023) (defining title as “a legally just cause of exclusive possession,” or “all the elements constituting legal ownership”); *see also* Transcript 344:23–25 (Judy testifying she did not initially contest Sioux County’s ability to sell the property because “[t]hey had title to it”). Certainly, even if it was unclear to the Sturzenbechers initially, Attorney Mike Fink knew that Sioux County “holding title” to the Property meant Sioux County would own it. Thus, even the Sturzenbechers’ own testimony acknowledges they knew Sioux County was intended by all to own the Property.

Likewise, what had consistently been referred to by all parties as “rent” from 2021 through the first half of 2022, *e.g.* Exhibit 35 (noting amounts of “rent” due); Exhibit 36 (referring to rent payments); Exhibit 8 (Record 529) (offering, after default of the Lease Agreement, to “rent” the Property), was transformed by the Sturzenbechers into “interest payments” for the first time after commencement of this lawsuit, *e.g.*, Transcript at 76:14–18, 147:20–148:3. The Sturzenbechers did not even agree who was supposedly obligated to pay those amounts. Cody testified the “the family” was making those payments, Transcript at 67:14–22, while Judy testified she was the only person liable to Sioux County, Transcript at

337:7–19. The amount of the payments was taken from the Lease, which was signed only by Cody and Sioux County. Exhibit 6.

Of course, in transactions like this, it helps to have it in writing “[t]o keep it[] straight and make sure everybody understands what’s written is what is the actual agreement.” Transcript 380:4–5. In fact, state law requires both the creation of a mortgage of real property and a contract for the sale of real property to be in writing. SDCL §§ 44-8-1, 53-8-2(3). Nonetheless, the Circuit Court disregarded the Purchase Agreement entirely, and supplanted it with an equitable mortgage based solely on the testimony of Cody and Judy, who could not even agree on who the debtor(s) is (are), using numbers cherry-picked from different (otherwise disregarded) agreements with different signatories. A court’s discretion to find an equitable mortgage is not unlimited—it is “bounded by the course of precedent and substantive rules governing permissible remedies.” *Adrian*, 2002 S.D. 10, ¶ 10, 639 N.W.2d at 533. By going out of its way to ignore the formal and informal writings the Circuit Court abused its discretion.

The agreements signed by the parties unequivocally show the Warranty Deed was an absolute conveyance. The Purchase Agreement, which Judy initialed on every single page, clearly described a sale of the Property from Judy to Sioux County. Exhibit 7 ¶¶ 1–2 at 1. The purchase price was \$3,187,500.00, which Sioux County paid in the form of loan reduction. *Id.* ¶ 2. As such, Judy conveyed the Property to Sioux County, and a debt was extinguished. If an unambiguous, completely written agreement, between two competent parties,

both of whom were represented by counsel, cannot be relied upon, what contract is safe from a reformation claim by a regretful party?

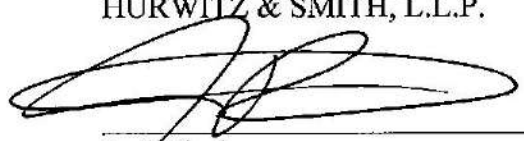
The Circuit Court found the Warranty Deed was intended as an equitable mortgage against reason and evidence, and in direct contradiction to SDCL § 53-8-5 and this Court's precedent, based on the Sturzenbechers' oral testimony. That was both an abuse of discretion and a legal error, and Sioux County respectfully requests this Court reverse the decision of the Circuit Court.

CONCLUSION

For all the reasons stated herein, Appellant Sioux County Ranch respectfully requests the Court vacate the Order Denying Defendant's Motions and Granting Plaintiff's Motion for Preliminary Injunction, and remand to the Circuit Court with instructions that Plaintiff's claims be dismissed, and Judgment be entered in favor of Defendant.

Dated at Sioux Falls, South Dakota, this 5th day of May, 2023.

DAVENPORT, EVANS,
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9,196 words and 47,331 characters *with no spaces*. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated at Sioux Falls, South Dakota, this 5th day of May, 2023.

DAVENPORT, EVANS,
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A handwritten signature in black ink, appearing to read 'JR', is written over a horizontal line.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

JUDITH STURZENBECHER and CODY STURZENBECHER, Plaintiffs/Appellees, vs. SIOUX COUNTY RANCH, LLC, Defendant/Appellant.	No. 30190 CERTIFICATE OF SERVICE
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I, Joel R. Rische, attorneys for the Appellant, Sioux County Ranch, LLC,
hereby certify that a true and correct copy of the foregoing *Appellants' Brief* was
sent by U.S. Mail, first-class, postage prepaid, to:

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I further certify that on the 5th of May, 2023, I emailed and mailed via U.S. first-class mail, postage prepaid, the foregoing *Appellants' Brief* to:

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

/s/ Joel R. Rische

JOEL R. RISCHE

APPELLANT APPENDIX
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STATE OF SOUTH DAKOTA)
)
COUNTY OF TURNER)

:ss

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

JUDITH STURZENBECHER and CODY
STURZENBECHER,

Plaintiffs,

v.

SIOUX COUNTY RANCH, LLC,

Defendant.

62CIV22-000049

**ORDER DENYING DEFENDANT'S
MOTIONS AND GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

The Court previously entered and extended a Temporary Restraining Order to enjoin Defendant Sioux County Ranch, LLC ("Sioux County") from selling the property¹ at issue in this litigation at an auction previously scheduled to take place on July 25, 2022. Plaintiffs then filed a Motion for Preliminary Injunction, and the Court held an evidentiary hearing on that motion on September 7 and 8, 2022, at the Turner County Courthouse. Plaintiffs were represented by Pamela Reiter and Ron Parsons of Johnson, Janklow, Abdallah & Reiter, LLP and Defendants were represented by Reece Almond and Joel Rische of Davenport, Evans, Hurwitz & Smith.

Defendants filed a Motion for Judgment on the Pleadings, on which the Court heard oral arguments on September 7, 2022, before the evidentiary hearing began. At the conclusion of the evidentiary hearing, the Court took all motions under advisement. On November 2, 2022, the Court entered its Memorandum Decision, which is hereby incorporated herein in its

¹ The property is located approximately 3.5 miles west of Hurley, South Dakota. The legal descriptions for the land at issue are set forth on Exhibit 1 attached to this Order.

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entirety. For the reasons set forth in the Court's November 2, 2022 Memorandum Decision it is hereby:

ORDERED that Defendant's Motion for Judgment on the Pleadings/Parole Evidence Rule is DENIED; it is further

ORDERED that Plaintiffs' Motion for Preliminary Injunction is GRANTED as set forth below; it is further

ORDERED that the facts set forth in the Court's November 2, 2022 Memorandum Decision are hereby designated as the findings of the Court and no separate findings of facts will be entered as contemplated under SDCL 15-6-52(a); it is further

ORDERED that pursuant to SDCL 15-6-65(d) Defendant is restrained from taking any action to sell or encumber the real property described in the attached Exhibit 1 that in any way effects the title of the real estate; it is further

ORDERED that pursuant to SDCL 15-6-65(d), this Order is binding not only upon the Defendant, its officers, agents, servants, employees, and attorneys, but also upon all those persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise; it is further

ORDERED that this Preliminary Injunction will remain in effect until further Order of the Court; it is further

ORDERED that pursuant to SDCL 15-5-65(c), the Court will increase the written undertaking, cash or surety required of Plaintiffs by the Court's Order Amending Temporary Restraining Order entered on August 5, 2022, from \$10,000 to \$18,000 to adequately secure Defendant of payment for damages up to \$18,000 if Defendant incurs damages by reason of

the preliminary injunction should the Court later determine that Plaintiffs were not entitled to the injunctive relief. In that event, Defendant would be required to provide proof at a future hearing of any such damages before any of the \$18,000 would be ordered to be paid by Plaintiffs to Defendant in the event Plaintiffs ultimately are found not be entitled to the relief sought in this action; to that effect, it is further

ORDERED that Plaintiffs, who have already submitted a cash deposit of \$10,500, are required to submit an additional undertaking to the Clerk of Court of Turner County in the amount of \$7,500, to bring the total undertaking to \$18,000, by 4:00 p.m. on November 8, 2022, and that such undertaking shall be secured either by an additional \$7,500 cash deposit or a surety bond.

11/10/2022 11:47:02 AM

BY THE COURT:

Attest:
Walker, James
Clerk/Deputy





Honorable David Knoff
Circuit Court Judge

APP003

62CIV22-000049

Addendum A

LEGAL DESCRIPTIONS

Legal Desc.: The NW ¼ Sec 31, T. 98N., R. 53W., (Hurley Twp.), Turner County, SD. +/- 159.22 Acres, Parcel #08000-09853-312-00

Legal Desc.: The NW ¼ Sec 25, T. 98N., R. 54W., (Norway Twp.), Turner County, SD. +/- 158 Acres, Parcel #12000-09854-252-00

Legal Desc.: The SW ¼ Sec 25, T. 98N., R. 54W., (Norway Twp.), Turner County, SD. +/-159.55 Acres, Parcel #12000-09854-253-00

Legal Desc.: The SE ¼ Sec 25, T. 98N., R. 54W., (Norway Twp.), Turner County, SD. +/-165.48 Acres, Parcel #12000-09854-254-00

Legal Desc.: The NE ¼ & N ½ SW ¼, Sec 36, T. 98N., R. 54W., (Norway Twp.), Turner, County, SD. +/- 239.47 Acres, Parcel # 12000-09854-361-00

Legal Desc.: The E ½ NW ¼ & SW ¼ NW ¼ Sec 36, T. 98N., R. 54W., (Norway Twp.), Turner, County, SD. +/- 119.76 Acres, Parcel # 12000-09854-362-00

Legal Desc.: The NW ¼ NW ¼ Sec 36, T. 98N., R. 54W., (Norway Twp.), Turner County, SD. +/- 39.76 Acres, Parcel # 12000-09854-362-10



APP004

Fink 0037

STATE OF SOUTH DAKOTA
COUNTY OF TURNER

CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

JUDITH STURZENBECHER and CODY
STURZENBECHER,

62CIV22-49

PLAINTIFFS,

vs.

MEMORANDUM DECISION

SIOUX COUNTY RANCH, LLC,

DEFENDANT

This is the Court's memorandum decision for the hearings held on September 7-8, 2022 at the Turner County Courthouse. The matters before the Court were Defendant's Motion for Judgment on the Pleadings and Plaintiffs' request for injunctive relief. The Court observed and heard the testimony of the witnesses and reviewed the exhibits. The facts set out in this decision are considered findings of the Court and no separate findings of facts will be made as contemplated under SDCL 15-6-52(a). The Defendant raised two issues prior to the hearing, the outcome of which would either make the hearing unnecessary or limit the testimony to be considered by the Court. Given the timing of the issues and schedule of the parties, the Court heard the entirety of the testimony, subject to its ruling on Defendant's motions. The relief sought by the Defendant on its motions would be dispositive of the case and will be addressed first. The Plaintiffs will be referred to as "Sturzenbechers" and the Defendant as "Sioux County."

Defendant's Motion for Judgment on the Pleadings/Parole Evidence Rule

Sioux County moved this court for judgment on the pleadings under SDCL 15-6-12(c). A party may move for judgment on the pleadings to test the legal sufficiency, substance, and form of the pleadings. *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3 (citations omitted). The first

APP005

argument is Sturzenbechers' equitable mortgage claim must fail because there is a written purchase agreement that contains the entirety of the agreement. Under the parole evidence rule, SDCL 53-8-5, a written agreement between the parties supersedes any oral negotiations or stipulations concerning its matter that were made before or at the time of the execution of the instrument. Before the Court can address the sufficiency of the pleadings it is necessary to determine if parole evidence can be received by this Court. The Defendant argued the written agreements between the parties are the entirety of the agreements, reduced to writing, and there is no reason to look outside those documents. The purchase agreement between the parties specifically declares there is an absolute conveyance of the property to the Defendant. Ex. 7, ¶ 13. When a claim is made for an equitable mortgage, the trial court has the option to grant or deny relief. *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 9. A document executed with the formality of a contract is ordinarily taken to express the true intent on its face. *Id.* at ¶ 11. The burden is on Sioux County to prove equitable mortgage by clear and convincing evidence. *Id.* Whether a document, absolute in form, constitutes a mortgage depends on the intent of the parties. This controlling intention must be gleaned from the written memorials and *all the surrounding circumstances*. *Id.* (citations omitted, emphasis added). Additionally, an equitable mortgage is a *recharacterization* of a document. *Myers v. Eich*, 2006 S.D. 69, ¶ 18. (emphasis added). In this case, it is a claim to recharacterize a series of documents to show this was not an absolute sale, but a transaction intended to be a loan.

The Court is not persuaded the purchase agreement language describing an absolute conveyance prohibits this Court from hearing parole evidence. In *Jones v. Rees-Max, LLC*, 514 F.Supp.2d 1139 (2007), the opponents of an equitable mortgage argued the documents stated explicitly that no security interest was being granted. *Id.* at 1145. The party opposing an

equitable mortgage elevated form over substance, and the true inquiry is whether the parties intended an *outright* sale or whether the “purpose and effect of the transaction is to give security on real property for a debt”. *Id.* The case describes the doctrine of equitable mortgage as “prevent[ing] an overreaching by one party that would unfairly exploit the other party’s financial position or relative lack of real estate dealings.” *Id.* If “the real nature of the transaction between the parties is that of a loan, advanced upon the security of realty granted to the party making the loan, it may be treated as an equitable mortgage”. *Id.*

Placing form over substance is exactly what this Court is being asked to do by Sioux County’s motion—a judgment on the pleadings without considering the circumstances surrounding the entire transaction. Sturzenbechers seek equitable relief, and to prohibit them *from even proceeding with their claim* of equitable mortgage due to the terms of the purchase agreement, would render equitable mortgages meaningless by adding certain words to that agreement. The document would not be able to be recharacterized regardless of the merit to the equitable mortgage claim. The surrounding circumstances would not matter if it is outside the four corners of the purchase agreement. The Court is denying Sioux County’s Motion for Judgment on the Pleadings and will consider the testimony of the parties and witnesses.

The Plaintiffs’ claim of unconscionability is made in the event the equitable mortgage claim does not prevail. Assuming the facts pled as true, there is a sufficient basis for the claim to proceed. There are facts that show there is unequal bargaining power and terms in the agreement could be seen as unconscionable. See complaint, ¶¶ 15, 25, 26, 49, 50. There were sufficient facts pled to overcome judgment on the pleadings.

Factual Background

Judy Sturzenbecher is the daughter of Arnold and Clara Wollman, who were owners of land that is at issue in this litigation. The land was inherited from Arnold's father, Judy's grandfather, who obtained the land in 1953. Prior to that, Judy's great-grandfather rented the land since 1941. Prior to Arnold and Clara's passing, they placed the land in the Wollman Trust in 1990. The land consists of 1041 acres in Turner County and is contiguous as shown in Exhibit 9 (Ex. 9). The land lies three and a half miles west of Hurley. It contains approximately 500 acres of crop land, 140 acres of tillable CRP¹ and the balance is in rangeland/pasture. The farm also has a house, sheds, barns, and other outbuildings. The house was occupied by Clara and Arnold, as well as Judy, then her sister, and now by Cody.

Judy ran a café for 18 years with her mother. She was the only one of her siblings to stay on the farm. She would do chores, feed animals, and help her dad unload bales. She has a high School degree, having graduated in 1977. She enjoys working with animals, including watering and feeding sheep. She has been married since 1983 and has two sons, Kyle and Cody. Judy is presently disabled and helps out on the farm when she can.

After the death of both Arnold and Clara, the land remained in the trust. There were also modest cash assets in the trust. The beneficiaries at that time were Judy, her sister Deb Washington, and the daughters of her deceased sisters. The trustee of the Wollman Trust, First Premier Bank, advised the beneficiaries in the summer of 2020 the land would be sold. Judy did not want the land to be sold as it has been owned by the family since her grandfather, and her son was presently living there. She wanted to own the land with the hope one day her granddaughter would be able to live there. Judy had a one-fourth beneficial interest in the trust with her sisters and the children of her deceased sisters have the remaining three-fourths interest. The trust

¹ The CRP ground is scheduled to be out of contract in 2023.

valued the land at just over four million dollars. Judy had never previously borrowed money with the exception of a contract for deed. Cody also has no experience buying property. He has never purchased or borrowed money for real estate. The family got together to see if the land could be preserved by a family member. Judy, mainly through her son Cody, discussed buying the property on a contract for deed. Judy's sister was not interested in this arrangement. The Sturzenbechers were unsuccessful in obtaining conventional financing as they could not afford a down payment and did not have a credit score. Although Judy had equity in the land, that was in the trust until the land was sold—at which point the land would be gone and Judy could not use the equity to purchase the land. The trustee valued the land on their accountings at \$4,459,561.

Ex. 21.

Cody became aware of Sioux County in the fall of 2020. He heard they will work with families to help keep the family farm. Both Kyle and Cody contacted John Koerselman (John) and discussed the farm. Kyle first called John to discuss the Sturzenbecher situation. Kyle clearly wanted to keep the farm in the family, explained the trust, and wanted help to get possession of the land. Sioux County was aware Sturzenbechers had no money to put in the land and had no ownership. They were unable to purchase the land from the trust for its full value. Nothing came out of this first contact. A few weeks later Cody contacted John. Cody also wanted to get the farm. According to John, Sioux County did not offer to lend money to Sturzenbechers. He stated they would take possession and then rent the property back to the Cody Sturzenbecher with an option to purchase.

John was hesitant due to the fact Sturzenbechers did not have ownership in the farm. Cody advised Sioux County of Judy's beneficial interest in the trust. Ultimately John and his business partner came out to the farm to meet with Judy, Cody, and Kyle. They toured the farm

and visited about their farming history. The Sturzenbechers felt they were both good men and Judy felt a connection with John as he had lost his wife to cancer, and Judy presently has cancer. At the meeting the Sturzenbechers were told Sioux County helps family farms keep going. Sioux County was aware Sturzenbechers wanted to preserve this family farm, they had a deep connection to the land as fourth generation farmers, and were seeking help. John understands the connection people have with farms. He himself was raised on a small dairy farm and has a love for agriculture and helping people. John testified Sioux County gets involved with farming operations because the farmer is usually not making his land payment. The typical scenario is the bank threatens to foreclose and Sioux County essentially makes an agreement to purchase the land at below market value using the equity the farmer has in the land, then enters into a lease with a buyback arrangement for the farmer. Sioux County is not a bank and does not hold themselves out as a bank. According to Sturzenbechers, at the meeting they were told Sioux County does short term loans for five years, by that time the land value would increase and with any other assets Sturzenbechers own there would be enough equity for them to obtain other financing. Sioux County did not visit the farm with the intention of buying the land at this time, and Sioux County had not looked at this land prior to this visit. The purpose of the visit was to look at options to help Sturzenbechers maintain the family farm.

According to John, the Sturzenbechers were told Sioux County would buy the property and lease it back with an option to purchase. The problem was that Sioux County needed to obtain the property below market value, so the buyback can be less than fair market value. Evidently, while knowing the Sturzenbechers had no money and Judy only had a beneficial interest in the trust that owned the property, the parties "brainstormed" to figure out how to purchase the property for less than fair market value. John further testified Cody then suggested

Judy could use her money from the trust to get the property.² John then thought about how to structure this arrangement.

The discrepancy in sophistication between the parties was evident. Both of Sioux County's members are retired bankers. John has a college degree from Iowa State University and a graduate degree from the School of Banking in Madison Wisconsin. He has an extensive background in lending. He worked as a loan officer since 1982. He was at First National Bank in Sioux Center in 2003, then a bank in Pender where he was a shareholder until the bank sold in 2008. After that he continued on as CEO. He was involved in ag lending his entire career. He also worked on Northwest State Bank in Orange City for three years. John's business partner (co-member) did debt workouts during his career. In comparison, Cody and Judy have high school degrees. Sioux County members were observed by the Court as having professional demeanors. The testimony of John evidenced someone fluent in ag financing. Judy was confused when questioned about numbers. She would mispronounce the word "specific" by saying "pacific", which evidenced she lacked some grammar skills. The Plaintiffs were dressed in work clothing.

The mechanics of the transaction between Sioux County were determined by Sioux County and drafted by their attorneys, as well as reviewed by Judy's attorney, Mike Fink. Judy was to first purchase the land from the trustee of the trust. The purchase price was \$4,250,000 (Ex. 2). This was arranged through Chuck Sutton Auctioneers. Judy was advanced this amount from Sioux County to facilitate the purchase. She signed a promissory note for \$4,250,000 to

² The Court finds this testimony to lack credibility. The Court is skeptical a banker, with a lifetime of farming and lending experience knowing the only asset the Sturzenbechers' have is Judy's equity in the Wollman Trust, would not immediately contemplate utilizing the equity in the property. Equity is the focus of Sioux County's business plan.

Sioux County (Ex. 3) as well as executed a mortgage to secure the funds to Sioux County. Of this amount, one fourth of the proceeds are beneficially owned by Judy but were not immediately distributed from the trust. Judy then turned around and sold the property to Sioux County by way of a real estate purchase agreement (Ex. 7) for \$3,187,500 as well as executed a mortgage. Sioux County borrowed \$3,095,950 from Farm Credit Services to finance the arrangement with the Sturzenbechers (Ex. 117). The purchase agreement (Ex. 7) sets out that upon the sale to Sioux County, the promissory note will reduce by \$3,187,500, so that \$1,062,500 is still owed by Judy on the note. Simply stated, on January 14, 2021, Judy purchased the farm for \$4.25 million and borrowed that amount from Sioux County to be able to do so. She then immediately sold it for \$3.1875 million to Sioux County, for a loss of over \$1.06 million. She still owed that amount on the note. When she received her distribution from the trust from the sale of the land, that amount would then be applied to the amount outstanding on the note to Sioux County. Judy would then owe nothing to Sioux County, nor have anything to show for her interest in the trust. Her son Cody, however, would have the ability to lease the ground for a period of 5 years at \$229,000 per year, with the option to purchase the property for \$3,825,000. Both the rent payments and the purchase price factor in a profit for Sioux County to make this arrangement work out. Although the sale to Sioux County was by Judy, and the lease with option is with Cody, the purchase agreement (Ex. 7) specifically references and requires the lease with purchase option (Ex. 6) making them intertwined.

Judy made the various payments under her arrangement with Sioux County, including providing her beneficial trust proceeds. Cody, however, was not able to make a rent payment by the due date of March 1, 2022. There was negotiation between Cody and Sioux County for the rent payment, however it never came to fruition and Sioux County terminated the lease and

proceeded towards selling the property. The property value is worth far more than the purchase price paid by both Judy and Sioux County. Marshall Hanson, a real estate broker and auctioneer, believed the sale would have brought \$7,000,000 this past summer.

Sioux County was the deed holder of the property, so they arranged a sale through Farmer's National Company. A marketing brochure was created and generated a fair amount of interest. The property was to be sold July 24-25, 2022 (Ex. 9). Prior to the sale, Sturzenbechers petitioned this court for an injunction and a temporary injunction was entered on July 22, 2022. This court hearing was held on the injunction. The purpose of the injunction is to bar the sale of the property pending this lawsuit.

Injunctive Relief

The standard for determining injunctive relief is well settled. Its purpose is to maintain the status quo pending the final determination of the action. *Long Prairie Packing Co. V. United Nat. Bank, Sioux Falls*, 338 N.W.2d 838, 840-840. The Sturzenbechers must establish four factors for injunctive relief: they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Hedlund v. River Bluff Estates, LLC*, 2018 S.D. 20, ¶ 15.

1. Likely to succeed on the merits: Constructive Mortgage

Sturzenbechers argue the agreement between the parties created an equitable mortgage. The burden is on the Plaintiffs to show by clear and convincing evidence that the deed from Judy was actually intended as security for a debt. A transaction that is structured as an absolute conveyance (sale) can be equitably recharacterized as a mortgage depending on the facts and circumstances. This would then insure a foreclosure process in the event of a default by the

grantor of the property. Equity allows the court to go beyond the written transaction and look at the intent of the parties by looking at the circumstances. We look at the inception of the relationship to determine whether an equitable mortgage was created. *Myers*, ¶ 24. The factors looked at by the Court to consider include: 1) pre-existing debt not extinguished with the conveyance; 2) conveyance made with an agreement to re-convey; 3) property value considerably more than the debt; 4) property in original transaction not appraised and no discussion of its value in relation to sale price; and 5) dealings between parties akin to that of a creditor-debtor. *Myers*, ¶ 25.

The transaction between the parties was one where simultaneously, Judy purchased land from the Trust and sold it to Sioux County, with the result that she owed \$1,062,500 to Sioux County. In other words, she paid Sioux County \$1,062,500 to be a pass through of the property from the Trust to Sioux County. The payment was to be made by the end of 2021. Although this is not the typical equitable mortgage situation where a party is behind in paying off a creditor and is assisted by a third party to pay off the debt, only to change the debt now owed to the third party, it has the same effect. This entire transaction was characterized by John as a means to *preserve the family farm for the Sturzenbechers*. This was not to buy the land in a typical buyer/seller transaction.

The sale between Judy and Sioux County was made with an agreement to re-convey. The lease with the option to purchase was not between Judy and Sioux County, but Cody and Sioux County. The purchase agreement between Jody and Sioux County specifically referenced the lease and option and is integral to the entire transaction. The purpose of invoking equity is to look at the transaction as a whole. Drafting the documents to include different family members is not a bar to equitable relief nor should it be a shield from that remedy. By John's own

testimony, Judy's 25% equity interest was utilized to make the deal. There is no rational reason Judy would simultaneously buy property for just over four million dollars and sell the same property for roughly three million dollars, no strings attached. The entire transaction induced Judy to give away her trust interest—her family inheritance.

The numbers clearly show the value of the property is greater than the debt incurred by over a million dollars. There is also no appraisal done by Judy. The value that was allocated to the property was determined by the trust. Just a year and a half later, the property was believed to be worth \$7,000,000 by Sioux County's witness. Sioux County is made up of sophisticated bankers who understand absolute sales and the value of land. They were able to purchase, without any explanation for the price, land at over a one-million-dollar discount from what it was purchased for on the same day. The only justification is this was a security agreement type arrangement.

Finally, listening to John testify about the transactions Sioux County typically gets involved in, as well as the purpose of the relationship—to provide the Sturzenbechers an opportunity to keep the farm intact—is sufficient for the Court to find this transaction was set up as a debtor-creditor relationship. The intent is to have the family ultimately own the property, with the equity in the property used as collateral while the family gets their financial affairs in order. Judy's equity in the trust was used to buy the time necessary for her family member to own the property. Annual payments (rent) were to be made with a balloon payment (option to purchase) within five years. A typical arms-length absolute sale does not contain an arrangement for the seller (or seller's family member) to get the property back.

Looking at the entirety of the documents and the unique facts before the Court, there is clear and convincing evidence this transaction was structured as a mortgage and not as a sale. As

discussed above, any language in the purchase agreement meant to thwart an equitable mortgage is not binding on the court. That would render the remedy of equitable mortgages unavailable with the drafting of a few words. The Sturzenbechers are likely to prevail on the merits.

2. Irreparable harm.

Next we look at whether the Sturzenbechers will suffer irreparable harm if the injunction is not maintained. The injunction will prohibit Sioux County from selling the property. A family farm is one where the notion of a specific parcel of property is of such a nature that it is irreplaceable. It contains generational family history as described by the Sturzenbechers. John recognized the importance of the family farm. If the property is sold, another property does not make up the unique nature of the family farm. The Sturzenbechers would suffer irreparable harm if the property was sold prior to a trial on the merits.

3. Balance of Equities.

The irreparable harm described above if the property is allowed to be sold before a trial is balanced against Sioux County not selling the property to a third party. Although not argued by the parties, the fact this litigation is pending likely places a cloud on title and makes sale to a third party difficult. Obviously the value of the land could decrease which would harm Sioux County. In July, the land sale was expected to bring *millions more* than the property was transferred for just over one year earlier. The balance of equities tips in favor of the Sturzenbechers.

4. A Restraining Order is in the Public Interest.

Maintaining family farms and their ongoing operation is in the public interest. Allowing a unique piece of property to be sold when the Court found the Sturzenbechers are likely to prevail

on their equitable mortgage claim factors against public policy. Ultimately, a finding of an equitable mortgage may not change the outcome and Sioux County may end up selling the property. The remedy is proceeding with a foreclosure and the protections it affords the Sturzenbechers. Finding equitable mortgage is not the same as granting property to one or the other of the parties.

Sufficient surety 15-6-64?

Sioux County argued for additional surety in the event the court grants the temporary protection order. In support of this request they rely on the testimony of Marshall Hanson. He has a long background in sales of property by auction sale. He is familiar with the property and sales in the vicinity and was engaged to market the property. He testified about the costs incurred to date and the additional costs to sell the property. As soon as he would be allowed to sell the property, it would be an additional 45 days before it would actually be sold. He also discussed the higher interest rates that are taking place at this time and that investors may put their money elsewhere. This land is not considered prime farmland, so is more susceptible to market fluctuations. He testified that if interest rates go up, the sale price could lower up to thirty percent, which would be a reduction of \$2.1 million from the \$7 million estimate. This is the amount Sioux County requests for surety.

After hearing the testimony, the Court finds not only the sale price, but also the possibility of reduction in land price is speculative. There was little actual evidence agricultural property is reducing in price due to rates. Clearly there would be additional marketing costs to sell the property and a loss shown of roughly \$18,000. The Court finds this \$18,000 is an appropriate surety to be posted by the Sturzenbechers.

Conclusion

The entirety of the arrangement between Sioux County and the Sturzenbechers was set up as a security agreement, which would afford the remedy of equitable mortgage. The Court finds they have met their burden for the injunction to remain in place. The amount of surety is to increase from \$10,000 to \$18,000. Counsel for Sturzenbeckers shall prepare orders conforming to this decision.

Dated November 2, 2022

Attest:
Walker, James
Clerk/Deputy



BY THE COURT:

A handwritten signature in black ink, appearing to read "David Knoff", is written over a horizontal line.

David Knoff, Circuit Court Judge

STATE OF SOUTH DAKOTA)
COUNTY OF TURNER)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

JUDITH STURZENBECHER, and
CODY STURZENBECHER,

Plaintiffs,

v.

SIOUX COUNTY RANCH, LLC,

Defendant.

CIV # _____

**COMPLAINT AND DEAMND FOR
JURY TRIAL**

Plaintiffs, Judith "Judy" Sturzenbecher and Cody Sturzenbecher, for their claims and causes of action against Defendant Sioux County Ranch, LLC, hereby state and allege as follows:

PARTIES

1. Plaintiff Judith Sturzenbecher is a resident of Parker, Turner County, South Dakota.
2. Plaintiff Cody Sturzenbecher is a resident of Hurley, Turner County, South Dakota.
3. Defendant Sioux County Ranch, LLC is a Nebraska limited liability company with its principal place of business in Sioux Center, Iowa.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to S.D. Const. Art. V, § 5 and SDCL 16-6-9.
5. This Court also has jurisdiction over the parties and the subject matter of this action pursuant to SDCL 21-24-1, which provides that "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal

relations whether or not further relief is or could be claimed,” and SDCL 21-24-3, which provides that “Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.”

6. Venue is proper within this judicial circuit pursuant to SDCL §§ 15-5-1 and 15-5-6.

FACTS

7. Judy and her three sisters grew up on their family farm located approximately 4 miles west of Hurley, South Dakota.
8. Their parents Arnold and Clara Wollmann created a trust named the Wollmann Trust on February 19, 1993, and they contributed their family farmland to the Trust.
9. The Wollmanns named their four daughters as remainder beneficiaries of their Trust.
10. The Trust prohibited the sale of the family farm until the death of the last of the four daughters.
11. Two of Judy’s sisters are now deceased.
12. Contrary to the terms of the Trust, Judy’s remaining living sister and the children of Judy’s two deceased sisters desired to sell the family farm in 2020 and obtain the proceeds of that sale by termination and distribution of the Wollmann Trust.
13. Judy’s son Cody farmed a significant portion of the family farm for several years before 2020 and has lived on part of the family farm for several years.

14. Judy desired to keep the family farm in the family despite the other beneficiaries' strong desire to sell it.
15. Cody contacted Defendant Sioux County Ranch, LLC regarding the company financing the Plaintiffs' purchase of the family farm from the Trust. Defendant is a sophisticated investment lender. Cody and Judy have operated their personal and farming businesses on a cash basis and have little to no experience with lending relationships.
16. Defendant agreed to fund the purchase price of the land, which, upon information and belief, was lower than its fair market value, with the agreement that Judy would make the down payment on that loan by assigning to Defendant the \$1,062,500 cash distribution that she would receive from the Trust after the sale of the family farm by the Trust was completed.
17. The Trustee of the Wollman Trust agreed to sell the family farm to Plaintiffs for \$4,250,000.
18. The family farm consisted of approximately 1,041 acres of tillable ground, grass, and pastureland.
19. Judy signed a purchase contract for the family farm on January 14, 2021, for \$4,250,000.
20. All the trust beneficiaries consented to this sale by the Trust.
21. After the sale to the Plaintiffs was completed and the Trust was in possession of the sale proceeds, Judy would receive \$1,062,500 as a cash distribution from the Trust representing her beneficial share.

22. Also on January 14, 2021, Judy signed a promissory note to Defendant to borrow \$4,250,000, with an interest rate of 4 percent ("the Note").
23. The Note required payment of the entire balance on or before December 31, 2021.
24. The Note was secured by a Mortgage-Collateral Real Estate Mortgage and an Assignment and Security Agreement, both executed on January 14, 2021.
25. Through the Assignment, Defendant was assigned Judy's right to receive the anticipated \$1,062,500 distribution from the Trust from the sale of the family farm.
26. On January 14, 2021, Judy also entered into a "purchase agreement" under which Defendant allegedly "bought" the family farm by reducing the principal balance of the \$4,250,000 Note by \$3,187,500 and by the promise to pay Judy's \$1,062,500 cash distribution to Defendant when she later received it.
27. That same day of January 14, 2021, Cody entered into a lease agreement with Defendant.
28. Through this lease agreement, Defendant, as the purported owner of the family farm, rented it to Cody for a term of 5 years, during which Defendant would receive annual rent payments of \$229,000 (average of approximately \$220 per acre).
29. The lease agreement also gave Cody an option to purchase the family farm at the end of the 5-year lease for \$3,825,000.
30. The option to purchase the family farm was tied to Defendant's loan and had several conditions including that there be no default under the rental agreement, payment of \$63,750.00 for the right to purchase the family farm back from Defendant and several other conditions.

31. Defendant was to receive all rent payments under the lease agreement and claimed the right to terminate the lease agreement if Cody was even 10 days late on the rent payments and Defendant gave written notice of that late payment.
32. If the lease agreement was in default, it provided that the option to purchase the family farm for \$3,825,000 was null and void. If Defendant declared the lease to be in default, it could then rent to another tenant and/or sell the family farm to another buyer to make a windfall profit.
33. Although the option to purchase the family farm was conditioned on Judy having paid Defendant the \$1,062,500 down payment on the \$4.25 million loan, Defendant was not obligated under the lease agreement to return the \$1,062,500 if the option to purchase the family farm was lost.
34. The rental payments were made for crop year 2021, the first year of the lease, which was paid to Defendant.
35. In 2022, Plaintiffs did not make the \$229,000 rent payment to Defendant on March 1, 2022, as called for in the lease agreement.
36. Several negotiations occurred regarding the rent and possible purchase of the family farm after March 1, 2022, including a tender of the 2022 rent payments by Plaintiffs in April 2022, but Defendant ultimately rejected the Plaintiffs' tender of the rent and rented the land to another tenant.
37. Plaintiffs learned through an advertisement that Defendant scheduled an auction of the family farm on July 25, 2022.

38. Defendant did not provide Plaintiffs any notice of its intention to sell the family farm or follow any of the proper procedures for foreclosure under South Dakota law.

CAUSES OF ACTION

COUNT ONE

Equitable Mortgage

39. Plaintiffs incorporate all previous paragraphs as if fully set forth herein.

40. This is a claim for declaratory relief pursuant to SDCL 15-6-57 and the Uniform Declaratory Judgments Act, SDCL Ch. 21-24.

41. The purported conveyance of the family farm to Defendant was intended as security for the \$4.25 million Note rather than an absolute conveyance.

42. The \$4.25 million Note was not extinguished by the conveyance of the family farm to Defendant.

43. The conveyance of the family farm to Defendant was made with the agreement in the lease that the Plaintiffs would be able to buy the family farm back within five years.

44. The value of the family farm is substantially more than the \$3,187,500 that Defendant paid to obtain it.

45. The dealings between the Plaintiffs and Defendant were akin to that of a debtor-creditor relationship.

46. Based upon the foregoing, the Plaintiffs are entitled to a declaration that the purported conveyance of the family farm to Defendant was an equitable mortgage

and that title to the family farm remains in the hands of the Plaintiffs, with Defendant holding a security interest in the family farm.

COUNT TWO
Unconscionable Contract

47. Plaintiffs incorporate all previous paragraphs as if fully set forth herein.
48. There was unequal bargaining power between the Plaintiffs and the Defendant in connection with the transaction at issue.
49. The contracts at issue were presented to the Plaintiffs on a take it or leave it basis with no ability for the Plaintiffs to negotiate the material terms.
50. The terms of the contract are overly harsh and one-sided in favor of the Defendant as set forth above.
51. Therefore, the Purchase Agreement between Judy and the Defendant is void and unenforceable.

WHEREFORE, the Plaintiffs pray for the following relief against the Defendant as follows:

- 1) That the Court declare that Sioux County holds an equitable mortgage but does not have title to the Plaintiffs' family farm and instead only holds a security interest in the family farm;
- 2) Alternatively, that the Purchase Agreement between Judy Sturzenbecher and Defendant is unenforceable because it is unconscionable;
- 2) For Plaintiffs' costs and disbursements herein; and
- 3) For such other and further relief as the Court determines to be just and proper.

Dated this 18th day of July, 2022.

**JOHNSON, JANKLOW,
ABDALLAH, & REITER, LLP**

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Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable.

/s/ Pamela R. Reiter

Pamela R. Reiter

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PRINTER FRIENDLY

53-8-5. Execution of contract in writing supersedes oral negotiations or stipulations.

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

Source: CivC 1877, § 921; CL 1887, § 3545; RCivC 1903, § 1239; RC 1919, § 860; SDC 1939, § 10.0604.

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LEASE AGREEMENT

THIS FARM LEASE, made this 14 day of January, 2021, by and between SIOUX COUNTY RANCH, LLC c/o JOHN KOERSELMAN, 669 10th Street Circle SE, Sioux Center, IA 51250, sometimes hereinafter called "Landlord," and Cody P. Sturzenbecher, of 45144 284th St., Hurley, South Dakota 57036, hereinafter called "Tenant."

ARTICLE 1

PREMISES AND TERM

Section 1. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the real estate described on Exhibit A, attached hereto and made a part hereof, and improvements thereon, which real estate and improvements are hereinafter called the "leased premises." The farmland is situated in Turner, County, South Dakota.

Section 2. To Have And To Hold the leased premises unto Tenant for a term of five (5) years commencing on the date Landlord acquires good and marketable title to, and possession of the leased premises.

Section 3. In the event the leased premises should not be ready for occupancy or Landlord for any reason is unable to deliver possession thereof by the commencement date of this lease, Landlord shall not be liable nor responsible for any claims, damages or liabilities in connection therewith or by reason thereof and this lease shall remain in full force and effect. Tenant shall not be liable for rent until Landlord delivers possession of the leased premises to Tenant, but the term shall not be extended by the delay.

Section 4. The parties agree and acknowledge that this Lease and the rights and responsibilities hereunder are contingent upon Landlord acquiring good and marketable title to, and the right to possession of the leased premises not later than March __, 2021, or such other date the parties may agree upon by written agreement. In the event Landlord does not obtain such title and right of possession by said date, this Agreement shall be null, void and of no legal force or effect.

ARTICLE 2

LEASED PREMISES

Section 1. Tenant takes and accepts the leased premises in their "as is" condition. "As is" shall mean in tenantable condition. Taking of possession of the leased premises by Tenant shall be conclusive evidence that the improvements on the leased premises were, on that date, in good, clean and tenantable condition as represented by Landlord. Tenant acknowledges that no representations as to the repair of the improvements or promises to alter, remodel or improve the improvements have been made by Landlord.

ARTICLE 3

RENT

Section 1. Rent payable by Tenant shall be the sum of Two Hundred Twenty Nine Thousand, 00/100 Dollars (\$229,000.00), per year payable in advance as follows: one half of the rent (\$114,500.00) shall be paid upon execution of this Lease and the second one half (\$114,500.00) shall be due and payable in full on or before November 15, 2021. Annual rent in the sum of \$229, 000.00 shall be payable in full every year thereafter on the 1st day of March through and including March 1, 2025, each year at such place designated by Landlord, without prior demand therefore. In addition, Tenant shall be responsible for the payment of all real property taxes as required by Article 6 hereof, all insurance as required by Article 10 hereof, and all other sums or payments required of Tenant by the terms of this Agreement.

Section 2. All rental and other sums payable hereunder by Tenant which are not paid when due shall bear interest from the date due to the date paid at the rate of eighteen percent (18%) per annum or the highest rate permitted by law, whichever is less.

Section 3. Tenant hereby grants to Landlord a security interest pursuant to the Uniform Commercial Code in the following property of Tenant, whether now owned or hereafter acquired: all farm products, including without limitation, all crops grown, growing, or to be grown, including crops produced on trees, vines and bushes and aquacultural goods produced in aquacultural operations; all livestock born or unborn; supplies used or produced in farming operations; and products of crops or livestock in unmanufactured states; all accounts, general intangibles, payment intangibles, instruments, deposit accounts, insurance or government payments or refunds from any of the foregoing property or goods, and all proceeds and products of any of the foregoing property or goods. Tenant, hereby agrees to execute any and all documents or agreements which Landlord may request to evidence and perfect the foregoing security interest, specifically including the execution of Effective Financing Statements whenever, during the term of this Lease, the Landlord may request execution of the same. Tenant agrees that Landlord may file Uniform Commercial Code Financing Statements as Landlord may deem necessary.

ARTICLE 4

USE

Section 1. The leased premises may be used for only farming purposes and for no other purpose without the written consent of Landlord, and Tenant agrees to conduct his farming business at all times in good faith, in a high grade and reputable manner. Tenant shall promptly comply with all laws, ordinances and regulations affecting the leased premises or Tenant's farming business thereon, plus insurance company requirements affecting the cleanliness, safety, use and occupation of the leased premises.

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Section 2. Tenant shall not, without Landlord's prior written consent, conduct any auction or bankruptcy sales in or about the leased premises, nor abuse any improvements, fixtures or personal property located on the leased premises, nor use plumbing for any purpose other than that for which constructed; nor create, maintain or permit a nuisance thereon; nor do any act tending to injure the reputation of Landlord. Tenant shall keep the leased premises clean and free from rubbish and dirt at all times. Tenant shall not plow or break up or remove any sod, grass, or any land not currently farmed included in the leased premises without the written consent of Landlord. Tenant shall not remove any top soil on the leased premises, whether cultivated or not.

Section 3. Tenant agrees to furnish at Tenant's own cost and expense all equipment, farm implements, and machinery to properly cultivate the leased premises during the farming season and to furnish and provide all proper assistance and to hire help necessary in connection with the cultivation and management of the leased premises, and to farm and cultivate the leased premises in accordance with Tenant's best skill and judgment. Tenant shall crop and cultivate the leased premises and harvest, thresh, and secure the crops grown thereon in a careful and husbandlike manner and take appropriate measures to cut and control noxious weeds growing along roads on or adjoining the leased premises and growing around the improvements thereon, including fences and buildings.

Section 4. Tenant agrees that he will, each year of the term of this Lease, prior to planting any crops, advise Landlord of the crops he will plant and will execute an Effective Financing Statement covering such crops if requested by Landlord.

Section 5. Tenant will comply with all Conservation Reserve Program Contracts (CRP) terms and conditions for the remainder of the contract term. Tenant undertakes and agrees that he will indemnify and hold Landlord harmless for any liquidated damages or penalties that may be assessed for Tenant's failure to comply with any CRP provisions. Any penalties for non-compliance with the existing CRP contracts, are in addition to the rent established hereunder, and shall be payable within ten (10) days after the Landlord or Tenant's receipt of notice of any such required payment. In addition Tenant undertakes and agrees with Landlord that he will cooperate with the preparation of submission of any documentation Landlord may need or desire to submit to any government agencies including, but not limited, to Farm Service Agency and Natural Resources Conservation Service.

ARTICLE 5

UTILITIES AND FUEL

Section 1. Tenant shall pay for all electricity, gas, fuel and fuel oil used on the leased premises throughout the term of this lease.

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ARTICLE 6

TAXES

Section 1. Tenant shall pay all real property taxes on the land and improvements payable during the lease term.

ARTICLE 7

REPAIRS

Section 1. Tenant shall keep the foundations, exterior walls, and roof of any buildings in good repair and, if necessary or required by proper governmental authority, make modifications or replacements thereof, except that Tenant shall not be required to make any such repairs, modifications or replacements which become necessary or desirable by reason of the negligence of Landlord, its agents, servants or employees, or by reason of anyone illegally entering or upon the premises.

Section 2. Tenant shall repair, replace and keep in good order and in clean, sanitary and safe condition, ordinary wear and tear excepted, the leased premises, all fences located on or used in connection therewith, and any equipment contained therein. Landlord shall at all times have access to and may entered upon the leased premises, for the purpose of repairing and maintaining the same, and if Landlord exercises its right pursuant to this section, Tenant shall reimburse Landlord for costs and expenses incurred herein upon demand. Tenant shall permit no waste, damage or injury to the leased premises any irrigation or other equipment located thereon, or any barn, silo, shed, residence or other structure located thereon.

ARTICLE 8

INSTALLATIONS AND ALTERATIONS

Section 1. Tenant, at his own expense, shall purchase, install and maintain in good condition equipment, used on the leased premises.

Section 2. Tenant shall not make any alterations or additions to the improvements, including fencing, on the leased premises or make any contract therefor without first procuring Landlord's written consent, which consent shall not be unreasonably withheld, and delivering to Landlord the plans and specifications and copies of the proposed contracts and necessary permits and shall furnish indemnification against liens, costs, damages and expenses, as Landlord may require. Tenant may remove his alterations, additions, improvements and fixtures, whether fixed or unfixed, at his election, provided that the actual cost of repairing any damage to the improvements on the leased premises arising from such removal and restoring the same to their original condition shall be paid for by Tenant.

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Section 3. Tenant shall promptly pay all contractors and materialmen, so as to avoid the possibility of a lien attaching to the leased premises and, should any lien be made or filed, Tenant shall bond against or discharge the same within ten (10) days after written request by Landlord. Nothing in this lease contained shall be construed as a consent on the part of Landlord so as to subject Landlord's estate in the leased premises to any lien or liability under the laws of the state of South Dakota.

ARTICLE 9

INDEMNITY

Section 1. Tenant agrees to indemnify and save Landlord harmless against any and all claims, demands, damages, costs and expenses, including reasonable attorneys' fees, arising from the conduct or management of the farming business conducted by Tenant or from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of Tenant to be performed pursuant to the terms of this lease, or from any act or negligence of Tenant, his agents, contractors, or employees, in or about the leased premises. Except as to claims arising out of the negligence of Landlord, its agents, contractors, or employees, Landlord shall not be liable and Tenant waives all claims for damage to person or property sustained by Tenant or Tenant's employees, agents, contractors, and invitees by reason of the improvements on the leased premises or any equipment or appurtenances thereunto appertaining becoming out of repair, or resulting from any accident in or about the leased premises.

ARTICLE 10

INSURANCE

Section 1. Tenant shall not store or permit to be stored, any equipment or personal property or do anything in or about the leased premises which shall in any way tend to increase insurance rates on the leased premises without the consent of Landlord. If Landlord shall consent to such use, Tenant agrees to pay as additional rental any increase in premiums for insurance resulting from the farming business carried on in the leased premises by Tenant. If Tenant installs any electrical equipment that overloads the power lines to any improvements, Tenant shall, at his own expense, make whatever changes are necessary to avoid such overload and to comply with the requirements of insurance underwriters and insurance rating bureaus and governmental authorities having jurisdiction.

Section 2. Tenant agrees to procure and maintain a policy or policies of liability insurance, at his own cost and expense, insuring Landlord and Tenant from all claims, demands, or actions for property damage and for bodily injury, personal injury, or death sustained by one or more persons as a result of any one occurrence in the amount of not less than One Million Dollars (\$1,000,000.00) per occurrence made by or on behalf of any person or persons, firm or corporation arising from, related to or connected with the conduct and operation of Tenant's farming business on the leased premises. Said insurance shall not be subject to cancellation except after at least ten (10) days' prior written notice to Landlord, and the policy or policies, or

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duly executed certificate or certificates for the same, together with satisfactory evidence of the payment of premium thereon, shall be deposited with Landlord at the commencement of the term and upon any renewal of said insurance not less than thirty (30) days prior to the expiration of the term of such coverage.

Section 3. Tenant shall procure fire and extended coverage and other such reasonably necessary insurance on any improvements as Landlord may require. Such insurance shall be for the benefit of Landlord and Tenant shall have no interest therein.

Section 4. If Tenant fails to comply with the requirements of this Article, Landlord may obtain such insurance and keep the same in effect, and Tenant shall pay Landlord the premium costs thereof on demand.

ARTICLE 11

FIRE OR OTHER CASUALTY

Section 1. In case any improvements shall be partially or totally destroyed by any fire or other casualty so as to become partially or totally untenable, the same shall be repaired at the sole option of Landlord. Landlord shall not be obligated to repair or rebuild any such improvements.

ARTICLE 12

ASSIGNMENT AND SUBLETTING

Section 1. Tenant shall not assign or in any manner transfer this lease or any interest therein, nor sublet said leased premises or any part or parts thereof, nor permit occupancy by anyone without the prior written consent of Landlord, which shall not be unreasonably withheld. Consent by Landlord to one or more assignments of this lease or to one or more sublettings of the leased premises shall not operate as a waiver of Landlord's rights under this Article. No assignment shall release Tenant of any of his obligations under this lease or be construed or taken as a waiver of any of Landlord's rights hereunder. The acceptance of rent from someone other than Tenant shall not be deemed to be a waiver of any of the provisions of this lease or consent to any assignment or subletting of the leased premises.

ARTICLE 13

ACCESS TO PREMISES

Section 1. Landlord shall have the right to enter upon the leased premises at any reasonable time for the purpose of inspecting the same, making repairs, additions or alterations thereto or to the improvements thereon, or for the purpose of exhibiting the same to prospective tenant, purchasers or others, or to prepare the leased premises for the planting of the succeeding

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year's crop. Landlord shall not be liable to Tenant in any manner for any expense, loss or damage by reason thereof, nor shall the exercise of such right be deemed an eviction or disturbance of Tenant's use or possession.

ARTICLE 14

HAZARDOUS WASTE

Section 1. During the term of this lease, Tenant covenants that he shall comply with all present and future environmental laws, ordinances, rules or regulations, and that Tenant shall not permit the generation, creation, treatment, incorporation, discharge, disposal, escape, release or threat of release of any contaminant above, upon, under, within or from the leased premises, and that no underground storage tanks containing any contaminant shall be located upon the leased premises.

Section 2. For the purposes of this lease, contaminant is a "Petroleum Product" as described in SDCL 37-2-5, asbestos, or a "Regulated Substance" as described in SDCL 34A-12-1(8) or substances regulated under and defined in the provisions of 15 U.S.C. 2601-2671 (1989) (TSCA) or 33 U.S.C. 1251-1387 (1989) (FWPCA) or 42 U.S.C. 6901-6999(i) (1989) (RCRA) or 42 U.S.C. 9601-9675 (1989) (CERCLA) or 42 U.S.C. 7401-7642 (1989) (CAA), and any corresponding federal and state regulations promulgated under the above federal and state statutes as well as amendments, deletions or corrections to such laws, ordinances, rules or regulations and further including laws, ordinances, rules or regulations concerning substances harmful to the environment which are passed subsequent to the commencement date of this lease and which will become effective during the term of this lease, or any extension hereof, and until Tenant surrenders possession of the leased premises. For illustrative purposes only and not by way of limitation, a partial listing of contaminants includes asbestos containing materials, gasoline, waste oil, lubricating oil, fuel oil, petroleum product distillates, solvents, paints, enamels, paint or enamel thinners, acetones, acids, pesticides, rodenticides, herbicides, fungicides, mercury, leads, cyanide, and polychlorinated biphenyls, or any combination of these substances. To the extent that any of the above referenced laws, ordinances, rules and regulations are inconsistent, Landlord and Tenant agree that the interpretation favoring the classification of a substance as harmful to the environment shall be controlling.

Section 3. Tenant covenants that he will, at his own expense, abate, remedy and remove any contaminant discovered on the leased premises which was located, generated, created, stored, treated, incorporated, discharged, disposed of, allowed to escape, released or about to be released by Tenant. Tenant shall indemnify Landlord, without prior payment being made by Landlord, against and shall hold Landlord harmless from any and all claims, demands, judgments, penalties, liabilities, costs, damages and expenses, including court costs and attorneys' fees prior to trial, at trial and on appeal, whether private or mandated by any governmental body, resulting from any breach of the foregoing covenant or from the discovery of a contaminant in, above, upon, across or under the leased premises, it being the intent of Landlord and Tenant that Landlord shall have no liability for damage to the environment or

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natural resources caused by Tenant, for abatement, removal or clean-up of, or otherwise with respect to any contaminants either by virtue of the interest of Landlord in the leased premises or created as a result of Landlord's exercise of any of Landlord's rights or remedies with respect to this lease, including, but not limited to, the eviction of Tenant or the re-entry of Landlord and Landlord's physical repossession of the leased premises.

Section 4. Landlord and Tenant agree that Tenant shall, for purposes of this Article, be designated as the "Owner" or "Operator" of the leased premises. The covenants and warranties contained in this Article shall survive the termination of this lease.

ARTICLE 15

REMEDIES

Section 1. Landlord may terminate Tenant's estate herein demised and Tenant's right to possession hereunder upon the failure of Tenant to pay any rent when due or to perform any other of their covenants under this lease and the continuance of such default for thirty (30) days (ten (10) days in the case of the payment of rent or other monetary obligations of Tenant hereunder) after written notice to Tenant.

Section 2. If, at any time during the term of this lease (a) Tenant shall file in any court a petition in bankruptcy or insolvency or for reorganization, or for arrangement or for the appointment of a receiver or trustee of all or a portion of Tenant's property, or (b) an involuntary petition of any kind referred to in subsection (a) of this section shall be filed against Tenant, and such petition shall not be vacated or withdrawn within thirty (30) days after the date of filing thereof, or (c) if Tenant shall make an assignment for the benefit of creditors, or (d) if Tenant shall be adjudicated a bankrupt, or (e) a receiver shall be appointed for the property of Tenant by order of a court of competent jurisdiction (except where such receiver shall be appointed in an involuntary proceeding, if they shall not be withdrawn within thirty (30) days from the date of appointment), Tenant's estate and right to possession hereunder shall terminate ipso facto upon the happening of any one of such events, and Tenant shall then quit and surrender the leased premises to Landlord, but Tenant shall remain liable as hereinafter provided.

Section 3. Upon the termination of the estate as aforesaid, Landlord may re-enter the leased premises by any lawful means and remove all persons and chattels therefrom, and Landlord shall not be liable for damages or otherwise by reason of re-entry or termination. Notwithstanding such termination, the liability of Tenant for the rent provided for hereinabove shall not be extinguished for the balance of the term remaining after said termination.

Section 4. In the event of any breach hereunder by Tenant, Landlord may immediately or at any time thereafter, without notice, cure such breach for the account and at the expense of Tenant. If Landlord at any time by reason of such breach is compelled to pay, or elects to pay, any sum of money or do any act which will require the payment of any sum of money, or incurs any expense, including attorneys' fees and costs incurred by Landlord in connection with the

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recovery of possession of the leased premises or the enforcement of any of the terms and provisions of this lease, the sum or sums so paid by Landlord shall be deemed to be due from Tenant to Landlord as additional rent.

Section 5. Should Landlord be in default under the terms of this lease, Landlord shall have reasonable and adequate time in which to cure the same after written notice to Landlord by Tenant.

Section 6. Tenant hereby expressly waives, to the full extent waivable, any and all rights or redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed for any cause or, in the event of Landlord obtaining possession of the leased premises, by reason of the violation of Tenant of any of the covenants or conditions of this lease, or otherwise.

ARTICLE 16

SURRENDER OF POSSESSION

Section 1. At the expiration of the lease term, whether by lapse of time or otherwise, Tenant shall surrender the leased premises in good condition and repair, reasonable wear and tear and loss by fire or unavoidable, insured casualty excepted. If the leased premises be not surrendered at the end of the term or the sooner termination thereof, Tenant shall indemnify Landlord against loss or liability resulting from delay to Tenant in so surrendering the premises.

ARTICLE 17

TENANT'S OPTION TO PURCHASE

In consideration of Tenant's payment to Landlord of the sum of Sixty Three Thousand, Seven Hundred Fifty Dollars and (\$63,750.00) Landlord hereby grants to Tenant the option to purchase the Leased premises. It is a condition to the continued existence and the exercise of this option that the loan Landlord previously made to Judith Sturzenbecher has been paid in full. The consideration for the option shall be paid to Landlord as follows: Five Thousand Dollars (\$5,000.00) upon execution of this Lease; and the balance of Fifty-Eight Thousand Seven Hundred and Fifty Dollars (\$58,750.0) plus 4% interest per annum on the date when this option is exercised, failing which the option will be null and void. This option shall continue in effect until 11:59 o'clock p.m., on the fifth anniversary of the date upon which this Lease commences as set forth in Article I, Section 2 hereof, and may be exercised if: Tenant is not in default under the terms of this Lease; no event has occurred which, with the passage of time or the giving of notice would constitute a default hereunder; the loan Landlord previously made to Judith A. Sturzenbecher has not been paid in full; or the Lease has, for any reason, been terminated. If Tenant desires to exercise this option, he must do so by giving Landlord written notice, sent certified mail return receipt requested with postage affixed thereto, addressed to Landlord's address set forth above, and received by Landlord prior to the expiration of this option to

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purchase. If Tenant does not exercise this option prior to the expiration thereof, Landlord shall retain absolutely the sum set forth above as consideration for this option. If Tenant exercises his option to purchase the Leased Premises, the purchase price shall be Three Million, Eight Hundred Twenty Five Thousand Dollars (\$3,825,000.00). The Purchase Price shall be paid in cash, at closing. The sale and conveyance of the Leased Premises under this option shall be subject to the following:

- (a) all mineral reservations, rights-of-way, and easements now of record;
- (b) all liens or encumbrances made or suffered by Tenant prior to the date of closing;
- (c) all real property taxes which shall be paid by Tenant.

Save and except as set forth above, Landlord shall convey the Leased Premises to Tenant by a warranty deed, conveying fee simple, marketable title to said real property. In the event Tenant exercises this option, closing shall take place forty-five (45) days following Landlord's receipt of the notice of exercise by Tenant. The parties shall procure a commitment for a policy of title insurance insuring the purchase price of the property, and the cost thereof shall be divided equally between them. All other closing costs shall be paid and prorated in accordance with accepted custom in the region where the Leased Premises are located. This option is personal to Tenant, and may not be assigned, transferred, alienated or otherwise encumbered.

ARTICLE 18

NOTICES

Section 1. Whenever under this lease provision is made for notice of any kind, such notice shall be in writing and shall be deemed sufficient to Tenant if actually delivered to Tenant or sent by electronic mail, telefax, or by registered or certified mail, return receipt requested, postage prepaid, to the last post office address of Tenant furnished to Landlord for such purpose or to the leased premises; and to Landlord if actually delivered to Landlord or if sent by electronic mail, telefax or by registered or certified mail, return receipt requested, postage prepaid, to Landlord at the address furnished for such purpose or to the place then fixed for the payment of rent.

ARTICLE 19

CONSENTS

Section 1. The parties agree that whenever under this lease provision is made for securing the written consent, permission or approval of either that such written consent, permission or approval shall not be unreasonably withheld or delayed.

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ARTICLE 20

TITLE

Section 1. Landlord covenants that it has full right and authority to enter into this lease for the full term hereof. Landlord further covenants that Tenant, upon performing the covenants and agreements of this lease to be performed by Tenant, will have, hold and enjoy quiet possession of the leased premises. Landlord and Tenant each represent to the other that they have had the benefit of such counsel from attorneys, financial advisers, real estate advisors, or other professionals as they desire, and have obtained such advice and counsel without reliance on or representation from the other party hereto. By virtue of each consultation, no presumption shall arise in the event it is necessary to construe any term of this Lease based upon the party drafting such provision. Save and except as set forth herein, neither party has received nor relied upon any information, warranty or representation from the other.

ARTICLE 21

GENERAL

Section 1. Relationship of Parties. Nothing contained herein shall be deemed or construed by anyone as creating the relationship of principal and agent or of partnership or of joint venture between the parties hereto.

Section 2. Cumulative Remedies and Nonwaiver. The various rights and remedies contained in this lease shall not be considered as exclusive of any other right or remedy, but shall be construed as cumulative and shall be in addition to every other remedy now or hereafter existing at law, in equity, or by statute. No delay or omission of the right to exercise any power by either party shall impair any such right or power or shall be construed as a waiver of any default or as acquiescence therein. One or more waivers of any covenant, term or condition of this lease by either party shall not be construed by the other party as a waiver of a subsequent breach of the same covenant, term or condition. The consent or approval by either party to or of any act by the other party of a nature requiring consent or approval shall not be deemed to waive or render unnecessary consent to approval of any subsequent similar act.

Section 3. Headings. The headings of the several articles contained herein are for convenience only and do not define, limit or construe the contents of such articles.

Section 4. Binding Effect of Lease. The covenants, agreements and obligations herein contained, except as herein otherwise specifically provided, shall extend to, bind and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns. Landlord, at any time and from time to time, may make an assignment of its interest in this lease, and, in the event of such assignment and the assumption by the assignee of the covenants and agreements to be performed by Landlord herein, Landlord and its successors and

APP038

assigns (other than the assignee of this lease) shall be released from any and all liability hereunder.

Section 5. Recording of Lease. Tenant shall not record this lease without the written consent of Landlord.

Section 6. Acceptance of Payment. No payment by Tenant or receipt by Landlord of a lesser amount than the amount then due under this lease shall be deemed to be other than on account of the earliest portion thereof due, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance due or pursue any other remedy in this lease provided.

Section 7. Unenforceability. Unenforceability of any provision contained in this lease shall not affect or impair the validity of any other provision of this lease.

Section 8. Governing Law. The laws of the state in which the leased premises are located shall govern the validity, performance and enforcement of this lease.

Section 9. Waiver of Subrogation. Anything in this lease to the contrary notwithstanding, to the extent of insurance proceeds recoverable, Landlord and Tenant each hereby waive any and all rights of recovery, claim, action or cause-of-action against the other, their agents (including partners, both general and limited), officers, directors, shareholders or employees, for any loss or damage that may occur to the leased premises, or any improvements thereto, or any property of such party therein, by reason of fire, the elements, or any other cause which could be insured against under the terms of standard fire and extended coverage insurance policies, regardless of cause or origin, including negligence of the other party hereto, their agents, officers or employees, and covenants that no insurer shall hold any right of subrogation against such other party.

IN WITNESS WHEREOF, Landlord and Tenant have signed this lease as of the day and year first above written.

SIOUX COUNTY RANCH, LLC

By John Karchner
Its Manager

Cody P. Sturzenbecher LANDLORD
Cody P. Sturzenbecher

TENANT

APP039

EXHIBIT A

The Southeast Quarter (SE1/4) of Section Twenty-five (25), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing one Hundred sixty (160) acres more or less,

The East One-half of the Northwest Quarter (E1/2NW1/4) of Section Twenty-five (25), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The East One-half of the Northeast Quarter (E1/2NE1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The West One-half of the Northwest Quarter (W1/2NW1/4) of Section Twenty-five (25), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The West One-half of the Northeast Quarter (W1/2NE1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The North One-half of the Southwest Quarter (N1/2SW1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The East One-half of the Northwest Quarter (E1/2NW1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Eighty (80) acres,

The Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Forty (40) acres,

The Northwest Quarter of the Northwest Quarter (NW1/4NW1/4) of Section Thirty-six (36), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing Forty (40) acres,

The Southwest Quarter (SW1/4) of Section Twenty-five (25), Township Ninety-eight (98), Range Fifty-four (54), Turner County, South Dakota, containing one Hundred sixty (160) acres

The Northwest Quarter (NW1/4) of Section Thirty-one (31), Township Ninety-eight (98) North, Range Fifty-three (53) West of the 5th P.M., Turner County, South Dakota.

APP040

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT (the "Agreement") is entered into as of the 14 day of January, 2021, between JUDITH A. STURZENBECHER of 45042 276th Street, Parker, South Dakota 57053 ("Seller"), and SIOUX COUNTY RANCH, LLC c/o JOHN KOERSELMAN, 669 10th Street Circle SE, Sioux Center, IA 51250 ("Purchaser").

WITNESSETH:

IN CONSIDERATION of the mutual premises, covenants, agreements and understandings contained herein, Seller and Purchaser agree as follows:

1. PURCHASE AND SALE. Seller agrees to sell to Purchaser, and Purchaser agrees to buy from Seller, a parcel of real property approximately 1041 acres in size, and described on Exhibit A attached hereto and incorporated herein by this reference plus all improvements (the "Property"), upon the terms and conditions contained in this Agreement. Unless terminated by Purchaser as permitted herein, or unless extended by the mutual written agreement of the parties, this Agreement shall expire and terminate at 11:59 p.m. (Central Standard Time) on the date which is the Closing Date. Seller will also assign all Conservation Reserve Program contracts to Purchaser and will execute such documents as may be necessary to assure Purchaser's receipt of CRP payments for 2021 and subsequent years.

2. PURCHASE PRICE. The purchase price for the Property (the "Purchase Price") shall be Three Million One Hundred Eighty Seven Thousand, Five Hundred Dollars (\$3,187,500.00) and is payable as follows:

(a) Contemporaneous with the delivery to Seller of an original and one (1) copy of this Agreement executed by Purchaser, Purchaser shall deliver the sum of One Thousand Dollars (\$1,000.00) (the "Initial Consideration") to Turner County Title Company, Parker, South Dakota, be held in escrow pursuant to the terms of this Agreement. Upon such delivery, Seller shall promptly execute this Agreement, and the date of Seller's execution of this Agreement shall be the "Effective Date".

(b) The balance of the Purchase Price shall be payable to Seller in the form of a reduction of the indebtedness Seller owes Purchaser by virtue of a Promissory Note evidencing a loan from Purchaser to Seller in the sum of Four Million Two Hundred Fifty Thousand Dollars \$4,250,000.00. Said indebtedness shall be reduced by the sum of Three Million One Hundred Eighty Seven Thousand, Five Hundred Dollars \$3,187,500.00 upon closing of this Purchase Agreement.

Seller's Initials

Purchaser's Initials

(c) The Initial Consideration shall be applied as follows:

- (i) If the sale of the Property is consummated, the Initial Consideration shall be applied to and credited against the Purchase Price at the closing.
- (ii) Under all circumstances Seller shall be entitled to retain the Initial Consideration as Seller's sole and exclusive property in consideration of the execution of this Agreement by Seller unless (a) the representations or warranties of Seller contained herein are untrue or misleading or (b) the sale of the Property to Purchaser is not consummated as a result of Seller's breach of its obligations hereunder, or (c) Purchaser terminates the Agreement pursuant to Sections 5, 6 or 8 below.

3. SURVEY. In addition, to the survey of building site described in Exhibit A attached hereto, and at its sole option, Purchaser may, at Purchaser's sole cost and expense, cause a boundary and topographical survey (the "Survey") of the Property, or any part thereof, to be prepared and delivered to Purchaser, which survey shall be the property of Purchaser. Seller shall cooperate fully with Purchaser and the surveyor selected by Purchaser in the conduct and completion of such survey, and, in addition, shall promptly furnish Purchaser with a copy of any survey of the Property in Sellers' possession.

4. TITLE COMMITMENT. Within fifteen (15) days following the date hereof, Seller shall obtain and deliver to Purchaser a Title Insurance Commitment (the "Commitment") covering the Property and issued by Turner County Title Company (the "Title Company"). The Commitment shall provide for the delivery to Purchaser of an Owner's Title Insurance Policy insuring marketable fee simple title to the Property in the amount of the Purchase Price and underwritten by a title insurance company acceptable to Purchaser. The Commitment shall include true, correct and legible copies of all instruments referred to therein as conditions or exceptions to the title to the Property, including liens.

5. REVIEW OF COMMITMENT. Purchaser shall promptly review the Commitment as described hereinabove and shall deliver to Seller in writing any objections which Purchaser may have with respect to the Commitment. In the event Purchaser fails to provide any written notice containing objections to the Commitment within thirty (30) days after Purchaser's receipt of a copy of the Commitment, Purchaser shall be deemed to have accepted the Commitment. Within fifteen (15) days after Purchaser's written notice to Seller of any objections, Seller shall deliver to Purchaser a statement including 1) any objections which Seller could not, upon the exercise of due diligence and good faith, cure prior to or concurrent with Purchaser's acquisition of the Property and 2) all objections which Seller agrees to cure prior to or concurrent with Purchaser's acquisition of the Property. Within fifteen (15) days after receipt of Seller's statement listing such title objections which Seller could not cure, Purchaser shall

Seller's Initials



Purchaser's Initials



elect to either waive such objections, in which event such objections shall become permitted exceptions, and to close the transaction in accordance with the terms of this Agreement, or terminate this Agreement in which event the parties hereto shall have no further rights, duties or obligations, except as provided in Section 2 (c) (i), above.

6. TESTS, BORINGS AND EXAMINATIONS. Seller will permit Purchaser, its agents, employees or representatives, to enter upon the Property at reasonable hours and for reasonable duration for the purpose of conducting environmental or other surveys, soil tests, borings, percolation tests, and any other tests, inspections or examinations that Purchaser desires in regard to the Property, including such other tests, inspections or examinations that Purchaser may desire to determine subsurface or topographic conditions of the Property. Purchaser agrees to indemnify and hold Seller harmless from and against any and all claims, demands, damages, costs and expenses, including reasonable attorneys' fees, arising or resulting from the conduct or actions of Purchaser, its employees, agents, servants, contractors or representatives in connection with such tests, inspections or examinations; provided, however, the foregoing indemnity shall not apply to and shall not relieve Seller of any liability or responsibility for any hazardous or toxic materials existing on or in the Property as of the date hereof that may be discovered or released by Purchaser's investigation of the Property. Purchaser shall immediately notify Seller of the discovery or release of any hazardous or toxic material, and shall discontinue such tests, inspections or examinations which permitted the discovery or caused the release. Seller shall not be liable and Purchaser hereby waives all claims for damage or injury to person or property sustained by Purchaser or its employees, agents, servants, contractors or representatives resulting from any accident in or about the Property in connection with the conduct of such tests, inspections or examinations, except to the extent due to the negligence of Seller. In the event the purchase of this Property is not consummated, Purchaser agrees to restore the Property to its original condition and repair any damage to the Property caused in connection with the conduct of such tests, inspections or examinations. Within thirty (30) days after the date hereof, Seller shall provide Purchaser with copies of any of the items referred to hereinabove in this paragraph which Seller may have in her possession. Purchaser shall have until forty-five (45) days after the Effective Date within which to notify Seller that the soil, grading, subsurface or topographic conditions of the Property are not conducive for Purchaser's proposed use and development of the Property in Purchaser's sole determination and judgment. In such event, then at Purchaser's option, this Agreement shall be terminated and neither party shall have any further obligations hereunder.

7. SELLER'S COVENANTS, WARRANTIES AND REPRESENTATIONS. Seller covenants, warrants and represents to Purchaser as follows:

(a) Seller has good, marketable and indefeasible fee simple title to the Property, free and clear of all liens, restrictions, rights-of-way, easements and judgments, except those set forth on Exhibit B attached hereto.

Seller's Initials



Purchaser's Initials



(b) Except as disclosed in Exhibit B hereto, there are no adverse or other parties in possession of the Property, or of any part thereof. Except as disclosed in Exhibit B, no party has been granted by Seller any license, lease or other right relating to the use or possession of the Property or any part thereof after the date of this Agreement, and Seller will not without Purchaser's prior written approval enter into any further leases or contracts relating to the Property.

(c) To the best knowledge of Seller, no facts or conditions exist which would result in the termination of the current access to and from the Property to any presently existing highways and roads adjoining or situated on the Property, or to any existing sewer or other utility facilities servicing, adjoining or situated on the Property.

(d) The Seller is not a party to any litigation affecting the Property and there is no litigation, pending or threatened, including condemnation action, affecting or otherwise related to the Property.

(e) The Property is free of hazardous wastes, materials or substances, and all underground storage tanks except as disclosed on Exhibit B.

(f) Except as to the hazardous waste identified by Seller on Exhibit B in this Agreement or disclosed by Seller prior to closing, Seller has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions pertaining to and affecting the Property.

(g) The performance of this Agreement will not result in any breach of, or constitute any default under, or result in the imposition of, any lien or encumbrance upon the Property pursuant to any Agreement or other instrument to which Seller are a party or by which Seller might be bound.

(h) No commitments have been made by Seller to any governmental authority, utility company or any other organization, group or individual relating to the Property which would impose an obligation upon Purchaser or its successors or assigns to make any contribution or dedication of money or land or to construct, install or maintain any improvements of a public or private nature on or off the Property; and, to Seller's best knowledge, no governmental authority has imposed any requirement that any owner of the Property pay directly or indirectly any special fee, benefit assessment or contribution or incur any expense or obligation in connection with any use of the Property or any part thereof.

(i) Neither the Property nor any part thereof is within an area determined by the Federal Emergency Management Agency to be flood prone under the Federal Flood Protection Act of 1973.

Seller's Initials

Purchaser's Initials

The image shows two sets of handwritten initials. The top set, corresponding to 'Seller's Initials', appears to be 'SS' or 'S.S.' written in a cursive style. The bottom set, corresponding to 'Purchaser's Initials', appears to be 'JK' written in a cursive style.

(j) From and after the date of this Agreement, Seller shall keep the Property free and clear of all easements, liens or encumbrances which are not disclosed in the Commitment.

(k) There are no existing loans affecting the Property, save and except those shown on Exhibit B.

(l) Seller is not a "foreign person" as that term is used in Section 1445(b)(2) of the Internal Revenue Code of 1986, as amended, and the related regulations. Seller agrees to execute a Certification That Seller Is Not A Foreign Person in a form acceptable to Purchaser prior to the Closing Date.

8. CONDITIONS TO CLOSING: The obligation of Purchaser under this Agreement to purchase the Property is subject to the following:

(a) the obligation of Purchaser to close under this Agreement is subject to Purchaser's execution of a Lease in form and content reasonably satisfactory to Purchaser, and specifically including the following provisions:

(i) The Lease will be for a term of Five (5) years with rental of 1041 acres for annual rental of Two Hundred Thirty (\$230.00) per acre and provides that the Lessee pays all real estate taxes which are payable during the Lease term;

(ii) The Lease will provide that the Lessee shall pay the costs of liability insurance naming the Lessor as an additional insured; and

(iii) The Lease shall provide that rental shall be paid annually, in advance, with the first year of rent payable one-half upon execution of the Lease, and the other one-half on or before November 15, 2021; and thereafter payable in full on the 1st day of March each year thereafter

(b) the delivery by Seller of the documents and items required by Paragraph 10 hereof or the waiver by Purchaser of such requirement;

(c) the procurement by Purchaser of financing of the Purchase Price, satisfactory to Purchaser in its sole judgment;

(d) completion of such environmental testings and surveys as Purchaser may elect, and the determination by Purchaser, in his sole discretion, that there is no contamination of, nor environmental hazard in or upon the Property;

Seller's Initials

Purchaser's Initials

The block contains two sets of handwritten initials. The top set, corresponding to 'Seller's Initials', consists of a stylized 'S' and 'C' written together. The bottom set, corresponding to 'Purchaser's Initials', consists of a stylized 'P' and 'K' written together.

9. APPRAISAL. Purchaser shall, at its expense, procure an appraisal by an appraiser of its selection. In the event such appraisal shows an appraised value less than \$4,547,250.00 Purchaser may elect to terminate this Agreement and neither party shall have any further obligation hereunder by save and except the Initial Consideration shall be returned to Purchaser.

10. TIME, PLACE, EXPENSES OF CLOSING.

(a) The closing hereunder shall take place in the offices of Turner County Title Company, Parker, South Dakota, on the date Seller closes the purchase of the Property from the Wollmann Trust . The date so designated for closing is referred to herein as the "Closing Date." The Closing Date may be extended by the mutual agreement of the parties.

(b) Ad valorem taxes for the year 2020, due and payable in 2021, and for all prior years, shall be paid by and be the responsibility of Seller. It is agreed that, in accordance with the lease to be entered into between the parties hereto, Seller shall pay such taxes as and when they become due, in a timely fashion. Any special assessments levied against the Property for improvements previously made for the benefit of the Property shall be paid by the Seller. Notwithstanding anything to the contrary contained herein, the provisions of this Paragraph 9(b) shall survive the closing.

(c) Except as otherwise specifically provided in this Agreement, all costs, fees and other expenses in connection with the transaction contemplated by this Agreement other than the legal fees of each party's counsel in negotiating, preparing and closing this Agreement, which shall be paid by each respective party, shall be prorated in accordance with accepted custom in the region where the Property is located.

(d) Seller agrees to furnish the following items to Purchaser at closing:

- (i) An owner's policy of title insurance (the "Title Policy") issued by the Title Company which shall insure marketable fee simple title to the Property in Purchaser for the amount of the Purchase Price as provided in the Commitment. The Title Policy shall not contain exceptions contained in the Commitment except restrictions, conditions, zoning and easement of record, none of which will interfere with or restrict the existing use of the Property, and those which Seller has agreed to remove. The Title Policy shall specifically insure against all mechanic's liens. The cost of the Title Policy shall be shared equally by the Seller and the Purchaser. Purchaser may obtain an extended coverage policy provided Purchaser pays for the additional cost of such policy in excess of the cost for the standard policy required to be provided hereunder.

Seller's Initials



Purchaser's Initials



- (ii) A good and sufficient warranty deed executed by Seller and which will convey fee simple, indefeasible title of the Property to Purchaser, free and clear of all except liens and encumbrances and restrictions, conditions, zoning and easements, save and except restrictions, conditions, zoning and easement to which will not interfere with or restrict the existing use of the Property.
- (iii) If requested by Purchaser, a certification that Seller is not foreign person in a form acceptable to the escrow holder.

11. TERMINATION; DEFAULT; REMEDIES. In the event that Purchaser terminates this Agreement as permitted in Sections 5, 6 or 8 hereinabove, Seller shall return to Purchaser the Initial Consideration paid to Seller by Purchaser hereunder. In the event the sale of the Property is not consummated for any other reason excepting only the Seller's failure to deliver the items required to be delivered by Seller at closing or in the event any of Seller's representations or warranties is untrue or misleading in any material respect, then this Agreement shall terminate and Seller shall retain the Initial Consideration paid by Purchaser to Seller hereunder as liquidated damages and such liquidated damages shall be Seller's sole and exclusive remedy in the event this Agreement is so terminated. In the event that the sale of the Property is not consummated by reason of Seller's default, Purchaser may pursue any and all remedies available at law or in equity by reason of such default. The prevailing party shall be entitled to recover reasonable attorneys' fees incurred.

12. NOTICES. All notices, demands and requests and other communications required or permitted hereunder shall be in writing, and shall be deemed to be delivered when received, if delivered in person, or whether actually received or not, forty-eight (48) hours after electronic transmission, telefax, or seventy-two (72) hours after the deposit thereof with an overnight delivery carrier, or in a regularly maintained receptacle for the United States mail, registered or certified, return receipt requested, postage prepaid, addressed to the parties at the following addresses:

PURCHASER:

SIOUX COUNTY RANCH, LLC
c/o John H. Koerselman
669 10th Street Circle SE
Sioux Center, IA 51250

Seller's Initials



Purchaser's Initials



With a Copy to:

Robert E. Hayes
Davenport, Evans, Hurwitz & Smith, L.L.P.
P.O. Box 1030
Sioux Falls, SD 57101-1030

SELLER:

Judith A. Sturzenbecher
45042 276th Street
Parker, South Dakota 57053

With a Copy to:

Attorney Mike Fink
225 N. Main Avenue
Bridgewater, SD 57319

13. COMPLETE AGREEMENT; PARTIES' RELATIONSHIP. This Agreement is the complete and entire agreement between the parties hereto and it may not be modified or altered except by the written agreement of the parties. Any revisions or modifications of this Agreement shall be in writing executed by both of the parties. Purchaser and Seller each represent to the other that they have had the benefit of such counsel from attorneys, financial advisers, real estate advisors, or other professionals as they desire, and have obtained such advice and counsel without reliance on or representation from the other party hereto. Save and except as set forth herein, neither party has received nor relied upon any information, warranty or representation from the other.

14. PARTIES BOUND. This Agreement shall be binding upon and inure to the benefit of Seller and Purchaser, and their respective heirs, personal representatives, successors and assigns.

Seller's Initials



Purchaser's Initials



15. SURVIVAL OF REPRESENTATIONS AND WARRANTIES. The representations and warranties set forth in this Agreement shall be continuing, be remade by the Seller at closing and shall survive the closing.

16. COMMISSIONS. Purchaser and Seller each represent and covenant to the other that they have not entered into any agreement, incurred any obligation or know of any facts which might result in an obligation for any party to pay a sales or brokerage commission or finder's fee for this transaction, save and except sums due from Purchaser which are not Seller's obligation. Seller and Purchaser each agree to indemnify and hold the other harmless from all liability, including reasonable attorneys' fees, arising from a breach of this representation and warranty. Seller acknowledges that she has independently consulted with a party or parties assisting Purchaser in the location and availability for sale of the Property. Seller warrants and represents to Purchaser that any such consultation has been independent of negotiation of the terms hereof and Seller warrants and represent that she has established to her satisfaction, that such consultations have been satisfactory and independent of any duties of such person to Purchaser.

17. ATTORNEYS' FEES. In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay to the prevailing party all costs and expenses incurred by the prevailing party in connection with the litigation, including but not limited to reasonable attorneys' fees.

18. PURCHASER'S APPROVALS AND DISAPPROVALS. Purchaser's rights to approve or disapprove matters as provided for in this Agreement shall be in the sole and absolute discretion of Purchaser. No such approval or disapproval shall affect Seller's representations and warranties herein or waive any rights of Purchaser to rely upon the representations and warranties of Seller.

19. TIME. Time is of the essence of each and every provision of this Agreement.

20. GOVERNING LAW. This Agreement is to be governed by and construed in accordance with the laws of the State of South Dakota.

21. POSSESSION OF PROPERTY; RISK OF LOSS. Possession of the Property shall be transferred on the Closing Date. All risks of loss with respect to the Property shall be borne by Seller until the later of the transfer of title or the transfer of possession to Purchaser.

22. CONSTRUCTION OF AGREEMENT. Headings in this Agreement are solely for the convenience of the parties and are not a part of this Agreement. This Agreement shall be construed as if it had been prepared jointly by Purchaser and Seller. Unless otherwise indicated, all references to paragraphs are to paragraphs in this Agreement. If any portion of this

Seller's Initials



Purchaser's Initials



Agreement shall be declared to be invalid, illegal or unenforceable by any court of competent jurisdiction, such portion shall be deemed severed from this Agreement and the remaining portions shall continue in full force and effect. If any date herein falls on a weekend or a holiday, the date referred to shall be deemed to be the next date which is not a weekend or a holiday.

23. EXPIRATION. This Agreement, when duly executed on behalf of Purchaser, constitutes Purchaser's offer to purchase the Property on the terms and subject to the conditions set forth herein. In the event that a copy of this Agreement is not duly executed on behalf of Seller and received by Purchaser on or before March 1, 2021 this Agreement shall be automatically deemed null and void, without necessity of further action on Purchaser's part.

24. HAZARDOUS MATERIALS. Seller warrants and represents to Purchaser that to the best of her knowledge, after reasonable inquiry, there has been no generation, creation, treatment, incorporation, discharge, disposal, escape, release or threat of release of any contaminant above, upon, under, within or from the real property described herein, and that there are no underground storage tanks containing any contaminant located thereon. The parties agree that the Seller shall, for purposes of all state and federal environmental laws, regulations or ordinances, be designated as the 'Owner' or 'Operator' of the Property. The Seller undertakes and agrees that she will indemnify, and hold Purchaser harmless from, any and all costs and expenses, liens, claims, judgments, incurred by Purchaser as a result of legal or regulatory enforcement actions, including attorney fees and other professional fees expended by Purchaser with respect thereto, arising from or related to any claim, legal proceeding or enforcement action alleging that contaminants were generated, created, treated, incorporated, discharged, disposed of, escaped, released or threatened of release prior to the transfer of title to the Property. This indemnification shall continue in full force and effect following the closing hereunder. Nothing contained in this Section 23 shall be deemed to limit or release Seller from any and all liability and responsibility for any contamination existing prior to the Closing Date and the remediation of the Property required by the appropriate state governmental agency which is necessitated by such contamination. Seller shall, upon Purchaser's request, provide Purchaser with copies of all reports, findings, studies and notices relating to the contamination and remediation of the Property and Seller shall provide Purchaser with the names of all contractors, consultants and vendors employed by Seller in connection with such contamination and remediation.

25. EFFECTIVE DATE. The Effective Date shall be the date upon which this Agreement is signed by Seller.

Seller's Initials



Purchaser's Initials



IN WITNESS WHEREOF, the parties have executed this Agreement on the date set opposite the signatures of the authorized representatives of the parties set forth hereinbelow.

01-14-21
Date

Judith A. Sturzenbecher
JUDITH A. STURZENBECHER

SELLER

SIoux COUNTY RANCH, LLC

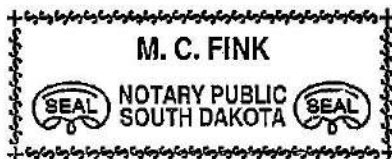
1/15/2021
Date

By John Koerselman
Its Manager
PURCHASER

STATE OF SOUTH DAKOTA)
COUNTY OF McCook) : SS

On this, the 14 day of January, 2021, before me, the undersigned officer, personally appeared Judith Sturzenbecher, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



M. C. Fink
Notary Public, South Dakota
My Commission expires: 7-15-2021

STATE OF Arizona)
COUNTY OF Maricopa) : SS

On this, the 15 day of Jan, 2021, before me, the undersigned officer, personally appeared John Koerselman who acknowledged himself to be the

Seller's Initials

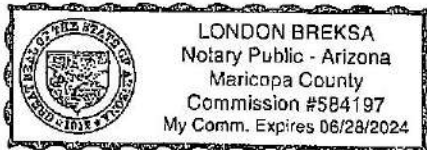
JS

Purchaser's Initials

JK

Manager of Sioux County Ranch, LLC, a limited liability company, and that he, as such Manager, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the limited liability company by himself as Manager.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



London Breksa

Notary Public, ~~South Dakota~~

My Commission Expires: 06/28/2024

Seller's Initials

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Purchaser's Initials

JK

EXHIBIT

tabbies

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PREPARED BY:

SABRINA MEIERHENRY
3809 S. KIWANIS CIRCLE
SIOUX FALLS, SD 57105
(605) 336-1095

Filed for Record - Turner County SD

Filed On 4/12/2021 4:07 PM
Document# R 089625 Type:DEED-WD
Book 119 of DEEDS
Page 947 # of Pages: 2

By Carol G. Viet
Carol G Viet, Register of Deeds T11530

Fee \$ 30.00
Transfer Fee \$ 3187.50

Return To:
LAND TITLE GUARANTY CO.
3809 S KIWANIS CIRCLE
SIOUX FALLS SD 57105

WARRANTY DEED - STATE FORM

Judith Ann Sturzenbecher, a married person

grantor of Turner County, South Dakota, for and in consideration of One Dollar and other good and valuable consideration, GRANT(S), CONVEY(S) AND WARRANT(S) TO

Sioux County Ranch LLC

grantees of 669 10th Street Circle SE, Sioux Center, IA 51250, all interest in the following described real estate in the County of Turner in the State of South Dakota:

The Northwest Quarter (NW 1/4) of Section Thirty-One (31), Township Ninety-Eight (98) North, Range Fifty-Three (53) West of the 5th P.M., Turner County, South Dakota.

The Northwest Quarter (NW 1/4) of Section Twenty-Five (25), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The Southwest Quarter (SW 1/4) of Section Twenty-Five (25), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The Southeast Quarter (SE 1/4) of Section Twenty-Five (25), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The Northeast Quarter (NE 1/4) of Section Thirty-Six (36), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

Transfer fee: \$ 3187.50

Alpha ☒
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Num ☒
Margin ☒
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COPY

The North Half of the Southwest Quarter (N 1/2 SW 1/4) of Section Thirty-Six (36), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The East Half of the Northwest Quarter (E 1/2 NW 1/4) of Section Thirty-Six (36), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The Southwest Quarter of the Northwest Quarter (SW 1/4 NW 1/4) of Section Thirty-Six (36), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

The Northwest Quarter of the Northwest Quarter (NW 1/4 NW 1/4) of Section Thirty-Six (36), Township Ninety-Eight (98) North, Range Fifty-Four (54) West of the 5th P.M., Turner County, South Dakota.

This deed is executed and delivered by Grantor and accepted by Grantee(s) subject to all legal highways and subject to, and with the benefit of all restrictions, easements, conditions, limitations and reservations of record, if any, and to zoning restrictions which have been imposed thereon, if any.

Grantor warrants that neither she nor any member of her immediate family has ever used or occupied said premises as a homestead.

Dated this 25 day of March, 20 21

Judith Ann Sturzenbecher
Judith Ann Sturzenbecher

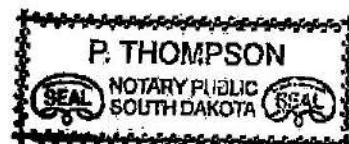
STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

On this 25 day of March, 20 21, before me, the undersigned officer, personally appeared Judith Ann Sturzenbecher, a married person, known to me or satisfactorily proven to be the persons(s) whose name(s) is/are subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

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

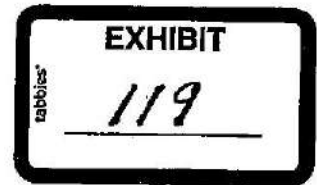
Shannon
Notary Public

My Commission Expires: 1-23-2024



APP054

COPY



STATE OF SOUTH DAKOTA)
: SS
COUNTY OF TURNER)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

JUDITH STURZENBECHER, and CODY
STURZENBECHER,

Plaintiffs,

vs.

SIOUX COUNTY RANCH, LLC,

Defendant.

62CIV22-000049

AFFIDAVIT OF MIKE C. FINK

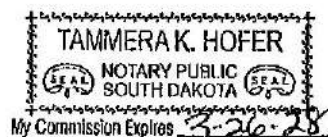
STATE OF SOUTH DAKOTA)
COUNTY OF McCook : SS

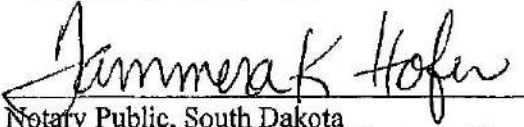
Mike C. Fink, being first duly sworn upon his oath, states as follows:

1. I have been practicing law in South Dakota since 1995.
2. I have been the McCook County State's Attorney since 2013.
3. I was hired by Judy Sturzenbecher to represent her, and did represent her, regarding a deal between Judy Sturzenbecher and Sioux County Ranch, LLC, that was memorialized by written agreements executed in 2021.
4. To my knowledge, the only deal between the Sturzenbechers (Judy and/or Cody) and Sioux County Ranch, LLC is that which is reflected in the agreements that were signed by the parties.
5. Further affiant sayeth not.


Mike C. Fink

Subscribed and sworn to before me this 7th day of September, 2022.




Notary Public, South Dakota
My Commission expires: 3-26-28

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

APPEAL NO. 30190

**JUDITH STURZENBECHER
and CODY STURZENBECHER,**

Plaintiffs and Appellees,

VS.

SIOUX COUNTY RANCH, LLC,

Defendant and Appellant.

**APPEAL FROM THE FIRST JUDICIAL CIRCUIT
TURNER COUNTY, SOUTH DAKOTA**

**THE HONORABLE DAVID KNOFF
CIRCUIT COURT JUDGE**

BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page number. Citations to the Appendix to this brief are designated as "App." and the page number. The transcripts of the hearings held before the circuit court are included and paginated within the record and are cited as "R." and the page number. The exhibits accepted into evidence are cited as "Ex." and the exhibit number as well as the page of the record on which they appear.

JURISDICTIONAL STATEMENT

Appellee agrees that this Court has jurisdiction over this appeal under SDCL 15-26A-3(5). *See Hedlund v. River Bluff Estates, LLC*, 2018 S.D. 20, ¶¶ 12-13, 908 N.W.2d 766, 770-71 & n.1.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED JUDGMENT ON THE PLEADINGS.

The circuit court denied judgment on the pleadings, holding it was authorized to consider evidence beyond the written documents alone in determining whether there was an equitable mortgage and that the alternative claims for declaratory relief should proceed.

- *Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76
- *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529
- *Russell v. Southard*, 53 U.S. 139 (1851)
- *Nygaard v. Sioux Valley Hospitals & Health Sys.*, 2007 S.D. 34, 731 N.W.2d 184

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ENTERING A PRELIMINARY INJUNCTION.

The circuit court applied the proper factors and held that a preliminary injunction enjoining the sale of the Sturzenbecher family farm was appropriate to preserve the status quo because they had a likelihood of success on their equitable injunction claim and the other factors also weighed in favor of granting the injunction.

- *Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76
- *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529
- *Wilson v. McWilliams*, 91 N.W. 453 (S.D. 1902)
- *Hedlund v. River Bluff Estates, LLC*, 2018 S.D. 20, 908 N.W.2d 766

STATEMENT OF THE CASE

On July 18, 2022, seven days before the Sturzenbecher family farm was scheduled to be sold in an auction conducted over the internet beginning at 8:00 a.m. on Monday, July 25, 2022, Plaintiffs Judith Sturzenbecher and Cody Sturzenbecher (Judy's son) filed an underlying complaint for declaratory relief alleging the existence of an equitable mortgage against Defendant Sioux County Ranch, LLC ("Sioux County) in Turner County of the First Judicial Circuit. (R. 3, 149). The complaint sought a declaration that Sioux County holds an equitable mortgage and security interest but is not the owner of their family farm. (R. 9). It also sought a declaration that the agreement between the parties was unconscionable. (R. 9).

Temporary Restraining Order

On July 19, six days before the internet auction, the Sturzenbechers filed a motion for a temporary restraining order (TRO) under SDCL 15-6-65(b) against Sioux County to prevent the impending auction of the farm. (R. 11). The TRO motion was set before the Honorable Cheryle Gering.

On the morning of July 22, less than three days before the scheduled auction, Judge Gering entered an order granting the TRO, finding:

Plaintiffs will suffer irreparable harm if a temporary restraining order is not granted; upon a review of the affidavits and case law, including but not limited to *Myers v. Eich*, 2006 SD 69, 720 N.W.2d 76 and *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529, Plaintiffs are likely to succeed on the merits of their claim; balancing the equities favors granting a temporary restraining order until the court has the opportunity to further address the issues in this case; and the public interest favors the granting of

the TRO to avoid a cloud on the title, see *Dyar v. Hazel*, 46 SD 427, 193 N.W. 666.

(R. 119). Following a hearing later that afternoon, Judge Gering issued an order maintaining the TRO. (R. 123, 267, 290-91). The auction of the Sturzenbecher family farm was stopped.

Preliminary Injunction

On July 25, 2022, the Sturzenbechers filed a motion for preliminary injunction under SDCL 15-6-65(a) “to protect and preserve the farm that has been in their family for over 80 years by enjoining Sioux County Ranch, LLC, from selling the family farm before the Court has the opportunity to rule on the merits of the Plaintiffs’ claims in this action.” (R. 140).

On August 23, 2022, Sioux County filed a motion for judgment on the pleadings under SDCL 15-6-12(c). (R. 323).

A hearing on both Sioux County’s motion and the preliminary injunction was held before the Honorable David Knoff on September 7-8, 2022, at the Turner County Courthouse. (R. 923).

On November 2, 2022, the court issued its memorandum decision denying Sioux County’s motion for judgment on the pleadings and granting the Sturzenbechers’ motion for preliminary injunction. (R. 833). In denying judgment on the pleadings, the court held that it was permitted to consider all of the surrounding circumstances and not limited to the written documents alone. (R. 834-35).

Turning to the preliminary injunction, the court made extensive factual findings. (R. 835-41). It then examined the factors for injunctive relief. (R. 841). The court agreed the Sturzenbechers had established a likelihood of succeeding on the merits. Analyzing the *Adrian* and *Myers* decisions, the court explained:

Looking at the entirety of the documents and the unique facts before this Court, there is clear and convincing evidence this transaction was structured as a mortgage and not as a sale. As discussed above, any language in the purchase agreement meant to thwart an equitable mortgage is not binding on the court. That would render the remedy of equitable mortgages unavailable with the drafting of a few words.

(R. 844). Regarding the remaining factors, the court held that the unique nature of real property, particularly a generational family farm, demonstrated that the Sturzenbechers would suffer irreparable harm if the farm was auctioned off while their claim was pending, the balance of equities favored granting the injunction to preserve the status quo, and it was in the public interest. (R. 844-45).

On November 20, 2022, the court entered its order denying Sioux County's motions and granting the Sturzenbechers' motion for a preliminary injunction enjoining Sioux County from selling the farm to preserve the status quo until the case is resolved. (R. 847-48). The court also designated the findings in its memorandum decision as its findings of fact under SDCL 15-6-52(a). (R. 848).

STATEMENT OF THE FACTS

A thousand acres

There is a family farm in Turner County, located on just over a thousand acres of land about four and a half miles west of Hurley, that has been home for the Sturzenbecher family for more than eighty years. (R. 953-54, 532; Ex. 9). Cody Sturzenbecher's great grandparents first moved there in 1941. (R. 953). Their son, Arnold Wollmann, bought the first piece of land in 1953. (R. 953-54). Arnold and his wife Clara spent the rest of their lives there. They had crops but mostly raised sheep and other livestock and grew a lot of hay. (R. 949, 955, 1014-15). They raised four daughters there: Judy, Debbie, Paula, and Marilyn. (R. 948, 1187).

Judy was the only one of the four sisters who stayed on the farm after finishing high school. (R. 949, 951, 1187). She married Dean Sturzenbecher. (R. 1186). They had two sons, Kyle and Cody, who also grew up helping their grandparents on the farm and basically never left:

Since we were knee high to a grasshopper we've been helping them. We've been with them our whole lives. I mean, that was our farming education was working with my grandparents. And we'd help them with livestock and haying. And you knew as soon as May rolled around, you knew what you were going to be doing. You were going to live in the hay field for the summer. That's what we did. We wore out many square balers behind tractors and that, putting up hay. I mean, we filled a lot of buildings full of hay and then my grandpa would sell hay in the winter and stuff.

(R. 947, 950, 1191-92). Judy and her husband lived in the homeplace after her parents. (R. 956, 1191-92). Cody started farming there full-time after his

Grandpa had a heart attack. He moved into the homeplace in 2002 and has been there ever since. (R. 951-52, 1192). Throughout the decades, Cody, Kyle, Dean, Judy, and even her little granddaughter all pitched in with farming and raising livestock. (R. 1188-89, 1192).

The Wollmann trust

In more ways than one, the concept of trust played a role in the unfolding of events in this case. On February 19, 1993, Arnold and Clara created the Wollmann trust to which they contributed their family farm. (R. 956, 1190). The Wollmanns named their four daughters as remainder beneficiaries of the trust, giving each a 25 percent share. (R. 547, 956, 1191; Ex. 12). Arnold died on July 5, 2011. (R. 947). Two of Judy's sisters later passed away. (R. 957). Clara died on June 11, 2020. (R. 957).

According to the terms of the trust, after Clara's passing the land was to be distributed in four equal shares to the four sisters (or their children if deceased). (R. 545, 957-58). Judy's remaining sister (Debbie) and the children of her late sisters wanted to sell the farm and obtain the proceeds of that sale by terminating the trust and distributing its assets.

But Judy wanted to keep the farm in the family. (R. 958). Her son Cody had farmed and lived there for almost two decades. The Sturzenbechers proposed purchasing it on a contract for deed. (R. 959). Judy's sister Debbie vetoed that idea. (R. 959-60). The bank that was the trustee for the Wollmann trust began making plans to sell. (R. 1195).

Sioux County enters the picture

As set forth in the circuit court's detailed factual findings, the Sturzenbechers were fine sheep farmers, good at growing and harvesting hay, but unsophisticated with no education past high school or experience borrowing money to purchase land or structuring financial transactions. (R. 839, 961, 1189). Because of the inheritance, Judy had over \$1 million in land equity in their farm, but the bank was unwilling to loan the money to buy it because the equity was tied up in the trust. (R. 584, 961-63; Ex. 21 at 4).

Desperate to keep their farm, the Sturzenbechers had Cody take the lead in trying to secure the financing necessary to purchase the farm from the trust. (R. 11920. They eventually were referred to Defendant Sioux County Ranch, LLC, a Nebraska limited liability company. (R. 964, 1100, 1192). Sioux County was owned by retired bankers John Koerselman and Rick Gruneich. (R. 964-65, 1101). Both were exceedingly sophisticated in farm lending and agricultural real estate with forty years of experience. (R. 1055-57, 1101). Koerselman also was quite talented at making connections with farm families and gaining their trust. (R. 964, 1060, 1193, 1284).

Koerselman and Gruneich came to South Dakota to meet the family and tour the Sturzenbecher farm. As Cody testified:

Q: ... And did they say anything to you during this first meeting in the fall of 2020 about helping family farmers finance their farms?

A: ... They said they do short-term loans for a period of five years. And by then generally land has went up in value

and you've also accumulated other assets, just the nature of farming. And generally after five years you have enough equity to find traditional financing. . . .

Q: During this meeting with Sioux County was there ever a discussion about Sioux County being the owner of the farm instead of the lender?

A: No.

Q: Was there a discussion of Sioux County being the purchaser of the land instead of your entire family?

A: No.

(R. 964-66, 969, 1058-60). The Sturzenbechers connected with Koerselman and Gruneich and trusted them. (R. 966-67). Judy felt a particular connection with Koerselman over shared experiences with cancer. (R. 1109, 1193). As Judy testified:

Q: And so what did you talk about after you developed that connection with John?

A: Cody and Kyle, Rick and John, they drove around the land looking at the acreage and, you know, all the land. And then they came back and then we had talked about the farm. And they had said that they helped family farms, families so that they could keep the family farms and they loaned money to them. And then after five years of having equity, we would be able to, you know, finance out of them.

Q: John denied yesterday that he used the term loan or financing with you, but do you recall him using those words with you?

A: Yes.

Q: And how did you feel about John and Rick after this meeting in terms of whether you thought they were genuine people and whether you could trust them?

A: I trusted them. I mean, I had a – I felt they were down to earth. And that's what we wanted is somebody that was – believed in family farms and were willing to help somebody that wasn't able to, you know, get funding from the banks and stuff.

Q: During this meeting in the fall of 2020 when they came and visited your farm, were there any discussions about Sioux County Ranch being the owner of your farm?

A: No.

(R. 1193-94). Sioux County and the Sturzenbechers settled on using Judy's inheritance from the trust as a down payment on a loan from Sioux County to buy the farm from the trust. (R. 1194-95). As Judy testified:

Q: Did you understand that Sioux County would be obtaining a loan from Farm Credit in order to loan your family the money to buy the farm?

A: Yes.

Q: And then who did you understand you would pay your inheritance to and for what purpose?

A: I would pay my inheritance to Sioux County as a down payment on the loan that they had borrowed us.

(R. 1200).

On October 31, 2020, Sioux County's attorneys contacted the attorneys for the Wollmann trust about the land. (R. 561, 967; Ex. 14). This was easy because Sioux County and the trustee bank were represented by the same Sioux Falls law firm. (R. 562, 967-68, 975-76, 1196; Ex. 15). Sioux County obtained an appraisal but did not share it with the Sturzenbechers. (R. 970, 1090, 1093). On November 17, 2020, Koerselman emailed Cody with the good

news: “I am ready to commit financing or the funds necessary for your mother to purchase the land. Have you guys prepared a purchase agreement or what is the status of your progress?” (R. 561, 968; Ex. 14).

The Sturzenbechers had McCook County State’s Attorney Mike Fink, who has a law office in Bridgewater, help negotiate the price with the trust, which was using auctioneer Chuck Sutton to negotiate. (R. 580, 976, 979, 1195; Ex. 20). Fink explained to Sutton that he represented the Sturzenbecher family and that Sioux County would be financing the transaction. (R. 580, 980-82, 1197-98; Ex. 20).

It was Sioux County, through Koerselman, who suggested that Judy alone, rather than the Sturzenbecher family, be named on the documents as the purchaser of the farm. (R. 971). The final price agreed by the Sturzenbechers to buy the farm from the trust was \$4.25 million. (R. 479, 590, 982; Exs. 2, 20).

A mortgage by any other name

Sioux County then drafted all the documents to accomplish the transaction it envisioned and it alone decided which Sturzenbecher’s name would be on each document. (R. 971-72, 985, 1052, 1200, 1205). Sioux County’s team of lawyers structured the transaction with five interrelated documents for the Sturzenbechers to sign in order to borrow the money from Sioux County to purchase their family farm from the trust:

- (1) Promissory Note (Ex. 3; R. 483);

- (2) Mortgage—Collateral Real Estate Mortgage and Security Agreement with Assignment of Leases and Rents (Ex. 4; R. 485);
- (3) Assignment and Security Agreement (Ex. 5; R. 499);
- (4) Lease Agreement (Ex. 6; R. 504); and
- (5) Real Estate Purchase Agreement (Ex. 7; 517).

Under the arrangement, Sioux County agreed to finance the purchase price of the land, which was lower than its fair market value, contingent on Judy making the down payment on that loan by assigning Sioux County the \$1,062,500 cash distribution she would eventually receive from the trust after the sale of the farm was consummated. (R. 983-86, 1060; Ex. 22). As Judy explained:

We would get a loan from Sioux County for \$4,250,000.00. We would make our annual payments and that would go towards the interest, the principal, the fees, and the use of Sioux County's name on the loan from Farm Credit. And we would make annual payments to them. And after five years we would have a balloon payment to pay to them and then we would get the title back.

(R. 1205). "Sioux County would have to hold the title until we got it paid off and that was because they had a loan through Farm Credit and they have to hold the title until it's paid off." (R. 1201).

Under Sioux County's version of the transaction, however, Judy bought the farm from the trust for \$4.25 million and on the same day sold it to Sioux County for \$3,187,500. (R. 1063). Moreover, the "price" that Sioux County would "pay" Judy for title to the land was dictated by Sioux County: there

were no negotiations. (R. 1203-04). Tellingly, the title commitment identified Judy as the owner of the land and Sioux County as the “lender.” (R. 688, 1146, 1206; Ex. 30).

By email, Sioux County sent the completed documents to Attorney Fink. (R. 577, 593-94, 976-77, 984-85; Exs. 18, 24, 25). All the documents drafted by Sioux County and presented to the Sturzenbechers on a “take it or leave it” basis were signed together by the Sturzenbechers on the same day. (R. 1063-64, 1201).

January 14, 2021
The transaction itself

On January 14, 2021, Judy first signed a contract to buy the family farm from the trust for \$4,250,000. (R. 479; Ex. 2). After the trust was in possession of the proceeds, Judy would receive a \$1,062,500 cash distribution from the trust representing her one-fourth beneficial share.

Judy then signed a promissory note to Sioux County, drafted by Sioux County, to borrow \$4,250,000, with an interest rate of four percent. (R. 1111). The note was secured by a Mortgage-Collateral Real Estate Mortgage and an Assignment and Security Agreement, both drafted by Sioux County. (R. 499, 1129; Ex. 5). Through the Assignment, Judy gave her right to receive the anticipated \$1,062,500 trust distribution to Sioux County to pay toward the loan. (R. 499, 1111-12, 1129; Ex. 5).

As part of the same transaction, Judy then signed a “real estate purchase agreement,” also drafted by Sioux County, under which it allegedly

“bought” the family farm by reducing the principal balance of the \$4,250,000 note by \$3,187,500 and Judy’s promise to pay her \$1,062,500 cash distribution to Sioux County when she later received it. (R. 517, 990-91, 1203; Ex. 7). Significantly, the “purchase agreement” for the Sturzenbecher farm drafted by Sioux County for Judy’s signature refers to a “lease agreement” for the farm drafted by Sioux County for Cody’s signature. (R. 521, 1131-32; Ex. 7). In fact, the “purchase agreement” drafted for Judy’s signature specifically references the five-year lease drafted for Cody’s signature (the designated “Lessee”) and the purchase agreement itself requires the “Lessee” of the farm to pay all real estate taxes and insurance on the Sturzenbecher farm during the five-year term as part of the “Conditions of Closing.” (R. 521, 1131-32; Ex. 7 at 5, ¶ 8).

On the same day, Cody signed the lease agreement drafted by Sioux County, by which Sioux County, the title holder of the family farm as the result of the same stack of documents, leased it back to Cody for a term of five years for yearly payments of \$229,000. (R. 504, 617-31, 987; Exs. 6, 26). The “lease agreement” drafted for Cody’s signature required payment of a \$5,000 “initial option fee” upon execution of the agreement, which *Judy* paid to Sioux County on January 14, 2021:

75-082/014 230

Judy Sturzenbecher

DATE 1-14-21

PAY TO THE ORDER OF Sioux County Ranch LLC \$ 5000.00

Five thousand dollars and no DOLLARS

FIRST SAVINGS BANK
WWW.FIRSTSAVINGSBANKS.COM
EXPRESS LINE (24 HOUR BANKING)
1-800-555-8985

MEMO Land - Judy Sturzenbecher

(R. 512, 637, 825, 1087-89, 1206; Exs. 50, 28, 6 at Art. 17).

The lease agreement also included what was labeled a "purchase option," which obligated Sioux County to reconvey the family farm upon a balloon payment of \$3,825,000 after the five-year term. As Cody testified:

- Q: I'll direct your attention back to the lease agreement which was Exhibit 6 again and ask you to turn to Article 17 which is on page 9. This is labeled tenants' option to purchase, correct?
- A: Correct.
- Q: And what do you understand this provision to be?
- A: This was how it was described to me was a balloon payment at the end of the five years.
- Q: All right. And what is the amount of the balloon payment required by this provision?
- A: \$3,825,000.00 – or \$3,825,000.00.
- Q: Sioux County calls it an option price in this document. What did you understand this payment was, based upon your understanding of the intentions of yourself and Sioux County – or your family and Sioux County?
- A: It was a balloon mortgage that was due at the end of five years.

Q: Okay. Was there any negotiation between you, your family, and Sioux County as to what the amount of this balloon payment would be?

A: No.

Q: It was just put in the lease agreement by Sioux County, correct?

A: Yes. They said that's what they – that's how they make money in this deal.

Q: Okay. So the amount of this balloon payment was dictated by Sioux County, correct?

A: Correct.

Q: Do you recall having a conversation with John about this balloon payment of \$3,825,000.00?

A: I did. ... He said that's a – you know, that's how they make money on this is with that, with the balloon – with that – with that being more than what our initial \$3,387,000.00 is. That was their profit in this.

(R. 988-90, 995-96). Under this “purchase option,” the difference between what the Sturzenbechers owed to Sioux County and the balloon payment or “option price” at the end of the five-year term was \$637,500.00, or about a twenty percent profit for Sioux County. (R. 997-98, 1112, 1202-03).

In addition to the “purchase option price” or balloon payment, Sioux County also would receive annual interest payments in the form of “rent” in the amount of \$229,000.00 for “leasing” the land to the Sturzenbechers for the five-year term. (R. 998, 1202). As Cody testified:

Q: And what did you understand this lease agreement was for?

A: It's a way to pay for our loan because of the way this is structured with Farm Credit and that. They needed a lease agreement. And it's basically our payment.

...

Q: Cody, why couldn't the \$229,00.00 payments be called loan payments instead of calling them rent payments?

A: Because they borrowed the money from Farm Credit and they needed a rental agreement is the way I understood it.

...

Q: Cody, why would you sign this lease if you didn't believe it to be a lease?

...

A: Because for the financing of the farm. They said they needed this to be able to get the loan from Farm Credit and this had to be the way it was and the paperwork had to be the way it was.

(R. 988-90, 995-96, 1052-53). This equated to a 7.2 percent interest rate being charged by Sioux County. (R. 998-99).

Q: Did you have a conversation with Rick Gruneich about the \$229,000.00 annual payment?

A: I did. ...

I said, goll, that's kind of high, you know, compared to rent, you know. *And he said, well, owning land is generally more expensive than renting land.*

(R. 999). All told, between the five years of interest or "rent" payments and the final balloon payment or "option price," Sioux County was to receive a profit of \$1,367,500.00 on its transaction with the Sturzenbechers, which would represent a net gain of 43 percent from the amount Sioux County

loaned the Sturzenbechers to purchase the farm. (R. 1002, 1138).

As the transaction was drafted by Sioux County, Sioux County was to receive all payments under the lease agreement and claimed the right to terminate the agreement if Cody was even ten days late on any payment. If the lease agreement was in default, it provided that the “purchase option” to reconvey the family farm for \$3,825,000 was null and void. Thus, if Sioux County declared the lease to be in default, it could then allegedly sell the family farm to another buyer to make an extraordinary windfall profit. Although the obligation to reconvey the family farm was conditioned on Judy having paid Sioux County the \$1,062,500 payment on the \$4.25 million loan, Sioux County did not have to give back the \$1,062,500 even if it avoided its obligation to reconvey the title.

In fact, the purported conveyance of the family farm to Sioux County was intended as security for the \$4.25 million loan rather than an absolute conveyance reflecting a debtor-creditor relationship:

Q: On January 14, 2021, when you and your mother signed all these documents drafted by Sioux County, what did you understand about who between your family and Sioux County would own your family's farm?

A: That we'd own it. They'd finance it.

(R. 991).

Q: Cody, tell us in your own words what agreement your family reached with Sioux County regarding the farm.

A: Financing the farm and the five-year-deal talked it was a balloon-type of mortgage and, yeah.

Q: And did you understand that Sioux County – what did you understand regarding Sioux County needing to get a loan in order to loan your family the money? What did you understand about that?

A: They said that they needed – they were going to borrow the money from Farm Credit and, you know, they needed paperwork to reflect a certain way to – so that that was possible.

Q: In terms of your understanding with Sioux County, did you understand that Sioux County would be only the lender or that they would own your farm?

A: We assumed they were the lender.

Q: And are those – was your assumption based upon statements made by John and John [Rick]?

A: Yeah.

Q: Who did you understand would have to hold the title to the farm?

A: I assumed they would because – I guess because any time I've gotten a loan like a pickup or something, the bank holds the title.

(R. 972-93).

Q: And who was – under your agreement with Sioux County, who was responsible for paying the property taxes after your family bought the farm from the trust?

A: We were.

Q: ... And who was responsible for carrying insurance on the farm after your family bought the farm from the trust?

A: I had to.

Q: Were there ever any negotiations with Sioux County about what price Sioux County would allegedly pay to buy

the farm from your family?

A: No.

Q: Never?

A: No.

Q: Were there ever any negotiations with Sioux County that it would buy the farm from your family for a million dollars less than your family paid for it the same day?

A: No.

...

Q: What is your understanding of why the documents were drafted as a purchase agreement and a deed from your mother to Sioux County purporting to sell the farm to Sioux County the same day she bought it from the trust?

A: Because they were borrowing the money from Farm Credit. They said they needed to hold title for it for that.

(R. 974-75).

March 25, 2021

The closing

At the closing, the Sturzenbechers were not represented by a lawyer.

(R. 1207). Sioux County was there with its lawyers. (R. 1207). Judy had a conversation with Koerselman:

A: I was standing off to the side and kind of down by the one hallway. And John came up to me and he says, well, you realize we have to hold the title because of the loan until the loan – and the loan is paid off.

Q: Okay. Were you emotional that day?

A: Yes.

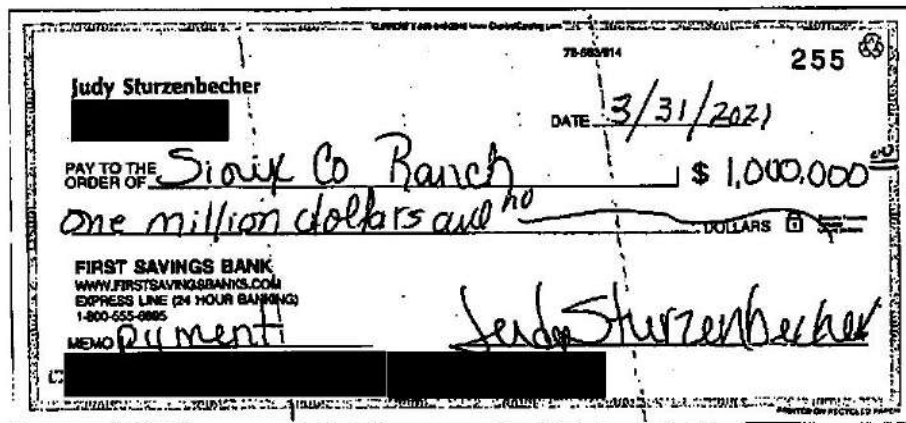
Q: Okay. And what did you feel like John was doing when he came up to you and spoke with you?

A: Comforting, being a friend, lending support. ...

(R. 1207-08). It also was clarified at the closing that the "purchase option" applied to the entire Sturzenbecher family. (R. 1000, 1080-82). After the closing, Judy still owed Sioux County \$4.25 million for the loan. (R. 1208). Her understanding was it would take up to a year for her to receive her inheritance. (R. 1209).

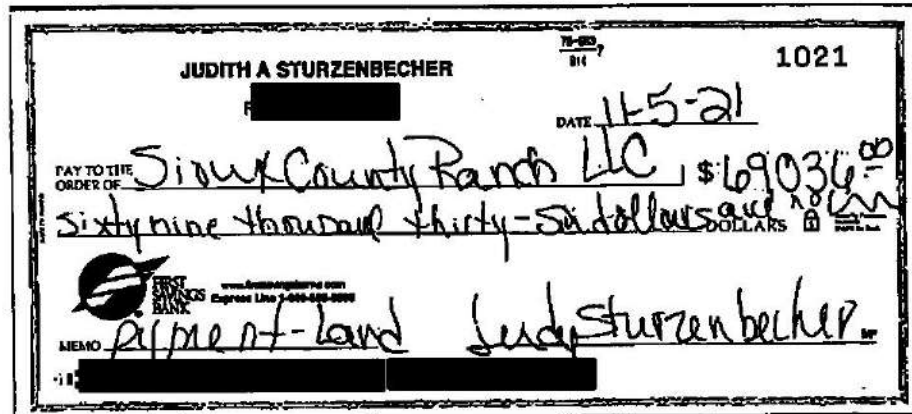
Judy pays her inheritance to Sioux County

Judy was shocked when she received the majority of her inheritance the week after the closing. (R. 540, 1209; Ex. 10 at 1). On March 31, 2021, Judy made the first loan payment to Sioux County:



(R. 541, 993-94, 1066, 1210; Ex. 10 at 2).

On November 5, 2021, eight months later, Judy made another payment to Sioux County:



(R. 543, 993-94, 1066, 1210-11; Ex. 10 at 4). These two checks represented Judy's entire inheritance. (R. 993, 1066). Koerselman told Judy she had overpaid by about \$4,000. Judy responded "Just keep it & put on my bill for payment for next year." (R. 728, 1067, 1212; Ex. 40).

March 1, 2022
Late payment

Cody made the \$229,000 payment to Sioux County for the first year. In the second year, however, he had not made the \$229,000 payment required by March 1, 2022, because the tillable acres were sublet to a neighbor and the Sturzenbechers had not yet received his payment. (R. 1005-09, 1097). Cody called Koerselman to let him know the payment would likely be late. (R. 1006). Cody called again later in March to tell him the payment was ready, but Koerselman told Cody he had to "check with his partners" and never got back to Cody. (R. 1139, 1141). In several calls, Koerselman told Judy the same thing. (R. 1215). Later, Koerselman texted Judy that Sioux County had rented the farm to someone else. (R. 1009, 1013, 1216).

On May 21, 2022, Sioux County offered to "sell" the farm back to the

Sturzenbechers for \$6.5 million (more than *twice* the price for which Judy allegedly sold it to Sioux County one year earlier) and gave them a week to finalize a deal. (R. 726-27, 1010-12, 1218; Ex. 39) (“The private treaty price is 6.5 with a July closing date. We keep the rent. We need a commitment by next Wednesday”). This would result in Sioux County making a stone-cold one-year *profit* of \$3,312,500 on its “purchase” of the farm from the Sturzenbechers. (R. 1096). The Sturzenbechers, of course, had already given Judy’s entire inheritance to Sioux County and paid an additional \$229,000 in interest. They had no ability to pay Sioux County \$6.5 million more to get back the title to their land. (R. 1012).

The Sturzenbechers later learned through a Facebook advertisement that Sioux County had scheduled an internet auction of their family farm for July 25, 2022. (R. 532, 1050-51, 1190, 1213, 1219; Ex. 9). Sioux County did not provide the Sturzenbechers with any notice of its intention to sell the farm or follow any of the required foreclosure procedures under South Dakota law. (R. 1050-51, 1213).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED SIOUX COUNTY’S MOTION FOR JUDGMENT ON THE PLEADINGS.

In its brief, Sioux County first argues that the lower court erred in denying its motion for judgment on the pleadings brought under SDCL 15-6-12(c). Because disputed factual issues precluded judgment as a matter of law in this action, the circuit court correctly denied Sioux County’s motion.

A. Legal Standard and Standard of Review.

Judgment on the pleadings under SDCL 15-6-12(c) tests the legal sufficiency, substance, and form of the proceedings and is only appropriate for resolving issues of law when there are no disputed facts. *See Estate of Lester*, 2014 S.D. 73, ¶6, 855 N.W.2d 876, 879; *Slota v. Imhoff and Assoc., P.C.*, 2020 S.D. 55, ¶12, 949 N.W.2d 869, 873. This Court reviews the disposition of a motion for judgment on the pleadings de novo. *See id.*

B. Extrinsic evidence is admissible to determine whether a conveyance is actually a security interest constituting an equitable mortgage under the law.

Sioux County's motion for judgment on the pleadings on Count 1 of Plaintiffs' complaint is based on the counterintuitive premise that the very evidence that is, by definition, necessary to establish that the transaction was intended to be a security interest or mortgage rather than a conveyance is inadmissible as a matter of law under the parol evidence rule expressed by SDCL 53-8-5. This argument contradicts both established South Dakota law and enduring legal precepts regarding the law of equitable mortgages.

The proper recharacterization of a purported sale or other conveyance as a mortgage is an established equitable remedy under South Dakota law. *See Myers v. Eich*, 2006 S.D. 69, ¶18, 720 N.W.2d 76, 82. This Court repeatedly has held that the existence of an equitable mortgage depends on the intent of the parties and that "[t]his controlling intention must be gleaned from the written materials *and all of the surrounding circumstances.*"

Adrian v. McKinnie, 2002 S.D. 10, ¶11, 639 N.W.2d 529, 533.

Russell v. Southard

Although legally untenable, Sioux County's theory that the relevant evidence is inadmissible is not new and has been thoroughly rejected over the years. In *Russell v. Southard*, 53 U.S. 139 (1851), the United States Supreme Court rebuffed a similar claim made by a lender trying to take a family farm away from a Kentucky farmer named Gilbert Russell:

The first question is whether this transaction was a mortgage, or a sale.

It is insisted, on b[e]half of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to, their contents.

But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed.

This is clear, both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practi[c]ed, under the shelter of any written papers, however precise and complete they may appear to be.

Id. at 147 (emphasis supplied). After examining all the testimony and evidence in that case, including the written purchase agreement accompanying the deed, the Supreme Court explained:

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained,

to be sufficient to fix the rights of the parties. “Necessitous men,” says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, “are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.”

Id. at 152. As a result, the Supreme Court held:

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.

Id. at 153. Today, it is black letter law that “[i]n determining whether a deed absolute in form is a mortgage, the court *is not limited to the face of the papers* but may consider *all the facts and circumstances surrounding the transaction.*” 59 C.J.S. Mortgages, § 68. Thus:

Parol evidence is admissible to establish that a deed purporting to be an absolute conveyance of real estate accompanied by a written agreement conferring on the grantor a right to purchase the real estate, was intended to serve as a security for an obligation, and should therefore be deemed a mortgage.

Restatement (Third) of Property (Mortgages) § 3.3 (1997 & May 2022

Update). “The obligation may have been created prior to or contemporaneous with the conveyance and need not be the personal liability of any person.” *Id.*

“Courts, exercising their equitable powers, will allow the admission of parol evidence to show that the conditional sale was intended to serve as security.”

Id. at Reporter’s Note; *see also* R.3d of Property (Mortgages), § 3.2.

Wilson v. McWilliams

The same principles were adopted by this Court in cases such as

Wilson v. McWilliams, 91 N.W. 453 (S.D. 1902), recognizing “as a general rule,” that “[w]hen property is transferred, *no matter in what form or by what conveyance*, as a mere security for a debt, the transferee takes merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees.” *Id.* at 456 (emphasis supplied). As this Court explained:

The respondent contends that the execution of the leases by the plaintiff is entirely inconsi[s]tent with his claim that the transaction constitutes a loan, and not a sale, but we attach but little importance to the making of these leases.

Parties seeking to take an undue advantage of mortgagors situated as the plaintiff was in this case almost invariably seek to cover up the transaction by inducing the party to whom the loan was really made to take a lease of the property; hence the mere fact of leasing should have but little weight with a court of equity, which seeks to discover the real transaction.

Id. at 457 (emphasis supplied). Looking *beyond* the formal papers by which the arrangement was drafted and instead seeking “to discover the real transaction” thus is the entire point of an equitable mortgage claim.

Adrian v. McKinnie

In *Adrian*, 2002 S.D. 10, 639 N.W.2d 529—just as in the present case—this Court examined a transaction involving a conveyance of land that included both a deed and a “Lease Agreement and Option to Purchase” related to a 600-acre tract of land in Custer County. *Id.* ¶¶ 1, 5. The Court first recognized the general rule that “[a] document executed with the formality of a contract will ordinarily be taken to express its true intent on its face.” *Id.* ¶11. However, “[d]eciding whether a document, absolute in form,

constitutes a mortgage depends on the intent of the parties.” *Id.*

Importantly, “[o]ne claiming such a document to be in fact a mortgage, although it appears to be something else, will have the burden of proving that it is a mortgage by clear and convincing evidence.” *Id.* And, as this Court made clear, “[t]his controlling intention must be gleaned from the written memorials and all the surrounding circumstances.” *Id.* (emphasis supplied). Sioux County’s argument that the intent of the parties must be gleaned from the written memorials *alone* is flatly inconsistent with controlling law.

The *Adrian* decision cited *Wilson v. McWilliams* for the principle that “[w]here there is a deed, and contract to reconvey, and *oral evidence* has been introduced tending to show that the transaction was one of security, and leaving upon the mind a well-founded doubt as to the nature of the transaction, then courts of equity incline to construe the transaction as a mortgage.” 2002 S.D. 10, ¶ 15, 639 N.W.2d at 535 & n.2. “Oral evidence” thus is admissible to help demonstrate the true nature of the transaction under South Dakota law.

Myers v. Eich

The same principles were confirmed again in South Dakota’s most recent decision resolving an equitable mortgage. As this Court explained:

The Eichs argued that the circumstances surrounding their relationship support a conclusion that an equitable mortgage existed, similar to the situation in *Adrian v. McKinnie*, 2002 SD 10, 639 N.W.2d 529. Although the Eichs signed a warranty deed purporting to convey title to Myers in 1999, they insisted that the purpose was only to secure the funds Myers loaned to them.

And the 2003 warranty deeds were executed to provide Myers security for additional loans.

Moreover, the Eichs said that their \$3,500 payments did not constitute an agreement to enter into a lease because they thought that this was the amount Myers wanted to receive each month. Because they never intended to convey to Myers absolute title of their properties, and the documents surrounding the transactions evince a security arrangement, the Eichs sought a finding that an equitable mortgage existed.

Myers, 2006 S.D. 69, ¶ 15, 720 N.W.2d 76, 81-82 (emphasis supplied).

In resolving that question, this Court again examined not only the agreements themselves, but also what “the Eichs said” about their understanding of the transaction, *id.*, as well as what Myers, the lender, claimed was the true intent of the deal. *See id.* ¶ 21. As this Court explained, “[e]quity requires that the transaction be treated according to its substance and effect, not its form.” *Id.* (citation omitted). Thus, “[a] purported absolute conveyance may be recharacterized as a mortgage, *depending on the surrounding circumstances and the parties’ intent.*” *Id.* As a result, “the circuit court abused its discretion when it declined the remedy of equitable mortgage.” *Id.* ¶ 34.

Based on an examination of the evidence and application of the relevant factors, the same result should hold true here:

Courts of equity are not governed by the same principles as courts of law in determining whether a mortgage has been created, and generally, whenever a transaction resolves itself into a security or an offer or attempt to pledge land as security for a debt or liability, equity will treat it as a mortgage, without regard to the form it may assume or the name the parties may choose to give it.

59 C.J.S. Mortgages, § 33. This Court's clear line of precedent holds that the existence of an equitable mortgage depends on the intent of the parties and "[t]his controlling intention must be gleaned from the written materials *and all of the surrounding circumstances.*" *Adrian*, 2002 S.D. 10, ¶11, 639 N.W.2d at 533. Because extrinsic evidence is admissible, and there were disputed facts on whether this was an equitable mortgage, the circuit court correctly denied judgment on the pleadings.

C. Judgment on the pleadings also was correctly denied on the declaratory relief claim involving unconscionability.

Sioux County also sought judgment on the pleadings on the Sturzenbechers' alternative claim for declaratory relief that their agreement with Sioux County was unconscionable. *See Mobile Electronic Service, Inc., v. FirsTel, Inc.*, 2002 SD 87, ¶¶ 7-9, 649 N.W.2d 603, 605-06. The basis for this alternative claim was that, in the event the circuit court finds for Sioux County on the equitable mortgage claim, the transaction as it is written in the papers would be unconscionable.

In determining unconscionability, this Court looks not only at the bargaining power between the parties but also at the specific terms of the agreement. *See Scotland Vet Supply v. ABA Recovery Service, Inc.*, 1998 SD 103, ¶ 13, 583 N.W.2d 834, 837; *Nygaard v. Sioux Valley Hospitals & Health Sys.*, 2007 S.D. 34, ¶24, 731 N.W.2d 184, 194-95. Thus, as this Court has explained, "we focus on both 'overly harsh or one-sided terms,'

i.e., substantive unconscionability; and how the contract was made (which includes whether there was a meaningful choice), *i.e.*, procedural unconscionability.” *Id.*

Accepting the facts pleaded in the complaint as true, there is little question that this transaction was both substantively and procedurally unconscionable. As the circuit court found, there clearly was unequal bargaining power between the Sturzenbechers and Sioux County in connection with the transaction at issue. (R. 839). Just as clearly, Sioux County presented the contracts to the Sturzenbechers on a take it or leave it basis with no ability to negotiate the material terms.

Under the documents drafted by Sioux County, the Sturzenbechers would have bought the land for \$4.25 million and sold it to Sioux County on the same day for \$3.2 million. Judy would have paid Sioux County \$1,062,500 in exchange for precisely nothing. No one would enter into such a harsh and one-sided transaction. The circuit court properly denied judgment on the pleadings on this alternative claim.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR ERR IN GRANTING A PRELIMINARY INJUNCTION TO PREVENT IRREPARABLE HARM AND PRESERVE THE STATUS QUO.

A. Legal Standard and Standard of Review.

A preliminary injunction preserves the status quo pending final determination of the case. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer

irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Hedlund*, 2018 S.D. 20, ¶ 15, 908 N.W.2d at 771 (quoting *Winter v. National Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

So long as an injunction is statutorily authorized,¹ this Court reviews a circuit court’s decision granting an injunction “under the abuse of discretion standard.” *McDowell v. Sapienza*, 2018 S.D. 1, ¶ 23, 906 N.W.2d 399, 406. “An abuse of discretion is ‘a choice outside the range of permissible choices,’” *id.* (citation omitted), such as “an error of law or ‘discretion exercised to an unjustified purpose, against reason and evidence.’” *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, ¶ 10, 888 N.W.2d 569, 573 (citation omitted). This Court defers to the circuit court’s findings of fact unless clearly erroneous. *See id.*

B. The circuit court properly applied the four-factor test for granting a preliminary injunction.

Sioux County does not really argue that the specific findings of fact made under SDCL 15-6-52(a) are clearly erroneous. Rather, Sioux County generally contends that the evidence did not establish an equitable mortgage. Moreover, Sioux County challenges only one of the four factors for granting a preliminary injunction: the circuit court’s determination that the

¹ Although SDCL 21-8-14 applies only to permanent injunctions, it follows that a preliminary injunction similarly is authorized where that statute’s requirements are met. Based on the circuit court’s unchallenged determination that the sale of their generational family farm would result in irreparable harm to the Sturzenbechers, (R. 844), a permanent injunction would be authorized here under SDCL 21-8-14(1).

Sturzenbechers are likely to succeed on the merits.

- 1. The circuit court did not commit legal error in considering all the relevant circumstances, including extrinsic evidence, in determining that the Sturzenbechers are likely to succeed on the merits.**

In this section of its brief, Sioux County first reasserts its previous argument that the parol evidence ruled prohibited the circuit court from looking at anything other than the documents involved in the transaction themselves. In response, the Sturzenbechers respectfully reassert the argument and authorities set forth in section I(B) above. In order to make such determinations, courts are instructed to examine both “the written materials *and all of the surrounding circumstances*,” including parol or extrinsic evidence, rather than confining the record to only the written materials themselves. *Adrian*, 2002 S.D. 10, ¶ 11, 639 N.W.2d at 533.

- 2. The circuit court’s finding under the Myers factors that the parties intended the transaction to be security for a debt was not clearly erroneous—it was fully supported by the evidence.**

The Sturzenbechers are likely to succeed on the merits of their claim that Sioux County is not the rightful owner of this family farm but rather has an equitable mortgage with a security interest in this property. As this Court has explained, “[a] purported absolute conveyance may be recharacterized as a mortgage, depending on the surrounding circumstances and the parties’ intent.” *Myers*, 2006, S.D. 69, ¶ 21, 720 N.W.2d at 82 (citing *Adrian*, 2002 SD 10, ¶ 11, 639 N.W.2d at 533).

This is so because “[e]quity requires that the transaction be treated according to its substance and effect, not its form.” *Myers*, 2006 S.D. 69, ¶ 21. “Because the recharacterization of a document is an equitable remedy, a court has discretion to grant or deny it.” *Adrian*, 2002 S.D. 10, ¶ 9, 639 N.W.2d at 533; *see also Wilson*, 91 N.W. at 456 (“[W]hile it is undoubtedly true that, to show that a deed in effect an absolute conveyance is intended as a mortgage to secure the debt, the evidence must be clear, satisfactory, and convincing, yet if, from all the evidence, a doubt arises as to whether the transaction was a mortgage or a conditional sale, such doubt must be resolved in favor of holding the instrument a mortgage”).

Importantly, “[a]lthough one of the essential elements of a mortgage is debt to be secured, whether a document was intended as security for a debt depends on the intent of the parties at the inception of the relationship.” *Myers*, 2006 S.D. 69, ¶ 21 (cleaned up). This is because, as this Court has long recognized, “the broad rule is that whether such transaction is a sale upon a condition or a mortgage depends upon the actual intention of the parties at the time as gathered from the situation of the parties and all attendant facts and circumstances.” *American Nat’l Bank v. Graft*, 229 N.W. 376, 379 (S.D. 1930); *see also Adrian*, 2002 S.D. 10, ¶ 11.

In *Myers*, this Court set forth the relevant factors to consider when determining whether the parties’ intent at the inception of a transaction constitutes an equitable mortgage despite what may appear on its face to be a

conveyance:

- (1) pre-existing debt not extinguished with the conveyance;
- (2) conveyance made with agreement to re-convey;
- (3) property value considerably more than the debt;
- (4) property in original transaction not appraised and no discussion of its value in relation to sale price; and
- (5) dealings between parties akin to that of creditor-debtor.

2006 S.D. 69, ¶ 25, 720 N.W.2d at 83-84. Applying those factors in *Myers*, this Court had no trouble in holding that the structured transaction was, in effect, a mortgage or security interest, and reversed the lower court's contrary determination:

Based on the circumstances surrounding the original transaction and the elements tending to prove an equitable mortgage set forth above, the conveyance of the shop and home properties were in fact security for the \$125,000 advanced by Myers.

Their relationship did not begin because the Eichs were attempting to sell their property, but because they needed money to redeem their property.

Myers, a licensed real estate broker, provided them with the necessary money and then dictated the terms of their arrangement. The Eichs agreed to his conditions. . . .

The fact that the conveyance and contract for deed were executed on the same day creates a strong doubt on whether this transaction was intended to be a sale.

The circumstances surrounding this case present a multitude of additional factors tending to prove an equitable mortgage.

First, there is no evidence that Myers ever planned to be the owner of the transferred property after he advanced the

\$125,000. In fact, the Eichs at all times retained possession of the premises and continued to be the sole operators of the truck repair business on the shop property.

Second, before the transaction, no discussions were had with respect to the value of the property in relation to the consideration provided and Myers did not have the property appraised. Instead, Myers advanced the exact amount the Eichs needed to redeem their property from First Bank of South Dakota and then charged a \$10,000 fee for the transaction.

Third, the home and shop properties were valued at approximately \$200,000. It defies logic to conclude that the Eichs sold both properties for \$125,000, and then also agreed to pay an additional \$10,000 as a fee.

Further evidence that a sale was not intended is the declaration in the letter from Myers to the Eichs summarizing their arrangement. He specifically stated that the conveyance was intended to provide security for the transaction, and he did not suggest that the \$125,000 was consideration for a purported sale.

Another strong element present in this case is that the debt was created as a result of the transaction and continued to remain after the transaction.

Finally, when a debtor and creditor relationship continues to exist after the transaction, this tends to indicate that the conveyance was intended to be security, not a sale. Here, the debtor and creditor relationship continued well after the conveyance. . . .

Considering all the circumstances, there was strong evidence that the absolute conveyance in 1999 was intended as a security for debt, thereby creating an equitable mortgage.

Id. ¶¶ 26-29 (citations omitted) (emphasis supplied). The circuit court correctly applied those same factors in this case and properly held that the evidence demonstrated that this was an equitable mortgage.

a. Pre-existing debt not extinguished

First, it is undisputed that the pre-existing debt was *not* extinguished by the conveyance. (R. 284, 1065). Sioux County's owner tried to dodge the question, but finally admitted it at the hearing. (R. 1065-66). The pre-existing debt of \$4,250,000 under the Promissory Note was not extinguished by the alleged conveyance from Judy to Sioux County.

Instead, after the Wollmann trust was paid the \$4,250,000 purchase price and title was transferred to Judy, the Purchase Agreement between Sioux County and Judy, which referenced the Promissory Note, required Judy (the alleged seller) to make a further payment to Sioux County (the alleged buyer). The required payment was the \$1,062,500 identified in the Assignment and Security Agreement that secured Sioux County's \$4,250,000 Promissory Note from Judy. (R. 499; Ex. 5 at ¶2). That payment could not be made on January 14, 2021, but rather was contemplated to be made well after the conveyance and "no later than December 31, 2021." (R. 483; Ex. 3). Judy ultimately made payments to Sioux County by her \$1,000,000 personal check cashed on April 1, 2021, and by paying the balance by her \$69,034 personal check cashed on November 9, 2021. (R. 541, 543, 993-94, 1066, 1210-11; Ex. 10 at 2, 4).

In substance, that money was a down payment on the Sturzenbechers' loan, which reduced their remaining principal balance with Sioux County from \$4,250,000 to \$3,187,500. (R. 499, 985-86, 1129; Ex. 5). Just as in

Myers, the Sturzenbechers' debt existed long after the stack of documents was signed on January 14, 2021, long after the closing on March 25, 2021, and continues to this day in the form of the equitable mortgage still held by Sioux County on the property.

b. Agreement to reconvey

Second, the conveyance from Judy to Sioux County was made with the agreement that the property could be reconveyed under the terms of Cody's "lease" with Sioux County. The Sturzenbechers' ability to reclaim title to the property strongly evidences that the intent was, as with a typical mortgage, that they would own the property free and clear once the obligations to the lender/mortgagee were satisfied and the security agreement released.

Like Sioux County, the lender in *Adrian* insisted on holding title to the land and so the borrowers (the McKinnies) and the lender (Adrian) agreed the parties would execute a "Lease Agreement & Option to Purchase." 2002 S.D. 10, ¶5. Analyzing the circumstances, this Court held "[t]here is ample reason to conclude that both parties intended their lease with purchase option to be a security device to protect Adrian's loan." *Id.* ¶13.

Similarly, Sioux County structured the documents to: (1) give the Wollmann trust \$4,250,000 in exchange for selling the land to Judy; (2) give Judy title to the property, which she would then immediately deed to Sioux County; (3) require Judy to pay the remaining \$1,062,500 to Sioux County during the ensuing year after her receipt of her distribution; and (4) require

Cody to make annual payments and further pay \$63,750 within five years of the lease's execution to exercise the right to reclaim title to the property with a balloon payment of \$3,825,000 after the five-year term. The effect was a five-year, high-interest, highly profitable, and fully secured loan.

c. Property value considerably more than the debt and “price” not negotiated.

Third, the property's value here is considerably more than the debt Judy owed to Sioux County after her trust distribution of \$1,062,500 was paid to Sioux County, *i.e.*, \$3,187,500. And fourth, the family farm was not originally appraised and *absolutely no negotiations* took place regarding the “price” for which Judy allegedly “sold” the property to Sioux County. The Sturzenbechers did not have an appraisal at any time and have never seen an appraisal obtained by Sioux County. (R. 970, 1090, 1093). Even though Sioux County did not share its appraisal, it can be inferred that the value of the land was at least \$4,547,250 or else Sioux County would have invoked its option to terminate the Purchase Agreement with Judy to not proceed with the transaction. (R. 522; Ex. 7 at ¶ 9).

It is undisputed that the \$4,547,250-plus value of the Sturzenbecher farm at the time of this transaction was *substantially* more than the \$3,187,500 for which Sioux County allegedly purchased it from Judy. (R. 517; Ex. 7 at ¶ 2). There were no negotiations between the Sturzenbechers and Sioux County regarding the purchase price of the farm under the Purchase Agreement—Sioux County just dictated what it would pay.

That is because, similar to the lending relationship in *Myers*, the business relationship between Judy and Cody and Sioux County formed not because the Sturzenbechers were seeking to sell their family farm to Sioux County (where a negotiation of the price of the land naturally would occur) and instead was formed because the Sturzenbechers needed to borrow a specific amount of money to pay the Wollmann trust to prevent an auction of the farm to third parties. 2006 S.D. 69, ¶ 26, 720 N.W.2d at 84; *see also Commercial & Savings Bank v. Cassem*, 145 N.W. 551, 553 (S.D. 1914) (“On the question whether a deed, absolute in form, is in fact a mortgage, the question whether the price is adequate is entitled to great weight”).

d. Debtor-Creditor relationship

Fifth, the relationship between the Sturzenbechers and Sioux County was that of a debtor-creditor both before, during, and after the alleged sale of the family farm to Sioux County. At the hearing, even Sioux County had to admit it had entered into a debtor-creditor relationship with the Sturzenbechers to purchase the farm. (R. 1064-65). Judy borrowed the money from Sioux County and signed a Promissory Note and Mortgage. (Exs. 3, 4 and 5). After the farm was allegedly conveyed to Sioux County, Judy continued to owe the \$1,062,500 payment on the loan from Sioux County that was due before December 31, 2021. (Exs. 3, 4, 5 and 7). The option to repurchase the land hinged, in part, on payment of the \$1,062,500 after the conveyance to Sioux County as well as the terms of the lease agreement with

Sioux County. (Ex. 6 at Article 17).

As this Court explained in *Myers*, “when a debtor and creditor relationship continues to exist after the transaction, this tends to indicate that the conveyance was intended to be security, not a sale.” 2006 S.D. 69, ¶ 28. Despite the Rubik’s Cube of interrelated legal documents developed by Sioux County and presented to this farm family in order to portray this series of transactions as an absolute conveyance or sale, this was a debtor and creditor relationship that continued after the conveyance. Sioux County’s two owners, with a combined eighty years of experience as sophisticated agricultural lenders, provided the Sturzenbechers the money they needed to buy the farm from the trust and dictated precisely how the arrangement looked on paper.

This Court has forewarned that “[i]t is well settled that once a mortgage always a mortgage.” *Id.* ¶30. Sioux County must foreclose its equitable mortgage before it can auction the Sturzenbecher family farm. As part of that foreclosure process, the Sturzenbechers may then exercise their right of redemption under South Dakota law and assert all other defenses or claims they have against Sioux County.

3. The circuit court did not erroneously rely on the testimony admitted at the hearing or ignore the documentary record.

Finally, Sioux County essentially brands the Sturzenbechers as liars and criticizes the circuit court for crediting their testimony. In fact, having

an opportunity to observe the demeanor of the witnesses at the evidentiary hearing, the circuit court held that *Sioux County's* testimony was not entirely credible. (R. 835-41 & n.2). After listening to all the evidence and examining each document, the circuit court concluded that at the inception of the transaction, the Sturzenbechers and Sioux County intended a mortgage relationship and was not an outright conveyance under South Dakota law.

A mortgage is what it is, no matter the name it is given. The structuring of the transaction on paper is not dispositive for it "has long ago been recognized in South Dakota that '[p]arties seeking to take an undue advantage of mortgagors situated as the plaintiff was in this case almost invariably seek to cover up the transaction by inducing the party to whom the loan was really made to take a lease of the property.'" *Id.* ¶32 (citation omitted); *see also* R.3d of Property (Mortgages), § 3.3 cmt. d.

The Sturzenbechers demonstrated they are likely to succeed on the merits of their claim. The circuit court properly entered the preliminary injunction halting the sale of their family farm.

CONCLUSION

WHEREFORE, the Sturzenbechers respectfully request that this Honorable Court affirm the circuit court's Order Denying Defendant's Motions and Granting Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this 10th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9,987 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was served via email and the Odyssey system upon the following counsel of record:

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

Appeal No. 30190

**CODY P STURZENBECHER and JUDITH ANN STURZENBECHER, APPELLEES
v.
SIOUX COUNTY RANCH, LLC, APPELLANT**

APPELLANT'S REPLY BRIEF

Appeal from the Circuit Court
First Judicial Circuit
Turner County, South Dakota

The Honorable David Knoff
Circuit Court Judge

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ARGUMENT

I. The Circuit Court Erred in Denying Judgment on the Pleadings

Plaintiff Judith Sturzenbechers (“Judy”) and Cody Sturzenbecher (“Cody”) asserted claims in this action that suffer fatal legal defects, and the Circuit Court erred by denying Defendant Sioux County Ranch’s (“Sioux County”) Motion for Judgment on the Pleadings.

A. Plaintiffs’ Equitable Mortgage Claim is Barred by the Purchase Agreement and State Law

Plaintiffs argue a thousand-acre loophole exists in SDCL § 53-8-5, allowing Judy, who with the assistance of counsel entered into an unambiguous, fully integrated written Purchase Agreement, to avoid the consequences of that agreement simply by pleading the magic words “equitable mortgage.” No such exception exists in state statute or in this Court’s precedent, and Judy is bound by the Purchase Agreement at the heart of this case, just as Sioux County would be if circumstances were different.

The equitable mortgage doctrine allows a court to recharacterize a “purported absolute conveyance” as a mortgage, “depending on the surrounding circumstances and the parties’ intent.” *Myers v. Eich*, 2006 S.D. 69, ¶ 21, 720 N.W.2d 76, 83. The parties’ actual intent with respect to the challenged deed, not necessarily its form, controls how it is treated by the court. *Adrian v. McKinnie*, 2002 S.D. 10, ¶ 11, 639 N.W.2d 529, 533.

The execution of a written contract supersedes oral negotiations or stipulations between the parties. SDCL § 53-8-5. Indeed, this Court has consistently held the intent of parties to a written contract are to be determined by the written terms of the agreement. *E.g., Ziegler Furniture & Funeral Home, Inc. v. Cicianec*, 2006 S.D. 6, ¶ 16, 709 N.W.2d 350, 355. The equitable mortgage doctrine is not, and cannot be, a court-created

trump card that supersedes legislatively enacted state law, and the Sturzenbechers have not cited a single case in which this Court has stated it is.

The Sturzenbechers first rely on *Russell v. Southard*, 53 U.S. 139 (1851), in which the United States Supreme Court recharacterized an absolute deed as a mortgage. That case came out of Kentucky, and the Supreme Court found no *Kentucky* law or equitable principle preventing it from varying from the written memorial signed contemporaneously with the deed. *Id.* at 146–48. Years later, after South Dakota was formed, its legislature enacted SDCL § 53-8-5. The Circuit Court *is* bound by that statute (as is this Court), which expressly prohibits using extrinsic evidence to alter the terms of the Purchase Agreement.

The Sturzenbechers also cite a legal encyclopedia and the Restatements to support the proposition that a court may always resort to extrinsic evidence on equitable mortgage claim. Brief of Appellees at 26 (citing 59 C.J.S. Mortgages § 68 and Restatement (Third) of Property (mortgages) § 3.3). Of course neither of those sources supersede state law. Moreover, both sources only support using extrinsic evidence to vary the terms of a bare deed—not a complete, unambiguous written agreement entered into with the advice and assistance of counsel. Restatement (Third) of Property § 3.3 (1997 & May 2022 Update); 59 C.J.S. Mortgages § 63 (May 2023 update).

The South Dakota cases cited by the Sturzenbechers, likewise fail to support their claim. In *Wilson v. McWilliams*, 91 N.W. 453 (S.D. 1902), there was no written agreement between the grantor/mortgagor and the grantee/mortgagee explaining the challenged instrument through which the alleged mortgagee received title to the property—only a sheriff’s certificate of redemption. *Id.*

Similarly, in *Adrian* there was no written agreement regarding the challenged deed, only a lease and option agreement through which, upon repayment, the defendant would deed the property *back* to the plaintiffs. *Adrian*, 2002 S.D. 10, ¶ 4, 639 N.W.2d at 532. Finally, in *Myers*, the Court addressed a bare deed to the grantee-mortgagee Myers, with a contract for deed outlining the terms for conveying the property *back* to the Eichs. *Myers*, 2006 S.D. 69, ¶ 4, 720 N.W.2d at 78–79. The writings that did exist from the time of the challenged deed, described the transaction as a loan from the grantee-mortgagee. *Id.* None of the cases cited by the Sturzenbechers involve a complete agreement explaining the parties’ intent with respect to the *challenged deed*. As such, the Court did not create or recognize an exception to SDCL § 53-8-5 for equitable mortgages in those cases. *Id.*

The Sturzenbechers’ position asks this Court to legislate from the bench and declare a court sitting in equity need not consider itself bound by state statute. Such a holding would give a “Chancellor’s foot” veto over contracts that, in hindsight, run afoul of a particular judge’s idiosyncratic sense of morality. *See, e.g., Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-33 (1999). But this Court need not choose between the equitable mortgage doctrine and state statute. Simply put, if the parties executed a complete written agreement with respect to the challenged deed, the parties’ intent must be derived solely from the terms of that agreement. SDCL § 53-8-5; *Ziegler Furniture & Funeral Home, Inc.*, 2006 S.D. 6, ¶ 16, 709 N.W.2d at 355. If not, as in *Adrian* and *Myers*, the court may utilize extrinsic evidence to determine the parties’ intent.

In this case, because a complete, written agreement was entered into by Judy and Sioux County, both of whom were represented by competent counsel, the Circuit Court was bound by the terms of the Purchase Agreement. The Purchase Agreement unambiguously states the parties intended the deed to be what it purports to be—an absolute sale to Sioux County. Exhibit 7 (Record 517). Therefore, the Circuit Court erred by denying Sioux County’s motion for judgment on the pleadings with respect to the Sturzenbechers’ equitable mortgage claim.

B. The Sturzenbechers’ Unconscionability Claim Fails as a Matter of Law

The Sturzenbechers’ unconscionability claim also fails for two reasons: (1) unconscionability is not an affirmative claim for relief but instead a defense to enforcement of a contract; and (2) the Sturzenbechers’ allegations show neither procedural nor substantive unfairness.

1. Unconscionability is not an Affirmative Claim for Relief

As discussed in Sioux County’s opening brief, even if the Purchase Agreement were unconscionable—an allegation Sioux County denies—it is not a basis for an affirmative claim for relief. Brief of Appellant at 18 (citing *Nygaard v. Sioux Valley Hospitals & Health Systems*, 2007 S.D. 34, ¶¶ 29–30, 731 N.W.2d 184, 195–96). Because both parties have fully performed under the Purchase Agreement, there is no executory obligation from which to shield the Sturzenbechers.

In their response, the Sturzenbechers did not address this argument. Brief of Appellees at 30–31. The Sturzenbechers’ failure to cite authority recognizing unconscionability as an affirmative claim for relief, or even argue it, constitutes waiver of the argument. *E.g., Longwell v. Custom Benefit Programs Midwest, Inc.*, 2001 S.D. 60,

¶ 30, 627 N.W.2d 396, 401. There is no affirmative claim for relief based on an allegedly unconscionable contract or term, and therefore the Circuit Court erred by denying Sioux County's Motion for Judgment on the pleadings with respect to that claim.

2. *The Sturzenbechers Failed to Plead Unconscionability*

The Sturzenbechers have not pled allegations which, if true, show the Purchase Agreement, or any other of the agreements they entered into with the assistance of their counsel, was unconscionable. This Court has defined an unconscionable agreement to be a "[o]ne-sided agreement[] whereby one party is left without a remedy for another party's breach." *Baldwin v. Nat'l Coll., a Div. of Dlorah, Inc.*, 537 N.W.2d 14, 17 (S.D. 1995). A court considers both the bargaining power between the parties and the specific terms of the agreement. *Nygaard*, 2007 S.D. 34, ¶ 25, 731 N.W.2d at 194.

The Sturzenbechers' response makes the conclusory assertion that "there was clearly unequal bargaining power between the Sturzenbechers and Sioux County in connection with the transaction at issue." Brief of Appellees at 31. The Sturzenbechers draw that conclusion notwithstanding the facts as pled that Judy Sturzenbecher was not under financial duress, and in fact anticipated receiving more than \$1 million from the sale of the trust's property. (Complaint ¶ 16). Moreover, the Purchase Agreement, which was referenced in the Complaint, shows Judy was represented by an attorney in the course of the transaction. Exhibit 7 at 8, 11.

Those two facts on their own preclude a finding of unconscionability. With respect to substantive unconscionability, the Sturzenbechers repeat the same factually incorrect assertion that Judy received "precisely nothing" when she sold the property to Sioux County Ranch for less than what she paid for it. Brief of Appellee at 31. As

illustrated by the documents and the pleadings, Judy secured the opportunity for her son Cody to purchase the property for less than what she paid. Complaint ¶¶ 26–29.

With the benefit of hindsight, it may be tempting to say that the transaction was a bad deal for Judy, but whether a contract is unconscionable is evaluated at the time of formation. *Johnson v. John Deere Co.*, 306 N.W.2d 231, 237–38 (S.D. 1981). At the time of the agreement, Judy was doing what Cody could not do on his own, obtaining the future *opportunity* to purchase the farm her parents had owned. If Cody had not squandered that opportunity, there is little chance the parties would be here today. But unconscionability is not an invitation for the courts to bail parties out of deals that did not turn out as they hoped. The pleadings fail to allege either procedural or substantive unconscionability, and therefore the Circuit Court erred in denying the motion for judgment on the pleadings.

II. The Circuit Court Erred Granting the Preliminary Injunction

The Warranty Deed being challenged in this lawsuit was executed by Judy Sturzenbecher, consistent with the terms of a Purchase Agreement she entered into with the assistance of her attorney after weeks of negotiations with Sioux County. The contemporaneous documents show the parties intended the Warranty Deed to be an absolute conveyance, not security for a debt, and Judy's attorney Mike Fink submitted testimony that the contract documents reflect the actual agreement between the parties.

The Circuit Court disregarded the Purchase Agreement and Attorney Fink's involvement and testimony regarding the transaction, and found, based almost entirely on the Sturzenbechers' own testimony about their generalized intent, that the Sturzenbechers were likely to succeed on the merits of their equitable mortgage claim. Therefore, the

Circuit Court found the Sturzenbechers were entitled to a preliminary injunction barring Sioux County from selling the Property. The decision ignores SDCL § 53-8-5; ignores the contradicting testimony from the Sturzenbechers' own attorney for the transaction; ignores conflicts between Judy's and Cody's own testimony; and put the Circuit Court's imprimatur on the Sturzenbechers' novel version of an equitable mortgage.

"An abuse of discretion can simply be an error of law, or it might denote a discretion exercised to an unjustified purpose, against reason and evidence." *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138 (quoting *Halls v. White*, 2006 S.D. 47, ¶ 4, 715 N.W.2d 577, 579). A court's discretion is not unlimited, it is "bounded by the course of precedent and substantive rules governing permissible remedies." *Adrian*, 2002 S.D. 10, ¶ 10, 639 N.W.2d at 533. The Circuit Court made an error of law by allowing extrinsic evidence—namely the Sturzenbechers' testimony—contradicting the unambiguous written terms of the Purchase Agreement. The Circuit Court further erred by finding the Sturzenbechers were likely to prevail on their equitable mortgage claim by clear and convincing evidence.

A. The Court Erred by Disregarding SDCL § 53-8-5

There is no dispute Judy and Sioux County entered into the Purchase Agreement. The Sturzenbechers rely only on their argument that SDCL § 53-8-5 does not apply in equitable mortgage cases. The Sturzenbechers do not assert their unconscionability claim provides a separate basis for the preliminary injunction. As discussed above and in Sioux County's opening brief, the equitable mortgage doctrine is not a magic phrase relieving the Circuit Court of its obligation to follow enacted statutes. Because the parties' intent with respect to the purpose of the Warranty Deed was clearly set forth in the Purchase

Agreement, the Circuit Court erred by tossing it aside in favor of the testimony of the Sturzenbechers.

B. The Circuit Court's Finding the Parties Intended the Warranty Deed to be Security for a Debt was Clearly Erroneous

The Circuit Court incorrectly applied the *Myers* factors in determining the Sturzenbechers were likely to succeed on the merits of their equitable mortgage claim. Of the four factors a court considers when determining whether to grant a preliminary injunction, the movant must show a likelihood of success on the merits. *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 12, 855 N.W.2d 133, 139. On a claim of equitable mortgage, the party claiming an equitable mortgage must prove the parties intended a facially absolute deed to instead be a security by *clear and convincing* evidence. *Myers*, 2006 S.D. 69, ¶ 21, 720 N.W.2d at 83. When the facts and evidence as presented at the hearing are applied to the *Myers*' factors, the Sturzenbechers failed to establish by clear and convincing evidence the parties intended the Warranty Deed to be security for a debt.

1. Instead of Securing a Debt, the Warranty Deed Extinguished a Debt

Judy's \$4.25 million debt to Sioux County was reduced by \$3,187,500.00 when she deeded the Property to Sioux County Ranch. Exhibit 7 § 2(b); Exhibit 35 (Record 721). However, when a deed is conveyed as security for a debt, the debt is not reduced at all. The Circuit Court found the debt was reduced and later completely extinguished. Memorandum Decision at 8, 10. The Circuit Court then recognized this transaction differed from a "typical equitable mortgage situation" but inexplicably concluded it has the "same effect" because, as the Circuit Court characterized the testimony, the overall purpose of the transaction was to preserve the family farm. *Id.*

The Circuit Court's analysis did not evaluate whether the Warranty Deed acted as a security for a debt; it disregarded that objective factor in favor of the Sturzenbechers' testimony. Had the Circuit Court applied the proper legal analysis to the facts as it found them, it would have determined that the Warranty Deed did not secure Judy's debt (like a mortgage would), it reduced Judy's debt. Thus, this factor does not support the Circuit Court's conclusion.

The Sturzenbechers do not argue the Circuit Court applied this factor correctly. Instead, they argue—contrary to the Circuit Court's findings—that the Warranty Deed did not reduce Judy's debt, and the two cash payments Judy made to Sioux County on the balance of her remaining debt were down payments. Thus, under one of the Sturzenbechers' theories, (both or all) the Sturzenbechers still owed the principal amount of \$3,187,500.00 plus interest after Judy paid the balance of \$1,062,500.00. Appellee's Brief at 37. Under another of the Sturzenbechers' theories, as testified to by Judy, only Judy owed the supposed "balloon payment" of \$3,825,000.00 (found in the option in Cody's Lease Agreement). Transcript 337:7–20. The Circuit Court did not ultimately accept either of the Sturzenbechers' factual theories, and the Sturzenbechers did not request this Court review that determination. The Circuit Court's factual findings—not the Sturzenbechers'—are owed deference by this Court.

The Circuit Court made a legal error when it incorrectly applied this factor. Because the debt was reduced with the transfer of the Warranty Deed, the Warranty Deed could not be security for a debt. The Circuit Court erred in finding the transaction likely constituted an equitable mortgage.

2. *There Was No Agreement to Reconvey the Property to Judy, the Claimed Mortgagor*

The Circuit Court recognized only Cody had an option to purchase the Property, not Judy, but concluded nonetheless the “sale between Judy and Sioux County was made with an agreement to re-convey.” Memorandum Decision at 10. Neither the Circuit Court nor the Sturzenbechers make any attempt to explain how *Cody’s* option to purchase the Property makes the Warranty Deed more like security for a debt than an absolute conveyance. Although Cody farmed a 70-acre portion of the Property prior to the transaction, he never owned any of it. Thus, it is inaccurate to characterize Cody’s option as an agreement to “re-convey.” Similarly, although Judy briefly owned the Property in the course of this transaction, she did not have an option to purchase it or any other right to retake possession of the Property. Because Judy, the alleged mortgagor, had no right to return of possession of the Property, the Warranty Deed does not act as security.

Cody and Judy, from the outset of this litigation, have deliberately conflated their separate interests, especially in relation to this factor, apparently to obfuscate the distinction between their case and equitable mortgages. *E.g.*, Brief of Appellees at 38 (“The *Sturzenbechers’* ability to reclaim title to the property . . .” (emphasis added)). The Circuit Court did not find Judy had a right to re-conveyance of the Property, it made the legal determination that the distinction between Judy and Cody did not matter. That distinction does matter, however, because Cody’s option does not evidence an intent that the Property is intended as security for repayment of Judy’s debt. The Circuit Court erred by finding this factor favored an equitable mortgage.

3. *The Property Value is not Considerably More Than the Debt*

As argued in Sioux County's opening brief and shown by the evidence, the debt Judy owed to Sioux County was the price she paid for the Property: \$4.25 million. The Purchase Price paid by Sioux County was less than that amount, but the difference was explained thoroughly by both Sioux County and Cody. *See* Appellant's Brief at 28 and citations therein. The Sturzenbechers simply argue counterfactually that Judy still owed Sioux County \$3,187,500.00 after she paid the balance of her loan off. That is contrary to the Circuit Court's findings. *See* Part II.B.1 *supra*. This factor does not support finding an equitable mortgage, and the Sturzenbechers have not provided an argument to the contrary. The Circuit Court's finding in favor of the Sturzenbechers was clearly erroneous.

4. *The Property Value Was Considered by the Parties*

The fourth *Myers* factor does not support a finding of an equitable mortgage. The fourth factor is whether the property was appraised and whether there was discussion of its value in relation to the sale price. *Myers*, 2006 S.D. 69, ¶ 25, 720 N.W.2d at 84. As discussed in Sioux County's opening brief, although Sioux County's purchase price from Judy was less than the price Judy negotiated with the Trust, the purchase price was based on the value of the property as understood by Judy and Sioux County. Appellant's Brief at 30.

The Sturzenbechers incorrectly characterize this factor as whether the purchase price was *negotiated*. Brief of Appellees at 39. That characterization misapplies the purpose of *Myers* factors. The *Myers* factors provide a framework for determining whether the transaction is more like a mortgage than an absolute conveyance. *See Myers*, 2006 S.D. 69, ¶ 25, 720 N.W.2d at 83–84. In *Myers*, the Court noted the ostensible buyer

did not have the property appraised, he paid the sellers just what they needed to pay off their preexisting debt to the bank. *Id.* ¶ 27, 720 N.W.2d at 84–85. Because Myers’ payment had no relation to the value of the property, it suggested the transaction was truly intended to be security for a debt. *Id.*

To the contrary, in this case Judy did not need an appraisal because she was keenly aware of the value of the Property after negotiating the purchase of the Property from the Trust in an arm’s length transaction. Sioux County’s loan to Judy equaled her purchase price. And Sioux County’s purchase price was derived from Judy’s value—not a debt to a third party, divorced from the value of the Property. The Sturzenbechers’ argument that the price was not negotiated—even if it were correct—does not utilize the rationale of *Myers*, does not show the transaction was more like granting of a security than an absolute conveyance, and does not support the conclusion of the Circuit Court.

5. *Judy and Sioux County Did Not Maintain a Debtor–Creditor Relationship*

The Circuit Court found testimony about Sioux County’s typical transactions and the “purpose of the relationship” was “sufficient for the Court to find this transaction was set up as a debtor creditor relationship.” Memorandum Decision at 11. There is no dispute Sioux County lent Judy the money to purchase the Property from the Trust. The Circuit Court found Judy owed \$1,062,500.00 on the promissory note after she transferred the Property to Sioux County, and that amount was paid off with interest later in 2021. *E.g.*, Exhibit 10, Exhibit 35, Exhibit 36. Cody never borrowed money from Sioux County.

The Sturzenbechers rely on the fact that Judy took several additional months after transferring the property before her debt to Sioux County was paid off to argue Judy and

Sioux County maintained a debtor–creditor relationship, but that is not persuasive. The Court’s precedent is clear that property can be transferred to apply to a debt without it being considered an equitable mortgage, especially, as here, when the creditor was already secured by a written mortgage. *Ravnaas v. Andrich*, 244 N.W.361, 362 (S.D. 1932). Sioux County confirmed Judy’s debt to them was paid in full in the fall of 2021, and neither Judy nor anyone else disputed that until this action was filed. Transcript 312:1–15; 387:2–16; Exhibit 36. With Judy’s debt extinguished, there is no remaining debt for the alleged equitable mortgage to secure. The Circuit Court erred in finding this factor militated toward finding an equitable mortgage.

6. *The Circuit Court Erred by Over-Emphasizing the Sturzenbechers’ Testimony Over the Documentary Record*

As the Circuit Court noted in its Memorandum Opinion, the transaction at dispute “is not the typical equitable mortgage situation.” Memorandum Decision at 10. Indeed, when analyzing the *Myers* factors, it is clear that the hallmarks of an equitable mortgage are absent, and the Warranty Deed was not in fact intended to be security for a debt. The Circuit Court repeatedly turned to the Sturzenbechers’ testimony regarding the general purpose of the transaction—to ultimately provide Cody an opportunity to purchase the Property—instead of following a straightforward application of the *Myers* factors. In doing so, it abused its discretion by emphasizing the Sturzenbechers’ self-serving testimony over both the formal and informal documentary evidence from around the time of the transaction, which shows the parties intended the Warranty Deed to be an absolute conveyance.

The party claiming a deed is in fact an equitable mortgage must show the parties intended the instrument to be security for a debt by clear and convincing evidence.

Myers, 2006 S.D. 69, ¶ 21, 720 N.W.2d at 83. “Evidence is ‘clear and convincing’ if it is ‘so clear, direct and weighty and convincing as to enable either a judge or a jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’” *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 9, 711 N.W.2d 607, 710 (quoting *In re Zar*, 434 N.W.2d 598, 602 n.7 (S.D. 1989)). The Sturzenbechers’ conflicting and ambiguous testimony does not meet that standard, especially in the face of the documentary record.

The Sturzenbechers argue the circuit court weighed the evidence and found at the “inception of the transaction,” the parties intended it to be a mortgage. Brief of Appellee at 42. To the contrary, the weight of the evidence shows the opposite.

The Sturzenbechers’ testimony fails to clearly establish the material terms of the oral agreement they claim exists. Importantly, their testimony is unclear who owes the allegedly remaining debt to Sioux County. Is it Judy? *See* Transcript 337:7–19 (Judy testifying only she, not Cody would owe the money to buy the Property). The family? *See* Transcript 67:6–22 (Cody testifying “the family” was to make annual payments to Sioux County on the alleged loan). If “the family,” which members—just Judy and Cody, or Kyle Sturzenbecher and Dean Sturzenbecher as well? How much does the debtor (or debtors) owe, and when is the debt ultimately due? Cody testified the alleged “balloon payment” was to be paid “at the end of five years.” Transcript 73:14–25. Judy testified it could be made anytime. Transcript 332:21–25. If the Sturzenbechers do not know who owes what and when, how is Sioux County to know? How does the Circuit Court know?

The Sturzenbechers cannot point to any documents to make that determination because the documentary evidence shows the transaction was in fact a sale. The formal

documents, executed by the Sturzenbechers with the assistance and advice of counsel show Judy sold the Property to Sioux County. For example, the Purchase Agreement, initialed by Judy on every page next to “Seller’s Initials,” and signed by her, clearly shows a sale of Property in exchange for a debt reduction. Exhibit 7. The Lease Agreement signed by Cody clearly acknowledges Sioux County is the owner of the property, and grants Cody the option to purchase from Sioux County if certain conditions are met. Exhibit 6. In addition, the Sturzenbechers’ own attorney, who represented them in the transaction, submitted his testimony that “the only deal between the Sturzenbechers (Judy and/or Cody) and Sioux County Ranch, LLC *is that which is reflected in the agreements that were signed by the parties.*” Exhibit 119 (Record 1346) (emphasis added).

Likewise, the documents created around the time of the transaction, and the communications of the parties, corroborate the formal documents—not the Sturzenbechers’ testimony. Prior to the transaction, Sioux County explained via text message that it would fund Judy’s purchase from the Trust, and then the parties would enter a separate purchase agreement between Judy and Sioux County. Exhibit 14 (Record 561). The Sturzenbechers’ attorney exchanged multiple emails and reviewed drafts of the Purchase Agreement and the separate Lease Agreement prior to signing. Exhibit 24 (Record 593); Exhibit 26 (Record 617); Exhibit 27 (Record 632); Exhibit 28 (Record 637); Exhibit 118 (Record 446).

After the transaction, the communications between the parties continued to show Sioux County was the owner of the Property, not Judy. In August 2021, Sioux County emailed Judy summarizing her payments up to that date—the reduction of the debt from

the transfer of the Property and the first of her cash payments—with no objection or correction from Judy. Exhibit 108 (Record 418); Transcript 331:1–17. On November 9, 2021, Sioux County texted Judy and Cody acknowledging Judy’s payment in full of the loan and reminding Cody of his upcoming lease payments. Exhibit 36 (Record 722). Cody went so far as to get Sioux County’s permission to sublet portions of the Property in 2021 and planned on doing it again in 2022. Exhibit 34 (Record 720); Exhibit 111 (Record 424). The documents consistently show Sioux County was intended to be the owner of the Property, but they were essentially discarded by the Circuit Court in favor of the generalized intent testified to by Judy and Cody.

The Circuit Court’s discretion is not unbridled. It must be put to a justified purpose and supported by reason and evidence. *Strong*, 2014 S.D. 69, ¶ 10, 855 N.W.2d at 138. The formal instruments and legal documents, and the communications between the parties (including the Sturzenbechers), consistently show the Warranty Deed is what it purports to be, an absolute sale to Sioux County. The only evidence that the Warranty Deed is not in fact a sale is the uncorroborated, inconsistent, and ambiguous testimony of the Sturzenbechers. That testimony is not sufficiently “clear, direct and weighty and convincing” for the Sturzenbechers to carry their burden of proof by clear and convincing evidence. *Irvine*, 2006 S.D. 20, ¶ 9, 711 N.W.2d at 710. The Circuit Court erred in finding they had.

CONCLUSION

Judy Sturzenbecher, with the assistance counsel, made a deliberate and calculated decision to sell the Property to Sioux County. That intent was memorialized in a complete, unambiguous written Purchase Agreement, which under applicable state law

controls this case. The Circuit Court disregarded state law and the Purchase Agreement, to relieve Judy of the consequences of her actions. Courts are not free to renegotiate contracts that turn out poorly for a party, and by reimagining the sale to Sioux County as a mortgage, the Circuit Court erred. Sioux County respectfully requests this Court vacate the Circuit Court's Order Denying Defendant's Motions and Granting Plaintiffs' Motion for Preliminary Injunction, and direct the Circuit Court to enter its order and judgment granting Sioux County's Motion for Judgment on the Pleadings, or in the alternative, direct the Circuit Court to deny the Sturzenbechers' Motion for a Preliminary Injunction.

Dated at Sioux Falls, South Dakota, this 9th day of August, 2023.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

JUDITH STURZENBECHER and CODY STURZENBECHER, Plaintiffs/Appellees, vs. SIOUX COUNTY RANCH, LLC, Defendant/Appellant.	No. 30190 CERTIFICATE OF SERVICE
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I, Joel R. Rische, attorneys for the Appellant, Sioux County Ranch, LLC, hereby
certify that a true and correct copy of the foregoing *Appellants' Reply Brief* was sent by
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I further certify that on the 9th of August, 2023, I emailed the foregoing

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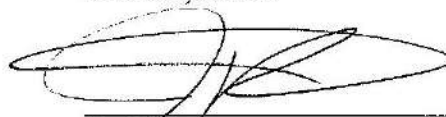
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 4,799 words and 24,999 characters *with no spaces*. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated at Sioux Falls, South Dakota, this 9th day of August, 2023.

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A handwritten signature in black ink, appearing to read 'Joel Rische', is written over a horizontal line.

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