

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal Nos. 29512 and 29560

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PLAINS COMMERCE BANK,  
Plaintiff and Appellant,

vs.

MATTHEW A. BECK, a married person; KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the B&B FARMS TRUST, u/t/a November 1, 1999;  
BROWN COUNTY, a governmental instrumentality of the State of South Dakota;  
MARSHALL COUNTY, a governmental instrumentality of the State of South Dakota;  
DEERE & COMPANY, a corporation,  
Defendants,

and

JAMIE MOECKLY,  
Intervenor and Appellee.

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

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The Honorable Scott P. Myren for Appeal No. 29512  
The Honorable Richard A. Sommers for Appeal No. 29560  
Circuit Court Judges

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**BRIEF OF APPELLANT PLAINS COMMERCE BANK**

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Notice of Appeal for Case No. 29512 filed on the 12th day of January, 2021  
Notice of Appeal for Case No. 29560 filed on the 25th day of February, 2021

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REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant Plains Commerce Bank hereby requests oral argument.

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## **BRIEF OF APPELLANT PLAINS COMMERCE BANK**

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### **PRELIMINARY STATEMENT**

This Brief will refer to Plaintiff/Appellant Plains Commerce Bank, Inc. as Plains Commerce or the Bank. Intervenor/Appellee Jamie Moeckly will be referred to as Intervenor or Jamie. References to the Clerk's Index will be referred to as CI followed by the page number. References to the Appendix attached to Appellant's Brief will be referred to as App followed by the page number. The B&B Farms Trust, u/t/a November 1, 1999, will be referred to herein as the Trust.

### **JURISDICTIONAL STATEMENT**

The Order Granting Intervenor Jamie Moeckly's Motion for Summary Judgment on Behalf of B&B Farms Trust u/t/a November 1, 1999 and Judgment of Dismissal was filed December 22, 2020. (App 1-2). The Notice of Appeal of this Order was filed January 12, 2021. (CI 1195-96). The Order on Intervenor Moeckly's Motion for Attorney Fees was filed February 17, 2021. (App 17-18). Notice of Appeal was filed February 25, 2021. (CI 1309-10). The two appeals were consolidated pursuant to an Order filed March 4, 2021.

### **STATEMENT OF LEGAL ISSUES**

**I. DID THE TRIAL COURT ERR IN DETERMINING THAT THE CONSENTS TO MORTGAGE SIGNED BY THE BENEFICIARIES DID NOT PROVIDE THE TRUSTEE WITH AUTHORITY TO MORTGAGE THE TRUST PROPERTY PURSUANT TO SDCL 55-2-3(1)?**

The trial court held that Plaintiff did not satisfy the requirements of SDCL 55-2-3(1), and failed to overcome the presumption set forth in SDCL 55-2-8.

*In re Estate of Moncur*, 2012 SD 17, 812 N.W.2d 485;

*Smid v. Smid*, 2008 SD 82, 756 N.W.2d 1;

SDCL 53-4-7;

SDCL 55-2-3(1).

**II. DID THE TRIAL COURT ERR IN DETERMINING THAT PLAINS COMMERCE COULD NOT RELY UPON THE CERTIFICATE OF TRUST IN ACCEPTING THE MORTGAGE SIGNED BY THE TRUSTEE?**

The trial court held that, because Plains Commerce had an opportunity to review the Trust Agreement itself, it could not rely upon the Certificate of Trust.

SDCL 55-4-53;

SDCL 55-4-54.

**III. DID THE TRIAL COURT ERR IN DETERMINING THAT § 6.2 OF THE TRUST AGREEMENT DID NOT PROVIDE THE TRUSTEE WITH AUTHORITY TO MORTGAGE THE TRUST PROPERTY EVEN THOUGH THE PRIMARY TRUST BENEFICIARIES CONSENTED TO THE TRUSTEE DOING SO?**

The trial court held § 6.2 did not provide the Trustee with authority to mortgage the Trust Property.

*In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 2012 SD 18, 813 N.W.2d 111;

SDCL 29A-1-201(36);

Black's Law Dictionary, 6th ed. (1990);

Restatement (Third) of Trusts, Section 74 (Am. Law Inst. 2007).

**IV. DID THE TRIAL COURT ERR IN DETERMINING THAT § 4.1 OF THE TRUST AGREEMENT DID NOT PROVIDE THE TRUSTEE WITH AUTHORITY TO MORTGAGE THE TRUST PROPERTY EVEN THOUGH THERE WAS EVIDENCE THE LOAN OBTAINED BY THE TRUSTEE WAS USED, IN PART, TO SATISFY DEBT WHICH EXISTED WHEN THE TRUST WAS CREATED?**

The trial court held § 4.1 did not provide the Trustee with authority to mortgage the Trust Property.



*In the Matter of the Estate of Russell O. Tank*, 2020 SD 2, 938 N.W.2d 449.

**V. DID THE TRIAL COURT ERR IN DETERMINING THAT THE CONSENTS TO MORTGAGE SIGNED BY THE BENEFICIARIES DID NOT CONSTITUTE AN ALTERING OF THE TRUST AGREEMENT UNDER ARTICLE III?**

The trial court held that the Consents signed by the beneficiaries did not constitute an amendment of the Trust Agreement but did not address the issue as to whether the Consents altered the Trust Agreement.

*Guardianship of Novotny*, 2017 SD 74, 904 N.W.2d 346;

*Board of Education v. Louisville Education Association*, 574 S.W.2d 310 (Ky. App. 1977);

*Levin v. Hamilton*, 218 S.W.2d 131 (Mo. App. 1949);

*Cross v. Nee*, 18 F. Supp. 589 (W.D. Mo. 1937).

**VI. DID THE TRIAL COURT ERR IN AWARDING ATTORNEY FEES TO INTERVENOR?**

The trial court held that Intervenor was entitled to a recovery of attorney fees.

*Center of Life Church v. Nelson*, 2018 SD 42, 913 N.W.2d 105;

*Estate of Ducheneaux v. Ducheneaux*, 2018 SD 26, 909 N.W.2d 730;

*Charlson v. Charlson*, 2017 SD 11, 892 N.W.2d 903;

*First Federal Savings & Loan Association v. Clark Investment Company*, 322 N.W.2d 258 (S.D. 1982);

SDCL 15-17-38.

**STATEMENT OF THE CASE**

This matter began as a mortgage foreclosure. One of the parties was the B&B Farms Trust. Jamie Moeckly intervened on behalf of the Trust. Plaintiff Plains Commerce Bank and Intervenor Moeckly filed cross motions for summary judgment. The Honorable Scott P. Myren granted Intervenor's Motion. Plains Commerce filed a

timely Notice of Appeal. Intervenor filed a Motion for Recovery of Attorney Fees. Due to Judge Myren's ascension to the Supreme Court, that issue was handled by the Honorable Richard A. Sommers. Judge Sommers granted the Motion for Attorney Fees. A timely Notice of Appeal was filed concerning this issue. This Court subsequently granted Plains Commerce's Motion to Consolidate the two appeals.

### **SUMMARY OF THE ARGUMENT**

Matthew and Kelley Beck sought a loan from Plaintiff/Appellant Plains Commerce Bank. Matthew Beck offered to provide part of the collateral for the loan in the form of a mortgage on property owned by the B&B Farms Trust of which he was the Trustee. Plains Commerce asked that all the Trust beneficiaries consent to the mortgage, which they did. After the Becks defaulted, Intervenor/Appellee Jamie Moeckly intervened in the lawsuit and claimed Mr. Beck did not have authority to mortgage the Trust property. The trial court agreed and granted Intervenor's Motion for Summary Judgment. Plains Commerce justifiably relied on the Consent of the beneficiaries and, for the reasons set forth herein, seeks a reversal of the trial court's decision.

### **STATEMENT OF FACTS**

On November 1, 1999, Gary J. Beck ("Gary") and Betty Beck ("Betty") executed a Trust Agreement (App 52-59) and named their son Matthew Beck ("Matt") as Trustee. (App 27, ¶ 1). The Trust was drafted by Attorney Danny Smeins. (CI 463). Gary and Betty were designated as the primary beneficiaries of the Trust with their children Matt, Brian Beck ("Brian"), and Jamie as secondary beneficiaries. (App 29, ¶ 6). Real estate owned by Gary and Betty was transferred to the Trust. (App 27, ¶ 2).

Matt worked on the farm his whole life. (CI 430, p. 6). After graduating from high school in 1998, he attended North Dakota State University but continued to come back and help on the farm while attending college. *Id.*, pp. 3-5. He graduated in 2001 and came back home to help run the farm. (CI 408, p. 28; CI 430, pp. 4-5). On August 16, 2010, Matt signed a mortgage on behalf of the Trust in favor of Legendary Loan Link for \$564,000. (CI 1120-23). On October 16, 2010, he signed another mortgage on behalf of the Trust with Legendary Loan Link for \$1,225,000. (CI 1124-27). Legendary Loan Link was run by Bill Thovson, a private lender. (CI 779, p. 16).

In 2015, Matt approached Plains Commerce for refinancing because Mr. Thovson was refusing to give him any more operating funds. (CI 442, p. 53; CI 779, p. 17; App 39, ¶ 7). The loan application was processed by Lance Vilhauer. (App 39, ¶ 12). Plains Commerce could not make the loan unless Matt provided a mortgage of Trust land as collateral. (App 40, ¶ 21). Matt provided Mr. Vilhauer with a copy of the Trust Agreement. *Id.*, ¶ 17. Vilhauer turned the Agreement over to Plains Commerce's attorney, Tom Cogley. (CI 780, p. 30; CI 781, p. 35). The Bank's counsel suggested that consent to the mortgage should be obtained from all the beneficiaries. (App 40, ¶ 22; CI 783, p. 41).

Attorney Smeins, who represented Gary and Betty, drafted the consent document which was entitled Consent to Mortgage of Trust Real Estate Owned By Trust. (App 40, ¶ 23; App 60-61; CI 403, pp. 10-11). Matt testified that he and his parents asked Mr. Smeins to prepare the Consent. (CI 442, p. 52). Mr. Smeins never represented Plains Commerce. (CI 781, p. 35).

After listing the legal description of the real estate owned by the Trust, the Consent states:

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to PLAINS COMMERCE BANK benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, MATTHEW BECK. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

(App 60).

Jamie testified she first learned of the existence of the Trust in October 2015, when she was asked by her mother to sign a document consenting to Matt's purchase of the Trust land. (CI 403, p. 9; CI 405-06, pp. 19-20; CI 618). She refused to sign the consent for sale document. (CI 406, pp. 20-22). On October 22, 2015, Jamie sent an email to Mr. Smeins asking for a copy of the Trust Agreement. (CI 618). She did not obtain a copy of it at that time. *Id.*

Despite being advised by her husband and son that she should not sign the Consent to Mortgage without reviewing the Trust Agreement, she voluntarily signed the Consent on November 12, 2015, without having obtained a copy of the Agreement. (App 61; CI 618-19). Even though she did not review the Trust Agreement, Jamie testified that when she signed the Consent, she fully understood the implications of doing so and was aware that Matt could use the mortgage to secure a loan up to \$800,000. (CI 409, p. 35; CI 411, p. 42).

All the other beneficiaries also signed the Consent in November 2015. (CI 589-92, 597-98). Jamie stated there were several reasons as to why she signed the Consent. The Trust provided that during the lives of Gary and Betty, the net income from the Trust assets was to be paid to them. (App 53, § 4.1). Jamie testified that, when she signed the Consent, it seemed her parents were not receiving any income. (CI 409, p. 32). She stated that by signing the Consent, “I felt that this was the best way to protect the trust and protect my parents’ interest and to hopefully patch things up with my parents.” (CI 408, p. 31).<sup>1</sup> She further stated that, “I thought that if Matthew was able to get back on his feet, then we’ll get things straightened out.” (CI 409, p. 32).

Following receipt of the executed Consents, Plains Commerce loaned Matt and his wife Kelley \$1,855,000 on November 25, 2015, and \$370,000 on December 14, 2015. (App 44, ¶¶ 57-58). On November 25, 2015, Matt signed a mortgage as Trustee in the sum of \$800,000 as collateral for the \$1,855,000 loan. (CI 720-35). This loan was used to pay off Legendary Loan Link and satisfy the mortgages on Trust land that was collateral for those loans. (CI 784, p. 83).

The Plains Commerce mortgage was limited to \$800,000 because the loan proceeds were to be used by Matt. Jamie and Brian understood the \$800,000 represented approximately one-third of the value of the Trust land, which would equal Matt’s share upon the deaths of Gary and Betty. (App 33-34, ¶ 19). The \$800,000 figure probably represented less than one-third of the value of the Trust property in that it had been appraised in July 2015 for \$3,659,000. (App 34, ¶ 20).

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<sup>1</sup> Jamie had a strained relationship with her parents and Matt going back to 2012. (CI 405-06, pp. 19-23; CI 609-11).

After Matt and Kelley defaulted, Plains Commerce commenced a mortgage foreclosure action in January 2018. (CI 3-11). On June 1, 2018, Jamie moved to intervene in the lawsuit on behalf of the Trust. (CI 119-26). The Motion to Intervene was granted on September 4, 2018. (CI 219-20). Jamie subsequently filed an Amended Answer alleging Matt did not have authority to encumber the Trust. (App 35, ¶ 27). The parties then conducted discovery. The parties eventually filed cross Motions for summary judgment on July 9 and 10, 2020. (CI 373-74, 738-39). In pursuing their Motions, the parties relied on the discovery conducted in both this case and in a Brown County trust litigation entitled *In the Matter of the Irrevocable Trust of Gary J. Beck and Betty Beck*, TRU18-02. Judge Myren issued a Memorandum Decision on December 4, 2020, granting Intervenor’s Motion. (App 3-16).

## **ARGUMENT**

### **I. The Consent to Mortgage signed by the beneficiaries gave Matthew Beck authority under SDCL 55-2-3(1) to mortgage trust property.**

The Consent signed by all the beneficiaries clearly stated that the proposed mortgage benefited “the Trustee and not all trust beneficiaries.” (App 60). To authorize self-dealing, a trust must provide “clear and unmistakable language” authorizing the Trustee to do so. *In re Estate of Stevenson*, 2000 SD 24, ¶ 15, 605 N.W.2d 818 (quoting *In re Irrevocable Inter Vivos Trust, etc.*, 305 N.W.2d 755, 760 (Minn. 1981)). There is no claim that the Trust in question contains such clear and unmistakable language. South Dakota law, however, provides exceptions to general rule regarding self-dealing. *Id.* at ¶ 11. One such statute is SDCL 55-2-3(1).<sup>2</sup> That statute states:

Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for

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<sup>2</sup> A copy of SDCL 55-2-3 is included as page 62 of the Appendix.

whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

- (1) When the beneficiary does have the capacity to contract and, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits the trustee to do so; . . .

For this statute to apply, three things must be shown: (1) the beneficiary has the capacity to contract; (2) the beneficiary has full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect her own decision; and (3) a lack of influence on the part of the trustee.

With regard to the first element, there is no indication that any of the beneficiaries did not have the capacity to contract when they signed the Consent. All of them were adults. There is nothing in the record to indicate that any of them were incompetent in November 2015.

The third element refers to a situation where a person uses their influence as a trustee to compel a beneficiary to agree to something. *In re Estate of Moncur*, 2012 SD 17, ¶ 18, 812 N.W.2d 485. There is no evidence Matt used his influence as Trustee to compel any of the beneficiaries to sign the Consent. Neither Betty nor Brian said anything about discussing the Consent with Matt. The only person who they said discussed the Consent with them was Mr. Smeins. (CI 511, 554). Jamie did not talk to Matt about the Consent nor did she speak to anyone at Plains Commerce. (CI 409, pp. 32-33).<sup>3</sup>

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<sup>3</sup> Gary was not deposed. He entered a nursing home in 2017 and died in September 2019. (App 30, ¶ 11; CI 956, pp. 22-23).

In making his decision, Judge Myren did not focus on elements 1 and 3 of the test for compliance with SDCL 55-2-3(1). The basis of his ruling was that the beneficiaries did not have full knowledge of the motives of the trustee and other facts concerning the transaction. (App 13-14). The court's opinion in this regard focused not only on Jamie but also on Betty and Brian. It needs to be noted that neither Betty nor Brian is part of the lawsuit. Neither of them have raised any objection to the mortgage.

The court's opinion states it is undisputed Betty did not know Matt had a debt of \$2.1 million until her deposition in October 2018. (App 14). While it is undisputed Betty testified to that effect (App 39, ¶ 10), there is evidence to the contrary. Matt testified that Gary and Betty were aware of the level of his debt. (CI 443, p. 58). Betty also acknowledged when she was deposed that she had memory issues. (CI 505, 529). Whether or not Betty actually knew of the extent of Matt's debt at the time she signed the Consent, she made it clear she did not object to it by signing a document on January 29, 2018, entitled Agreement Regarding B&B Farms Trust Originally Established November 1, 1999. (CI 599-603). Paragraph 6 of the Agreement states:

By signing this AGREEMENT REGARDING B & B FARMS, TRUST, the Primary Beneficiaries herein agree to all actions taken by the Trustee from November 1, 1999 to present and agree that all said actions when made were proper in all respects and were made with their consent at the time made or hereby ratify, approve and confirm the same.

(CI 601). Even if Betty did not know the full amount of Matt's debt, there is no reason that would negate her consent to the mortgage. The Trust property did not secure the entire amount of Matt's debt because it was limited to \$800,000. There is no dispute that



Betty knew and fully understood Matt was taking a mortgage of \$800,000 against property owned by the Trust. (App 41, ¶ 26; CI 513).

As for Brian, the court notes that he did not see a copy of the Trust Agreement until after January 15, 2018. (App 14). Brian made it very clear in his deposition that additional information would have not changed his mind about signing the Consent. (CI 560). Based on their testimony and the document signed by Betty in January 2018, there is no basis to conclude that Betty and Brian did not fully support the mortgage.

As far as Jamie is concerned, the court noted that she did not know the Trust existed until October 2015, and that she never saw a copy of the Trust Agreement until after January 2018. (App 14). Based on this, the court concluded that she did not have “full knowledge of the facts concerning the transaction.” *Id.* There is no dispute Jamie was not aware of the Trust until October 2015, when her mother attempted to get her to sign the consent to sale. (CI 618). The important thing is that she knew the Trust existed when she signed the Consent to Mortgage. She testified her husband and son told her not to sign the Consent until she obtained a copy of the Trust. (CI 618-19). She sent Mr. Smeins an email asking for a copy of the Trust Agreement. (CI 618). She also testified that she left one or two voice messages at Smeins’ office but never personally requested a copy of the Trust Agreement from him. (CI 418, p. 69). She nevertheless signed the Consent without reviewing the Trust Agreement. She understood the Consent would allow Matt to get an \$800,000 mortgage against the Trust property. (App 33-34, ¶¶ 18-19). After signing the Consent, she did nothing further to obtain a copy of the Agreement. She did not see the Trust until after she retained counsel who was able to obtain a copy from Mr. Smeins sometime after January 2018. (CI 403, p. 72; CI 626-27).

What we have here is a situation where Jamie and the other beneficiaries signed a document consenting to Matt mortgaging the Trust property. In reliance upon that Consent, Plains Commerce loaned Matt over \$2 million. After the Consent was signed and the loans were made, Jamie did not complain about anything for over two years until Matt had financial problems and the Bank sought to enforce its rights under the mortgage. Jamie now claims her consent was not knowingly given because she did not avail herself of an opportunity to review the Trust Agreement before signing the Consent. She had the power not to sign the Consent. She exercised that power when she refused to sign the consent for sale. She should not be allowed to complain about the fact she did not review the Trust before signing the Consent when she took minimal efforts to obtain a copy of the Trust Agreement. There was no reason she could not have followed the advice of her husband and son and simply refused to sign the Consent until she was provided with a copy of the Trust Agreement.

Allowing Jamie to invalidate her Consent under these circumstances would set a dangerous precedent. The law should not allow contracting parties to enter into agreements upon which others justifiably rely, only to later use their willful ignorance as a sword to invalidate their contractual representations and obligations. Jamie's attempts to invalidate her Consent are especially concerning because there is no evidence Plains Commerce did anything to prevent her from accessing whatever information she believed she needed before signing the Consent. She never requested any information from Plains Commerce. She never had any contact with Plains Commerce whatsoever. (CI 412, p. 45). Yet she now asserts the cost of her failure to read the Trust Agreement should be borne by Plains Commerce in the amount of \$800,000. The only thing Plains Commerce

is guilty of is refinancing a loan that otherwise would have been in foreclosure to allow the Becks to keep their family farm intact and have a fair chance at turning the operation around.

The position taken by Jamie is similar to that taken by plaintiff Audrey Smid in *Smid v. Smid*, 2008 SD 82, 756 N.W.2d 1. Audrey signed a trust agreement under which she waived her statutory rights as a surviving spouse. *Id.* at ¶ 8. She claimed that she did not voluntarily sign the trust and that she did so only to avoid probate. *Id.* at ¶ 9. She also claimed the waiver was the result of fraud, mistake, or undue influence. *Id.* In affirming the trial court's decision that the trust agreement and the waiver were enforceable, this Court stated:

While Audrey argues that she lacked full knowledge of the facts and law, we have held that “one who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party.” *Holzer v. Dakota Speedway, Inc.*, 2000 SD 65, ¶ 28, 610 N.W.2d 787, 795 (quoting *LPN Trust v. Farrar Outdoor Adver., Inc.*, 1996 SD 97, ¶ 13, 552 N.W.2d 796, 799 (additional citations omitted)). There is no evidence that Audrey was forced to sign the waiver; Audrey admits as much. In addition, more than three years passed before she ever claimed she signed the documents involuntarily. As Audrey has not met her burden of demonstrating otherwise, the circuit court's finding that her waiver was voluntary is not shown to be in error.

*Id.* at ¶ 17. Like Audrey, Jamie is not claiming she was forced to sign the waiver. She said she did so voluntarily. (CI 619). Like Audrey, Jamie waited a considerable period of time before she raised any issues about the Consent. In her case, it was more than two years.

Jamie's position is also similar to that taken by parties who attempt to avoid contractual obligations by claiming they did not read a contract. That situation was addressed in *LPN Trust*, 1996 SD 97 at ¶ 13, wherein this Court stated:

To permit a party . . . to admit that he signed [a written contract] but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.

(quoting 17 Am.Jur.2d *Contracts* §§ 224-228 (1991)).

Jamie should not now be allowed to claim her Consent was invalid because she did not obtain and read the Trust Agreement, when there is no reason she could not have refused to sign the Consent before having an opportunity to review the Trust. Jamie's position raises still another question. Is she claiming she would not have signed the Consent if she had read the Trust? What is it about the Trust that would have convinced her not to sign? She testified that she signed the Consent because she "felt that this was the best way to protect the trust and protect my parents' interest and to hopefully patch things up with my parents." (CI 408, p. 31). How would any of those reasons have been changed by her actually reading the Trust Agreement?

The Consent informed Jamie and the other beneficiaries that the proposed mortgage benefited Matt and not all the Trust beneficiaries. It further informed her and the others that it was limited to \$800,000. Jamie understood that Matt was to pay Plains Commerce with personal funds and if he was unable to do so, the Bank would be paid from Matt's share of the Trust. (CI 411, pp. 42-43). SDCL 55-2-3(1) requires the beneficiary to have knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect the beneficiary's decision. There is no

doubt as to Matt's motives. It was to take care of debt and keep the farming operation going. There is no indication as to what other facts Jamie needed to know which would have affected her decision. The only thing referenced is her failure to read the Trust Agreement.

In addition to finding that Plains Commerce failed to establish compliance with the elements of SDCL 55-2-3(1), the court also determined Plains Commerce was unable to overcome the presumption of undue influence set forth in SDCL 55-2-8. (App 13). SDCL 53-4-7 sets forth the elements of undue influence.

Undue influence consists:

- (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
- (2) In taking an unfair advantage of another's weakness of mind; or
- (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

There is no evidence in this record of Jamie having reposed confidence in Matthew or that Matthew held real or apparent authority over her. There is no evidence Jamie had a weakness of mind over which Matt took an unfair advantage. There is also no evidence of Matt taking a grossly oppressive and unfair advantage of Jamie's necessities or distress. None of these things could have happened since he never talked to her about the Consent. (CI 409, pp 32-33).

The presumption set forth in SDCL 55-2-8, as it relates to SDCL 55-2-3(1), was considered in *Estate of Moncur*. Bernadine Moncur created a trust naming her five

daughters as beneficiaries. She designated her daughters Miki and Dianne as co-trustees. The co-trustees arranged for real property owned by the trust to be auctioned. The auction notice stated that family members could bid. At the auction, a surrogate bidder acted on behalf of the co-trustees and submitted the winning bid. Two of the other beneficiaries, Shirley and Janet, objected to Miki and Dianne purchasing the real estate and alleged they had breached their fiduciary duty. They sought to have Miki and Dianne removed as co-trustees.

The trial court ruled in favor of the co-trustees. On appeal, this Court recognized that SDCL 55-2-3(1) creates an exception to the general rule that a trustee is precluded from taking part in a transaction adverse to a beneficiary. 2017 SD 17 at ¶ 12. Shirley and Janet argued the trial court erred in finding that the elements of SDCL 55-2-3(1) had been met. *Id.* at ¶ 13. They contended they did not have full knowledge of the motives of Miki and Dianne or facts concerning the sale of the property. In rejecting this argument, the Supreme Court noted that Shirley and Janet had received notice of the auction and a copy of the auctioneer's contract which indicated family members could bid. *Id.* at ¶ 14. Shirley and Janet admitted they knew Miki and Dianne were going to bid at the auction. *Id.* Neither Shirley nor Janet voiced any objection to Miki and Dianne bidding on the property. *Id.* This was found to be sufficient to meet the requirements of the statute. *Id.*

Shirley and Janet also argued that Miki and Dianne failed to overcome the presumption set forth in SDCL 55-2-8. *Id.* at ¶ 15. The Supreme Court agreed with the trial court's conclusion that the presumption was overcome. *Id.* at ¶ 18. The Court cited the same facts supporting the conclusion that the elements of SDCL 55-2-3(1) had been

satisfied. *Id.* This case presents a similar factual scenario. Therefore, the trial court erred in determining Plains Commerce failed to overcome the presumption contained in SDCL 55-2-8.

In *Neugebauer v. Neugebauer*, 2011 SD 64, ¶ 12, 804 N.W.2d 450, this Court stated that, “undue influence is a non-technical, fact-based inquiry that requires the circuit court to examine the parties’ states of mind and motives. . . .” In that case, which involved a plaintiff who alleged her son had unduly influenced her to sell him land, the plaintiff was found to be susceptible to undue influence due to her eighth grade education, lack of experience in business matters, age, hearing difficulties, and mental impairment. *Id.* at ¶ 18. There was also evidence that the defendant told his mother not to tell the other children about the contract for deed to purchase the land. *Id.* at ¶ 23. There are no facts like that in this case. There simply is no evidence of undue influence whatsoever. At a minimum, questions concerning both SDCL 55-2-3(1) and 55-2-8 raise issues of fact which should have precluded summary judgment being granted to Intervenor.

**II. Plains Commerce had a right to rely upon the Certificate of Trust which stated the Trustee had the authority to mortgage real estate.**

Plains Commerce was provided with a Certificate of Trust. (CI 593-94). Mr. Smeins prepared the Certificate of Trust, which was dated May 25, 2007. (CI 594). It stated that the Trustee possessed all powers granted by SDCL 55-1A-3, including the power to mortgage real estate. (CI 593, ¶ 6).

SDCL 55-4-53 states:

Any person who acts in reliance on a certificate of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so

acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.

SDCL 55-4-54 states:

Any person who in good faith enters into a transaction in reliance on a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

Judge Myren ruled that Plains Commerce could not rely on the Certificate of Trust because Plains Commerce had a copy of the Trust Agreement and knew its actual terms. (App 15). The court went on to find that Plains Commerce recognized the Trust Agreement did not authorize the Trustee to mortgage Trust property which explained their efforts to get the Consents executed. *Id.*

As will be discussed in succeeding sections of this Brief, the Trust did not prohibit the mortgaging of Trust real estate if certain conditions were met. Based on the arguments presented by the parties, there is at least a legitimate dispute as to whether the Trustee was allowed to mortgage the property. Under SDCL 55-4-53, the fact Plains Commerce had a copy of the Trust does not prevent them from relying on the certification, especially when a reasonable interpretation of the Trust supports what was represented in the Certificate of Trust. There was no reason for Plains Commerce to believe the information in the Certificate of Trust was incorrect, particularly in light of the fact it was prepared by the same attorney who prepared the Trust itself. Judge Myren's decision presupposes Plains Commerce could have anticipated he would ultimately conclude the powers afforded to the Trustee in the Trust were insufficient to allow Matt to mortgage Trust property.



The fact Plains Commerce decided to seek Consents from the beneficiaries simply demonstrates that the Bank was exercising due diligence and acting in good faith. The Bank could easily have simply accepted the Certificate of Trust and not even asked to see the Trust Agreement. The Bank should not be penalized and face an \$800,000 loss for acting in a responsible manner. In accordance with SDCL 55-4-54, the Bank was acting in good faith and, therefore, had the right to rely on the statement in the Certificate of Trust that the Trustee had the authority to mortgage the property. The trial court erred in holding otherwise.

**III. Gary and Betty Beck’s Consent to the Trustee mortgaging Trust property provided the Trustee with authority to do so under § 6.2 of the Trust Agreement.**

Setting aside the arguments regarding SDCL 55-2-3(1) and the Certificate of Trust, the Trust Agreement itself provided authority for Matt, acting as Trustee, to mortgage the Trust property. Section 6.2 of the Trust Agreement states:

The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of GARY J. BECK except upon the unanimous written consent of both the primary beneficiaries.

(App 56).

The trial court held that § 6.2 did not allow the Trust property to be mortgaged for a couple of reasons. The first was that § 6.2 is included in Article VI which is entitled “Trustee’s Powers as to Sale of Real Estate.” (App 56). The title of the Article was improperly considered in determining the meaning of § 6.2. Under § 10.6 of the Trust Agreement, “[t]he headings of articles and sections are included solely for convenience of reference. If any conflicts between any heading and the text of this Agreement exist, the text shall control.” (App 57-58).

The court recognized that the language of § 6.2 was broad. (App 10). “By itself, such language would arguably authorize the trustee to ‘dispose of an interest’ by mortgaging the property.” *Id.* The court correctly determined that the use of the word “dispose” contemplated encumbering the property. Black’s Law Dictionary, 6th ed. (1990), defines disposal as “[s]ale, pledge, giving away, use, consumption or any other disposition of a thing.” Obviously, a mortgage is a pledge. If the language of § 6.2 was truly limited to situations involving the sale of Trust property, why even include the word “dispose.” As this Court has held, “[a]ll the words and provisions appearing in [the trust] must be given effect as far as possible, and none should be cast aside as meaningless.” *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 2012 SD 18, ¶ 21, 813 N.W.2d 111 (quoting *In re Estate of Klauzer*, 2000 SD 7, ¶ 10, 604 N.W.2d 474).

The second reason cited by the court for holding that § 6.2 did not allow Matt to mortgage the Trust property was that such a reading would render meaningless Article IV and the spendthrift provision. (App 10-11). Section 4.1, which will be discussed in more detail in the next portion of this Brief, allows for the mortgaging of Trust property “to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust.” (App 53). Section 4.2 provides: “All assets of the Trust of every kind or nature shall be administered and distributed by the Trustee upon the terms and conditions set forth in the succeeding articles hereof.” *Id.* All § 6.2 does is to expand on the authority to mortgage granted in § 4.1. It does not render § 4.1 meaningless. Under § 4.1, the Trustee has the power to mortgage Trust property in connection with debts related to that property. Under § 6.2, that property is expanded if both of the primary beneficiaries concur.

The spendthrift provision is found in Article VIII. It states:

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, *other than by power of appointment or withdrawal expressly granted hereunder*, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

(App 56) (emphasis added).

The court concluded that Plains Commerce's interpretation of § 6.2 "would mean that the spendthrift provision can be eliminated by the written consent of the primary beneficiaries." (App 11). That is exactly what § 6.2 provides. It says that the Trustee cannot dispose of any interest in the real estate during Gary's lifetime "except upon the unanimous written consent of both the primary beneficiaries." The primary beneficiaries were the Grantors Gary and Betty. They provided written consent for the mortgage. (CI 597-98). Although recognizing the language from the spendthrift clause italicized by Plains Commerce, the court provided no analysis as to the meaning of those words. (App 9-10). The term "power of appointment" is currently defined by SDCL 55-1-12. That definition, however, was not adopted until 2016. Therefore, it is not applicable to defining the term as it appears in the Trust Agreement created in 1999. Prior to 1999, power of appointment was defined by SDCL 29A-1-201(36). That statute provided, in pertinent part, as follows:

"Power of appointment" means a power to vest absolute ownership in the property subject to the power, whether or not the powerholder then had capacity to exercise the power. "General power of appointment" means a power exercisable in favor of the powerholder, the powerholder's

estate, the powerholder's creditors, or the creditors of the powerholder's estate, whether or not the power is also exercisable in favor of others.

Plains Commerce is unaware of a definition of the term "power of withdrawal" in the South Dakota Code when the Trust was created in 1999.<sup>4</sup>

The Restatement (Third) of Trusts, Section 74 (Am. Law Inst. 2007) is helpful in explaining the meaning of the phrase "power of appointment or withdrawal":

- (1) While a trust is revocable by the settlor and the settlor has capacity to act:
  - (a) The trustee
    - (i) has a duty to comply with the direction of the settlor, even though the direction is contrary to the terms of the trust or the trustee's normal fiduciary duties, if the direction is communicated to the trustee in writing in a manner by which the settlor could properly amend or revoke the trust; and
    - (ii) may comply with the direction or act in reliance on an authorization of the settlor although the direction or authorization is contrary to the terms of the trust or the trustee's normal fiduciary duties, even if the direction or authorization is not manifested in a manner by which the settlor could properly amend or revoke the trust.

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<sup>4</sup> The term is currently defined in SDCL 55-1-24.2. "A withdrawal power allows a person a right to withdraw all or some part of the trust property, whether from income or principal."

- (b) The rights of the beneficiaries are exercisable by and subject to the control of the settlor.
- (2) To the extent that a trust is subject to a presently exercisable general power of appointment or power of withdrawal and the donee of the power has capacity to act, the donee has authority similar to the authority that the settlor of a revocable trust has under Subsection (1).

The authority the Grantors gave to themselves under § 6.2 falls within the terms “power of appointment or withdrawal” as contained in the spendthrift clause. As such, § 6.2 is not inconsistent with the spendthrift provision and does not result in it becoming meaningless. The trial court’s Memorandum Decision states: “The court’s task when interpreting a trust instrument is to ‘ensure that the intentions and wishes of the settlor are honored.’” (quoting *Florence Y. Wallbaum*, 2012 SD 18 at ¶ 20). Under § 6.2, the Grantors provided themselves with the power to allow for the disposition of Trust property. They exercised their power by signing the Consent form. Their wishes should be honored and § 6.2 enforced.

**IV. Section 4.1 of the Trust Agreement provided the Trustee with authority to mortgage the Trust property since there was evidence that the loan obtained by the Trustee was used, in part, to satisfy debt which existed when the Trust was created.**

The pertinent portion of § 4.1 of the Trust Agreement states: “Grantors acknowledge that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust.” In rejecting the argument that § 4.1 allowed Matt to mortgage the Trust property, the court relied upon the language that the Trustee can only mortgage Trust property for “debt of the estate” or “debt secured by the real estate at the time of the creation of the

trust.” (App 10). The court stated: “There is no legitimate factual dispute that the loan secured by Matthew was not debt which fell within either of those two categories.” *Id.* The evidence presented to the court does not support this statement.

Around the time the Trust was created, Matt bought 560 acres of land from his parents. (CI 432, pp. 12-13). Gary and Betty asked him to purchase the land in order to get him back to the farm and to help alleviate some of their debt. *Id.*, p. 13. Matt obtained a \$170,000 loan from the Farm Service Administration to make the purchase. (CI 432-33, pp. 13-15). According to the deposition testimony of Matt, Betty, and Brian, despite Matt’s purchase of the 560 acres, there was still farm debt when the Trust was created. (CI 433, p. 15; CI 525-26, 556-57, 570, 572). In 2015, when Matt applied for a loan with Plains Commerce, he told banker Lance Vilhauer that a large portion of the existing debt related back to his parents’ debt. (CI 1039).

This testimony establishes that at least some of the debt which was refinanced by way of the Plains Commerce loan was debt of the Trust or debt that existed when the Trust was created. As such, Matt did have authority to mortgage Trust property under § 4.1. At the very least, the testimony of Matt, Betty, and Brian raised issues of fact that should have precluded the granting of summary judgment with regard to § 4.1 of the Trust Agreement. “We review the evidence in favor of the nonmoving party and reasonable doubts are resolved against the moving party but the nonmoving party must have presented specific facts showing that a genuine, material issue for trial existed.” *In the Matter of the Estate of Russell O. Tank*, 2020 SD 2, ¶ 19, 938 N.W.2d 449 (quoting *Niesche v. Wilkinson*, 2013 SD 90, ¶ 9, 841 N.W.2d 250). The above-stated facts create such an issue.

**V. The Consents signed by all the beneficiaries constituted an alteration of the Trust allowing for the Trustee to mortgage Trust property.**

Article III of the Trust provides, in part, as follows:

This Trust may not be altered or amended by Grantors during the lifetime of GARY J. BECK and BETTY J. BECK except upon unanimous consent of the primary and secondary beneficiaries except as to appointment of a successor Trustee pursuant to Article VIII below.

(App 53). Other than stating an alteration or amendment can only occur upon unanimous consent of all the beneficiaries, the Trust Agreement does not specify how such an alteration or amendment is to be accomplished.

The trial court stated it was Plains Commerce's position that the Consents constituted an amendment of the Trust. (App 14). The court then stated: "Whatever they are, they are clearly not an amendment of the trust document. A consent of that type would expressly list the intended amendment to the trust. These do not." *Id.* First of all, Plains Commerce did not take the position that the Trust had been amended by virtue of the execution of the Consents. Instead, Plains Commerce argued that the Trust had been altered. (CR 1022, 1257). The inclusion of the word "or" between altered and amended indicates they are separate acts. Neither word should be cast aside as meaningless. Alter is defined by Black's Law Dictionary, 6th ed. (1990), as follows:

To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."

There is seemingly not much recent authority which addresses the definition of the terms "amend" and "alter." Amend is generally defined as to make something better.

“[T]o amend is to change for the better by removing defects or faults.” *Cross v. Nee*, 18 F. Supp. 589, 594 (W.D. Mo. 1937). *See also Ex Parte Woo Jan*, 228 F. 927, 940 (E.D. Ky. 1916); *Sessions v. State*, 41 S.E. 259, 260 (Ga. 1902). Alter is somewhat different.

In the case of *Ex Parte Woo Jan* (citation omitted) the court stated that the word “alter” was broad enough to cover a mere addition and said that a thing is made different from what it was when nothing more is done than to add something to it.

*Board of Education v. Louisville Education Association*, 574 S.W.2d 310, 311 (Ky. App. 1977).

In *Levin v. Hamilton*, 218 S.W.2d 131 (Mo. App. 1949), the court cited both the *Cross v. Nee* and *Sessions v. State* cases. *Id.* at 132-33. In quoting Words and Phrases, Volume 2, p. 284, the court stated: “To alter a thing is to change its form or nature, without a destruction of the existence of the thing altered or changed, or a loss of its identity.” *Id.* at 133.

The consent of the beneficiaries did amount to an alteration of the Trust. There is nothing in the Trust that says an alteration cannot be accomplished with a form like the Consent. If it’s determined that §§ 4.1 or 6.2 did not allow Matt to mortgage the Trust property, the Consent of the five beneficiaries constituted an alteration. It made a change in that it allowed a portion of the Trust property to be mortgaged to provide collateral for a loan which it was hoped would allow the farm to continue and provide support to Gary and Betty. The intent of the Trust is determined by reviewing the text of the Trust as well as the expressed wishes of the Trustors. *See Guardianship of Novotny*, 2017 SD 74, ¶¶ 19-20, 904 N.W.2d 346. Jamie agreed that her “parents were desirous of helping Matthew and they wanted to keep the farm in the family and help him be a success.” (CI



413, p. 49). The altering of the Trust by way of the Consents was consistent with that goal. Even if it were determined that §§ 4.1 or 6.2 do not allow the Trustee to mortgage the Trust land, the Consents amounted to an alteration of the Trust which did allow for him to do so.

**VI. The trial court erred in awarding attorney fees to Intervenor under SDCL 15-17-38.<sup>5</sup>**

SDCL 15-17-38 provides as follows:

The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. However, attorneys' fees may be taxed as disbursements if allowed by specific statute. The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony. The court may award the fees before or after judgment or order. The court may award attorneys' fees from trusts administered through the court as well as in probate and guardianship proceedings. Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement.

The first question is whether the statute allows for the assessment of attorney fees in favor of Intervenor under the facts of this case. Judge Sommers recognized in his Conclusions of Law that South Dakota “has vigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power.” (App 21, ¶ 4) (quoting *Berggren v. Schonebaum*, 2017 SD 89, ¶ 9, 905 N.W.2d 563). The enforcement of this rule was clearly displayed by way of this Court’s decision in *Estate of Ducheneaux v. Ducheneaux*, 2018 SD 26, 909 N.W.2d 730.

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<sup>5</sup> Should the Court reverse the granting of summary judgment to Intervenor, this issue will become moot. Judge Sommers recognized this in the hearing regarding the attorney fees motion. (CI 1330, 1345).

That case involved a dispute in which a defendant had arranged for transfers of property from his elderly father to himself shortly before his father's death. The father's estate challenged the transfers. Judgment was awarded in favor of the estate requiring the defendant to return the property and to pay general and punitive damages. In addition, attorney fees were awarded to the estate and the estate's personal representative. Although SDCL 15-17-38 allows for an award of attorney fees in probate proceedings, this Court reversed the trial court's decision concerning attorney fees. The Court held that the statute was not sufficiently specific to permit the circuit court's award of attorney fees against the defendant. *Id.* at ¶ 57. The Court stated the statute "does not make clear that the Legislature meant to permit an award of fees *against* an individual in probate proceedings." *Id.* (emphasis in original). Likewise, it is not clear the Legislature intended to allow attorney fees to be awarded in a case like this that started as a mortgage foreclosure but then changed into something else.

Paragraph 4 of the prayer for relief in Plaintiff's Complaint requested "that the claims and rights of Defendants be declared and adjudged to be junior, inferior, and subordinate to Plaintiff's mortgage lien." (CI 10). This step had to occur before the actual foreclosure of the Trust's mortgage could be addressed. After Jamie intervened, the focus of the case changed dramatically. It became more in the nature of a declaratory judgment action. The parties were focused on the issue as to whether Matt had authority to mortgage the Trust's land under South Dakota law and the terms of the Trust.

The plain language of SDCL 15-17-38 only allows for the recovery of fees on the foreclosure action itself, not on different issues raised in an action in which a foreclosure

is also pending. Plains Commerce is unaware of any case in which an Intervenor challenging the terms of a Trust has been awarded attorney fees.<sup>6</sup>

Although the dispute regarding Matt's authority has been addressed as part of the original mortgage foreclosure case, it is in effect, a separate proceeding. This Court has held on more than one occasion that separate proceedings, even though related to a cause of action for which attorney fees are recoverable, do not allow for an award of such fees.

In *First Federal Savings & Loan Association v. Clark Investment Company*, 322 N.W.2d 258 (S.D. 1982), the trial court awarded the plaintiff, which was foreclosing on a mortgage, \$6,592.40 in attorney fees. This included \$3,943.02 in fees which the plaintiff had incurred in defending a declaratory judgment action. This Court held that the fees in connection with the declaratory judgment action were improperly awarded. *Id.* at 261-62.

Another relevant case is *Charlson v. Charlson*, 2017 SD 11, 892 N.W.2d 903. In that case, the husband commenced a divorce proceeding in Minnesota. The case was bifurcated. A divorce was granted, but the Minnesota court left issues of alimony, property division, and other financial matters to be determined.

The husband later filed a declaratory action in Minnesota regarding the validity and enforceability of a premarital agreement signed by the parties. The Minnesota court determined that Butte County, South Dakota was the proper venue for that issue. Therefore, the wife started a declaratory judgment action in Butte County. A lengthy trial was held to interpret the premarital agreement as it related to the debts and assets of the parties, which decision was forwarded to the Minnesota divorce court.

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<sup>6</sup> Paragraph 5 of the court's Conclusions of Law cites *Kimball Inv. Land, Ltd. v. Chmela*, 2000 SD 6, 604 N.W.2d 289. (App 21-22). That was a case in which the party foreclosing on a mortgage was awarded attorney fees.

The Butte County court ruled in the wife’s favor regarding the premarital agreement. On appeal, the wife sought appellant attorney fees under SDCL 15-17-38.

The Court denied that request stating:

[T]he dissent contends that SDCL 15-17-38 allows for an award of fees because “this declaratory action is a necessary part of the parties’ divorce.” *Dissent* ¶ 42. But that statute does not say that fees are allowable in a separate civil action for declaratory relief so long as the civil case *relates* to a separate divorce case. Instead, a court may award attorney’s fees “in all *cases* of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony.” This appeal concerns none of the types of cases listed—it is an appeal from a civil action interpreting a contract as it relates to ownership of property.

*Id.* at ¶ 37. (emphasis in original).

Plains Commerce recognizes that both *First Federal Savings* and *Charlson* involved situations where there were two separate litigations. That is not the case here. Nevertheless, the nature of the proceedings were in essence two separate cases. The first involved an analysis of trust law and the terms of the Trust itself. The other would have been the mortgage foreclosure against the Trust had Plains Commerce’s motion for summary judgment been granted. Under these circumstances, it should be held that there was no authority for the trial court to award attorney fees to Intervenor under SDCL 15-17-38.

Even if there was such authority, the court failed to properly apply the statute. In both its Findings of Fact and Conclusions of Law, the court made note of the fact that Intervenor was the prevailing party. (App 20, ¶ 7; App 22, ¶ 9). Unlike SDCL 15-17-37, SDCL 15-17-38 says nothing about a prevailing party. SDCL 15-6-54(d) specifically discounts consideration of the prevailing party where attorney fees are concerned.

“Except as otherwise provided by statute, costs and disbursement, *other than attorneys’ fees*, shall be allowed as of course to the prevailing party unless the court otherwise directs.” *Id.* (emphasis added). Under SDCL 15-17-38, “[t]he court, if appropriate, in the interests of justice, may award payment of attorneys’ fees. . . .”

There is nothing in the court’s Findings of Fact and Conclusions of Law that mentions the interests of justice. (App 19-22). When it was suggested to the court during the hearing on Intervenor’s motion for attorney fees that the court should address the interests of justice argument, the court’s response was to equate the situation to a default judgment and appeared to reject the idea that the interests of justice needed to be considered. (CI 1337-39). The primary basis of the court’s ruling appears to be that Intervenor was the “successful party.” (CI 1345). The court also made the assumption that Jamie signed the Consent based on “horrible advice” from the family attorney. (CI 1344-45). Whether or not advice given by Mr. Smeins was horrible has nothing to do with whether attorney fees should have been awarded to Intervenor. Even if Mr. Smeins gave bad advice, it should not be held against the Bank.

There are numerous facts the court should have considered in addressing the interests of justice question. It may be somewhat understandable that was not done in light of the fact Judge Sommers only became involved in the case in connection with the attorney fees motion. He acknowledged a couple of times that he was not particularly familiar with what had previously transpired. (CI 1335-36, 1339).

Pertinent facts are thoroughly discussed in the prior sections of this Brief. These facts should have been considered by the court. An award of attorney fees under SDCL 15-17-38 is within the trial court’s discretion. *Kappenmann v. Kappenmann*, 523 N.W.2d

410, 414 (S.D. 1994). There is nothing in SDCL 15-17-38 which mentions that a prevailing party is necessarily entitled to an award of attorney fees. This is in contrast to SDCL 15-17-37 which provides that a prevailing party is generally entitled to recover certain costs.

Just because a party prevails in a case in which a statute allows for attorney fees, does not automatically entitle that party to an award of attorney fees. In *Center of Life Church v. Nelson*, 2018 SD 42, 913 N.W.2d 105, this Court dealt with a request for attorney fees under SDCL 43-4-42, which like SDCL 15-17-38, states that a court “may” award such fees. The plaintiff in *Center of Life Church* argued it was entitled to attorney fees because it was the prevailing party. The Supreme Court disagreed. “The Legislature’s use of the word ‘may’ makes fee awards discretionary under this statute.” *Id.* at ¶ 34. This is where consideration of the interests of justice should have come in.

As discussed above, the Bank consulted legal counsel who suggested that consent to the mortgage be obtained from the beneficiaries. Jamie and the other beneficiaries signed the Consent. Even if the Consent drafted by Mr. Smeins was insufficient to allow the transaction, and even if Matt is guilty of self-dealing, Plains Commerce did nothing wrong that should subject it to an award of attorney fees. Although Judge Myren eventually determined the mortgage was void, it cannot be argued that Jamie’s decision to sign the Consent did not play a part in the Bank’s decision to accept the mortgage. Under these circumstances, Intervenor should not be awarded for her failure to object to the mortgage until such time as Plains Commerce commenced this litigation. Presumably litigation regarding the validity of the Trust mortgage would not have been necessary if Jamie had refused to sign the Consent since no mortgage would have been given. These

facts and others set forth above should have been considered by the court in addressing the interests of justice factor. Based on the interests of justice, the request for attorney fees should have been denied.

A party seeking attorney fees has the burden of proving the basis and the reasonableness of the fees by a preponderance of the evidence. *American Legion Home Association Post 22 v. Pennington County*, 2018 SD 72, ¶ 41, 919 N.W.2d 346. A number of factors have been set forth to be considered in determining the reasonableness of attorney fees. See *Eagle Ridge Estate Home Owners Association, Inc. v. Anderson*, 2013 SD 21, ¶ 28, 827 N.W.2d 859. The court's Findings and Conclusions do not address several of these factors. The only thing Intervenor presented to the court to support the requested attorney fees was an Affidavit of Roy Wise which did not address all the factors set forth in the *Eagle Ridge* case. (CI 1183-84). Furthermore, Plains Commerce specifically objected to a number of the fees being claimed by Intervenor. (CI 1234-36). Other than agreeing to eliminate certain charges that were conceded by Intervenor's counsel, the court did not address Plains Commerce's specific objections. (CI 1247-48, 1346).

If the Court does not reverse the decision granting Intervenor's summary judgment and determines that Intervenor is entitled to an award of some attorney fees, it is requested that the matter be remanded to the trial court for a proper evaluation of the attorney fees issue taking into consideration the interests of justice requirement and the specific objections raised by Plains Commerce.

## **CONCLUSION**

Plaintiff Plains Commerce Bank respectfully requests that the Court reverse the trial court's decision granting summary judgment to Intervenor Jamie Moeckly and grant summary judgment to Plains Commerce. If the Court determines there are issues of fact precluding the entry of summary judgment in favor of Plains Commerce, it is requested that the matter be remanded to the circuit court for trial. Should the summary judgment in favor of Intervenor be affirmed, it is requested that the award of attorney fees be reversed or remanded.

Dated this 5th day of April, 2021.

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

/s/ Reed Rasmussen

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Attorneys for Plaintiff/Appellant



CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 9,487 words and 46,155 characters (not including spaces).

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

\_\_\_\_\_  
/s/ Reed Rasmussen

CERTIFICATE OF SERVICE

The undersigned, attorneys for Plaintiff/Appellant, hereby certifies that on the 5th day of April, 2021, a true and correct copy of the foregoing BRIEF OF APPELLANT PLAINS COMMERCE BANK was served by electronic transmission on the following:

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the B&B Farms Trust u/t/a November  
1, 1999*

and by first class mail on the following:

Mr. Matthew A. Beck, Individually  
and as former Trustee of the B&B  
Farms Trust u/t/a/ November 1, 1999  
10949 408th Avenue  
Hecla, SD 57446

Ms. Kelley R. Beck  
10949 408th Avenue  
Hecla, SD 57446

Brown County  
c/o Brown County Commission Chairman  
Brown County Courthouse  
25 Market Street  
Aberdeen, SD 57401

Marshall County  
c/o Marshall County Commission Chairman  
Marshall County Courthouse  
911 Vander Horck Street  
Britton, SD 57430

Deere & Company  
c/o CT Corporation Systems  
319 S. Coteau Street  
Pierre, SD 57501

Dated this 5th day of April, 2021.

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

/s/ Reed Rasmussen

## APPENDIX

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STATE OF SOUTH DAKOTA  
COUNTY OF BROWN

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

Defendants.

06CIV18-000055

**ORDER GRANTING INTERVENOR  
JAMIE MOECKLY'S MOTION FOR  
SUMMARY JUDGMENT ON BEHALF  
OF B&B FARMS TRUST U/T/A  
NOVEMBER 1, 1999 AND  
JUDGMENT OF DISMISSAL**

This matter came on for hearing upon the parties' cross motions for summary judgment before the Honorable Scott P. Myren on **July 31, 2020**, in the courtroom of the Brown County Courthouse, Aberdeen, South Dakota. Plaintiff appeared through counsel, Reed Rasmussen. Intervenor Jamie Moeckly and Jamie Moeckly's counsel, Josh Wurgler, appeared pursuant to a prior order of this Court authorizing Jamie Moeckly to represent the interests of the B&B Farms Trust (u/t/a November 1, 1999) (the "Trust" below) in this action. The successor trustee, Dacotah Bank, appeared through its trust officer Cassie Backman and counsel, Tom Tonner. Matthew Beck appeared personally. Brown County, Marshall County, and Deere & Company have not appeared in the case.

Based upon the pleadings, affidavits, briefs, and presentations of counsel, and the written decision of the court, which is on file and is incorporated herein, the Court finds that there are no genuine issues of material fact and the Trust is entitled to summary judgment as a matter of law.

{04003078.1}1

Plains Commerce Bank v. Matthew Beck, *et al.*  
Brown County 06CLV18-000055  
Order Granting Intervenor Jamie Moeckly's Motion for  
Summary Judgment on Behalf of B&B Farms Trust u/t/a November 1, 1999,  
and Judgment of Dismissal

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Plaintiff's Motion for Summary Judgment is DENIED; it is further

**ORDERED, ADJUDGED, AND DECREED** that Intervenor Jamie Moeckly's Motion for Summary Judgment on Behalf of B&B Farms Trust u/t/a November 1, 1999, is GRANTED and that Plaintiff's claims against the trustee and the Trust are hereby dismissed on the merits and with prejudice, with Plaintiff recovering nothing; it is further

**ORDERED, ADJUDGED, AND DECREED** that the mortgage and guaranty (attached as Exhibits D and H to Plaintiff's Complaint in this case) entered into by Matthew Beck as trustee of the Trust were void and unenforceable from the moment they were signed, and that any right, claim, or interest claimed by Plaintiff in the Trust's property arising out of the mortgage and guaranty signed by Trustee Mathew Beck are likewise void and unenforceable from the moment they were signed; it is further

**ORDERED, ADJUDGED, AND DECREED** that unless Plaintiff files a timely notice of appeal, within 30 days of filing of notice of entry of this order Plaintiff shall perform those acts necessary to fully and completely release and discharge all property of the Trust from all lien, encumbrance, force, and effect of the mortgage and guaranty herein referenced; and it is further

**ORDERED, ADJUDGED, AND DECREED** that if Plaintiff files a timely notice of appeal of this order, this order will be automatically stayed without further order of the Court during the pendency of the appeal so long as Plaintiff: (i) delivers to the clerk of courts executed original documents that would release and discharge the Trust property from all lien, encumbrance, force, and effect of the mortgage and guaranty, pursuant to SDCL § 15-26A-29; and (ii) deposits funds with the clerk of courts pursuant to SDCL § 15-26A-41, or executes a supersedeas bond pursuant to SDCL § 15-26A-25, in an amount sufficient to cover the costs awarded below. The parties retain the right to move the court to lift or modify the stay; and it is further

**ORDERED, ADJUDGED, AND DECREED** that Plaintiff pay the statutory costs of Intervenor Moeckly in the amount of \$\_\_\_\_\_, such sum to be hereinafter inserted by the Clerk of this Court.

BY THE COURT:

Signed: 12/21/2020 6:41:59 PM



Hon. Scott P. Myren  
Circuit Court Judge

Attest:  
Schmidt, Beth  
Clerk/Deputy



# FILED

STATE OF SOUTH DAKOTA

DEC -7 2020

IN CIRCUIT COURT

COUNTY OF BROWN

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
5TH CIRCUIT CLERK OF COURT

FIFTH JUDICIAL CIRCUIT

By                       
PLAINS COMMERCE BANK, INC. a  
banking corporation,

Plaintiff,

v.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the B&B  
FARMS TRUST, u/t/a November 1, 1999;  
BROWN COUNTY, a governmental  
instrumentality of the State of South Dakota;  
MARSHALL COUNTY, a governmental  
instrumentality of the State of South Dakota;  
DEERE & COMPANY, a corporation;

Defendants,

and

JAMIE MOECKLY,

Intervenor.

**06CIV18-000055**  
**MEMORANDUM DECISION**

Plaintiff Plains Commerce Bank, Inc. (hereinafter Plains Commerce) sought recovery from Defendants Matthew A. Beck, Kelley R. Beck, Matthew A. Beck as Trustee of the B&B Farms Trust, Brown County, Marshall County, and Deere & Company through Plaintiff's Complaint filed on January 28, 2018. Claims involving all parties except B&B Farms Trust were resolved in prior motions hearings. Jamie Moeckly was authorized to intervene on behalf of B&B Farms Trust. Now, Plains Commerce seeks recovery from B&B Farms Trust, with Intervenor Jamie Moeckly representing the Trust.

Summary judgment is appropriate when there is no genuine issue of material fact. SDCL 15-6-56(c). A fact is material when it is one that would impact the outcome of the case “under the governing substantive law” applicable to a claim or defense at issue in the case. *Schwaiger v. Mitchell Radiology Associates, P.C.*, 2002 SD 97, ¶7, 652 NW2d 372, 376 (citing *South Dakota Cement Plant Comm’n*, 2002 SD 116, ¶9, 616 NW2d at 376 (quoting *Stoebner v. South Dakota Farm Bur. Mut. Ins. Co.*, 1999 SD 106, ¶6, 598 NW2d 557, 558)).

When deciding a Motion for Summary Judgment the Court must view the evidence in the light most favorable to the non-moving party. Summary judgment should be denied if the Court must engage in any weighing of evidence regarding any material facts.

The following facts are undisputed between the parties:

Gary and Betty Beck established the B&B Farms Trust on November 1, 1999 as an irrevocable trust. The Trust named Gary and Betty Beck as the primary beneficiaries. The Trust named their children—Brian Beck, Jamie Moeckly, and Matthew Beck—as the secondary beneficiaries. Matthew Beck was designated as Trustee for B&B Farms Trust. Gary and Betty Beck transferred real estate located in Brown County into the B&B Farms Trust. This land was the only asset in the Trust. Gary and Betty Beck wanted the Trust property to remain as an asset of the Trust during the lifetime of Gary Beck. Also, it was important for Gary and Betty Beck that the farm stay intact for the family.

The Trust is “irrevocable” for the natural lives of Gary J. Beck and Betty J. Beck. After the death of Gary and Betty, the Trust becomes revocable with the consent of a majority of the secondary beneficiaries. The Trust agreement provides that:

The trust may not be altered or amended by Grantors during the lifetime of Gary J. Beck and Betty J. Beck except upon unanimous consent of the primary and secondary beneficiaries except as to appointment of a successor trustee. After the

death of Gary J. Beck and Betty J. Beck the Trust may be altered or amended by a majority of the secondary beneficiaries.

Article IV of the Trust is entitled Administration and Distribution of the Trust. It provides that during the lives of Gary Beck and Betty Beck, the Trustee “shall collect, receive and receipt for and manage the principal and income of the Trust and after paying the proper charges and expenses of the trust estate, the trust shall hold and distribute the net income” to the primary beneficiaries. The Trust document then specifies: “Grantors acknowledge that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of the creation of the trust.”

The trust contains a spendthrift provision that reads:

Article VIII. PROTECTION OF TRUST FUND No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the trust estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

Article VI of the trust is titled “Trustee’s Powers as to Sale of Real Estate.” Section 6.2 provides: “The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of Gary J. Beck except upon the unanimous written consent of both the primary beneficiaries.” This Court notes that it is written in the negative, a fact that is relevant when it comes to interpreting the application of that provision.

The trust does not contain any provision authorizing the trustee to self-deal.

The following are undisputed facts of events that occurred years after the creation of the B&B Farms trust.

Matthew Beck had a personal debt of \$2.1 million. Betty Beck was unaware of this debt until her October 3, 2018 deposition. In 2015, Matthew Beck sought financing from Plains



Commerce to satisfy his personal debt. Counsel for Plains Commerce reviewed the B&B Farms Trust agreement. Plains Commerce agreed to lend money to Matthew Beck on the condition that the loan would be secured by a mortgage on the property of the B&B Farms Trust. Legal counsel for Plains Commerce suggested that Matthew Beck seek consent to mortgage the Trust property from the beneficiaries of the trust. Attorney Danny Smeins drafted "Consent to Mortgage of Trust Real Estate Owned by Trust" documents for the primary and secondary beneficiaries to sign.

Brian Beck reviewed the "Consent to Mortgage" with Danny Smeins. Brian understood that by signing the consent that he was allowing Matthew Beck to mortgage his third of the trust and that \$800,000 was Matthew Beck's one-third of the value of the Trust land. Brian also understood the mortgage on Trust land was for Matthew Beck personally and not for the Trust. Brian signed the consent in November of 2015. Brian did not see a copy of the Trust Agreement until after January 15, 2018.

Jamie Moeckly did not know the B&B Farms Trust existed until October 2015. Moeckly signed the consent thinking it was the best way to protect the Trust and her parents' interest, to patch things up with her parents, and to help Matthew Beck get "back on his feet." Moeckly never saw a copy of the Trust Agreement until after January 2018.

On November 25, 2015, Matthew Beck, as trustee for B&B Farms, executed a mortgage to Plains Commerce to secure loans to borrowers Matthew and Kelley Beck. The mortgage provided the land in the B&B Farm Trust as collateral for a \$1,855,000 loan to Matthew and Kelley Beck. Matthew and Kelley Beck defaulted on their loan, which resulted in Plains Commerce commencing this foreclosure action in January 2018.

## ANALYSIS

A document creating a trust specifies the term and purpose of the trust and sets forth the powers of the trustee and the limitations on the trustee. The court's task when interpreting a trust instrument is to "ensure that the intentions and wishes of the settlor are honored." *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 20, 813 N.W.2d 111, 117 (quoting *Luke v. Stevenson*, 2005 S.D. 51, ¶ 8, 696 N.W.2d 553). If the intention of the settlor is clear from the language of the trust instrument, the court must declare it and enforce it. *Id.* When interpreting a trust instrument, "all the words and provisions appearing in the trust must be given effect as far as possible, and none should be cast aside as meaningless." *Id.*

The terms of the B&B Farm Trust are not disputed. When reading the trust, these are things this Court notes to be of importance to the issues presented in these cross-motions for summary judgment.

1. It is an irrevocable trust.
2. It contains a spendthrift provision.
3. The trust document does not authorize the trustee to self-deal.
4. Under the terms of the trust document, Gary and Betty are to receive the net income from the trust estate during their lives.
5. The trust document recognizes that operation of the real estate in the trust may require the **Trust** to borrow money and authorizes the trustee to enter into a mortgage for that limited purpose: "to secure debts of the trust." This is a specific provision related to the power to mortgage the trust property. It also authorizes a mortgage for "debts secured by real estate at the time of the creation of the trust."

6. The trust document specified that the trust may not be altered or amended by the Grantors during the lifetime of Gary Beck and Betty Beck, except upon unanimous consent of the primary and secondary beneficiaries.
7. The trust document has an express provision related to the “Trustees Powers as to Sale of Real Estate.” It provides that the trustee may not “sell, option or dispose of any interest in the real estate during the lifetime of Gary Beck except upon the unanimous written consent of both primary beneficiaries.”

It is clear from these provisions, read together, that the Grantors of the trust, Gary and Betty, intended the assets of the trust to be made secure and to provide for them during their lives. They included a spendthrift provision to make sure that no individual beneficiary could threaten the security of the assets of the trust by their actions. The South Dakota Supreme Court has made it clear that the law of South Dakota pays great deference to such a provision. Similarly, the South Dakota legislature has enacted statutes evincing a clear public policy in favor of the protections contained in a spendthrift trust provision. SDCL § 55-1-35 provides that:

[a] declaration in a trust that the interest of a beneficiary shall be held subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of a beneficial interest by a beneficiary to the maximum extent provided by law. Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift trust.

SDCL § 55-1-41 further explains that: “[i]f the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level.” A spendthrift provision applies to both distribution interests and remainder interests and is a material provision of a trust. SDCL § 55-1-37. The South Dakota legislature “has placed

formidable barriers between creditor claims and trust funds protected by a spendthrift provision.” *Matter of Cleopatra Cameron Gift Tr.*, dated May 26, 1998, 2019 S.D. 35, ¶ 26, 931 N.W.2d 244, 251.

A spendthrift provision generally serves to protect trust assets from creditors of the beneficiaries. A spendthrift provision “disallows a beneficiary from assigning, or a creditor from reaching, the beneficiary’s beneficial interest in the trust.” Mark R. Krogstad & Matthew W. Van Heuvelen, *Domestic Asset Protection Trusts: Examining the Effectiveness of South Dakota Asset Protection Trust Statutes for Removing Assets from A Settlor's Gross Estate*, 61 S.D. L. Rev. 378, 381 (2016). “Traditionally settlors used spendthrift clauses to protect trust assets from the creditors of irresponsible beneficiaries.” *Id.* Therefore, in cases “where beneficiaries recklessly incurred debt that put the trust assets at risk, the spendthrift clause limited the trust’s exposure to the possible invasion of the trust by the creditors of the beneficiaries.” *Id.* The B&B Farms Trust Agreement likewise contains a spendthrift provision. Like all spendthrift provisions, this provision intends to protect the trust from creditors of a *beneficiary*. As a secondary beneficiary of B&B Farms Trust, the spendthrift provision protects the Trust against his Matthew Beck’s creditors. *See* SDCL § 55-1-37 (“A spendthrift provision applies to both distribution interests and remainder interests.”)

Plains Commerce acknowledges the spendthrift provision, but argues the provision itself allows Matthew Beck to mortgage the Trust property. Specifically, Plains Commerce points to the following language: “...no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder.” Plains Commerce

contends that the language “power of appointment or withdrawal expressly granted hereunder” activates Provisions 4.1 and 6.2 of the B&B Farms Trust agreement.

Provision 4.1 states the following:

Grantor acknowledges that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust.

Under that provision, the trustee may only mortgage the trust property for “debt of the estate” or “debt secured by the real estate at the time of the creation of the trust.” If the mortgage in question in this suit is not for “debt of the estate” or “debt secured by the real estate at the time of the creation of the trust” it did not fall within the trustee’s mortgage authority under Article IV of the trust. There is no legitimate factual dispute that the loan secured by Matthew was not debt which fell within either of those two categories. Accordingly, Provision 4.1 did not authorize Matthew Beck to mortgage the trust property in the circumstances evidenced by this case.

Provision 6.2 states the following:

The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of Gary J. Beck except upon the unanimous written consent of both the primary beneficiaries.

That provision is titled “Trustee’s powers as to sale of real estate.” When Matthew executed the mortgage at issue, he was not selling the land. He was mortgaging the land. The language of the provision is quite broad -- “sell, option or dispose of any interest.” By itself, such language would arguably authorize the trustee to “dispose of an interest” by mortgaging the property. However, in the presence of a specific provision expressly limiting the trustee’s authority to mortgage trust property, such an interpretation must fail. The specific provision limiting the Trustee’s ability to mortgage trust property cannot be made meaningless by a less specific provision that by its terms relates to sale of trust property. This is reinforced by the fact

that the real estate sale provision is written in a negative. The Trustee may not sell, option or dispose of real estate unless he gets the consent of the primary beneficiaries. If the court were to interpret it as proposed by Plains Commerce, it would mean that a written consent by the primary beneficiaries authorizing a single secondary beneficiary (who happens to be trustee) to mortgage trust property could render meaningless the limitation on power to mortgage expressly stated in Section IV and the express protections intended by the spendthrift provision. Under this interpretation, the corpus of the trust is subject to invasion by any individual beneficiary simply by securing consent from the primary beneficiaries. This is contrary to the concept of the irrevocable trust and eviscerates the spendthrift provision. Essentially, such an interpretation would mean that the spendthrift provision can be eliminated by the written consent of the primary beneficiaries. Such an interpretation is also in conflict with the provision which provides that the trust may not be altered or amended by the grantors during the lifetime of Gary and Betty “except upon unanimous consent of the primary and secondary beneficiaries.” Interpreting the “sale of real estate” provision as proposed by Plains Commerce renders three express provisions of the trust document meaningless – it removes the express limitation on the trustee’s authority to mortgage trust property, it destroys the spendthrift trust provision, and it eliminates the provision that requires consent of all beneficiaries to amend the terms of the trust during the lives of the primary beneficiaries.

Plains Commerce contends that the consents signed in November of 2015 constitute such “unanimous written consent of both the primary beneficiaries.” However, Provision 6.2 cannot be read in a vacuum. Its scope must be assessed considering all other provisions of the trust, including the spendthrift provision. The B&B Farms trust spendthrift provision specifies that: “no beneficiary shall have any power to transfer, encumber or in any manner, other than by

power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder . . . .” Read together, those provisions do not authorize Matthew Beck to mortgage the trust property for his own personal benefit. With the unanimous written consent of both primary beneficiaries, under Provision 6.2, a Trustee could sell, option or dispose of an interest in the real estate during the lifetime of Gary Beck.

However, the possible scope of that potential authority is still limited by the spendthrift provision. Nothing in the trust agreement, including Provision 6.2 “expressly grants” a Trustee (who is also a beneficiary) the authority to mortgage trust property for his own personal benefit. “In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary...” SDCL § 55-2-1. A trustee’s “first duty as a fiduciary is to act wholly for the benefit of the trust.” *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d 818, 820. Also, a “trustee is bound to act in the highest good faith toward [the] beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.” *Id.* (quoting SDCL § 55-2-1). A trustee, as a fiduciary, “must act with utmost good faith and avoid any act of self-dealing that places h[is] personal interest in conflict with h[is] obligations to the beneficiaries.” *Id.* (quoting *American State Bank v. Adkins*, 458 N.W.2d 807, 811 (S.D.1990) The trustee also may not “use or deal with the trust property for his own profit or for any other purpose unconnected with the trust.” *Id.* (quoting SDCL § 55-2-2). The trustee “violates the duty of loyalty...when the trustee uses trust property for the trustee’s own financial or other purposes.” *Id.* (quoting *Restatement (Third) of Trusts* § 170 (1992), cmt. 1).

South Dakota law generally does not allow self-dealing actions. However, there are exceptions to this general rule. Self-dealing activities may be authorized when trust provisions

provide “clear and unmistakable language” allowing self-dealing. *Stevenson*, 2000 S.D. 24, ¶ 15, 605 N.W.2d at 822. While B&B Farms Trust agreement contains provisions allowing a Trustee to mortgage trust property in Provision 4.1 or “option or dispose of any interest in the real estate” in Provision 6.2, neither of these provisions *clearly and unmistakably* allow Matthew Beck to self-deal for his own benefit. They are merely general trustee powers to deal with trust property for the sake of the trust. If no such clear language for self-dealing exists, a trustee’s powers “must always be used *for the trust* and its beneficiaries, not for the trustee.” *Id.* Trustee Matthew Beck used this provision to secure a loan benefitting himself and Kelley Beck, not for the benefit of the Trust and its beneficiaries.

South Dakota law also provides an exception in SDCL § 55-2-3(1), which allows a trustee to engage in a transaction that may otherwise be considered self-dealing. When “the beneficiary has the capacity to contract and, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits the trustee to do so.” *Id.* (quoting SDCL § 55-2-3(1)). “[A]ll transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence.” *Stevenson*, 2000 S.D. 24, ¶ 19, 605 N.W.2d at 823 (quoting SDCL § 55-2-8).

The record shows that Plaintiff cannot overcome the presumption set forth under SDCL § 55-2-8 nor can he satisfy the stringent requirements in SDCL § 55-2-3(1). A beneficiary must have “full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision...” SDCL § 55-2-3(1). Matthew Beck sought



financing to manage his substantial personal debt of \$2.1 million. It is undisputed that beneficiary Betty Beck did not know such debt existed until her October 3, 2018 deposition. While Secondary Beneficiary Brian Beck understood the mortgage on Trust land was for Matthew Beck personally, it is undisputed that Brian did not see a copy of the Trust Agreement until after January 15, 2018. It is undisputed that Secondary Beneficiary Moeckly did not know the B&B Farms Trust existed until October 2015. It is undisputed that Moeckly never saw a copy of the Trust Agreement until after January 2018. Moeckly signed the consent thinking it was the best way to protect the Trust and her parent's interest, to patch things up with her parents, and by helping Matthew Beck get "back on his feet." *Id.* at ¶ 42-3. Clearly, based on those undisputed factual matters alone, this court must conclude that the beneficiaries of the Trust did not have "full knowledge of the facts concerning the transaction," and together with the presumption in SDCL § 55-2-8, cannot be said to have validly consented to Matthew Beck mortgaging the Trust assets. Those undisputed facts alone make it impossible for Matthew Beck to overcome the presumption in SDCL 55-2-8.

It is argued that the "consents" constitute an amendment of the trust. Whatever they are, they are clearly not an amendment of the trust document. A consent of that type would expressly list the intended amendment to the trust. These do not. Rather, they purport to be consents by the beneficiaries, to authorize the trustee to do two things he is not authorized to do by the trust agreement. First, self-dealing. Second, mortgaging trust property for debt that is not trust debt.

If all the beneficiaries had agreed, they could have amended the trust agreement to remove the spendthrift trust provision, they could have expanded the trustee's mortgage authority, and they could have authorized the trustee to self-deal. They did not do so. Instead, they purportedly consented to allow the trustee to do all those things in violation of the trust

document. There are factual disputes about whether the “consents” of Betty and Jamie were voluntarily, knowingly, and intelligently given. This court concludes that even if they were, they did not constitute an amendment of the trust document.

This court concludes that even if consent were voluntarily, knowingly, and intelligently given, the beneficiaries, (absent an amendment to the trust agreement) could not consent to the trustee entering into a mortgage which exceeded his authority under the trust agreement.


It is undisputed that prior to the execution of the mortgage in question, Plains Commerce had a copy of the actual Trust Agreement for the B&B Farms Trust. By the terms of that trust agreement, “no person dealing with any Trustee purporting to act hereunder need inquire into the authority of Such Trustee to act, but any such person may rely upon the statement of such Trustee.” Plains Commerce contends that it was entitled to rely on a Certificate of Trust provided to it by Matthew Beck. Such reliance might be allowed in the absence of knowledge that the trust agreement did not grant the authority purported to exist in that certificate. Plains Commerce had a copy of the Trust agreement and accordingly may not rely on the certificate of trust which inaccurately stated the trustee’s power to mortgage the trust property. Accordingly, they were not entitled to rely on the Certificate of Trust. It is undisputed that Plains Commerce knew the actual terms of the trust agreement. It is apparent that Plains Commerce recognized that trust agreement did not expressly authorize the Trustee to mortgage trust property to secure his own personal debt. This explains their efforts to create such authority through the execution of the purported consents. As explained above, the mortgage executed by Matthew Beck, as trustee of the B&B Trust, exceeded his authority as trustee and is consequently void as to the trust.

### CONCLUSION

Moekley's Motion for Summary Judgment is granted. Plains Commerce's Motion for Summary Judgment is denied.

Dated this 4<sup>th</sup> day of December, 2020.

BY THE COURT:



Scott Myren  
Circuit Judge

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November 1,  
1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental instrumentality  
of the State of South Dakota; DEERE &  
COMPANY, a corporation;

Defendants.

06CIV18-000055

**ORDER ON INTERVENOR  
MOECKLY'S MOTION FOR  
ATTORNEY'S FEES**

This matter came on for hearing upon Intervenor Moeckly's Motion for Attorney's Fees before the Honorable Richard Sommers on February 4, 2021, in the courtroom of the Brown County Courthouse, Aberdeen, South Dakota. Plaintiff appeared through counsel, Reed Rasmussen. Intervenor Jamie Moeckly appeared through counsel, Josh Wurgler. No other appearances were made. Based upon the pleadings, affidavits, briefs, and presentations of counsel, and the findings of fact and conclusions of law entered by the court, it is hereby

**ORDERED, ADJUDGED AND DECREED** that Intervenor Moeckly's Motion for Attorney's Fees is GRANTED in the amount of \$33,364.85; it is further

**ORDERED, ADJUDGED AND DECREED** that, because of the pending appeal on this court's summary judgment in favor of Intervenor Moeckly and the appeal's potential impact on this Order, Plains Commerce Bank may pay the attorney's fees to Intervenor Moeckly or deposit the fees or bond for the amount of the fees with the court. Plains Commerce Bank shall pay Moeckly or deposit the fees or bond with the court within thirty days of notice of entry of this order. Upon Plains Commerce Bank taking any of those actions, this order is automatically stayed pending the South Dakota Supreme Court's decision on the summary judgment appeal, and if a timely appeal of this order is filed, this order is automatically stayed pending the Court's decision on both appeals.

BY THE COURT:

Attest:  
Young, Rebecca  
Clerk/Deputy



Signed: 2/16/2021 4:03:10 PM

A handwritten signature in black ink, appearing to read "Richard A. Sommers", written over a horizontal line.

The Honorable Richard A. Sommers

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

Defendants.

06CIV18-000055

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This matter came on for hearing upon Intervenor Moeckly's Motion for Attorney's Fees before the Honorable Richard Sommers on February 4, 2021, in the courtroom of the Brown County Courthouse, Aberdeen, South Dakota. Plaintiff appeared through counsel, Reed Rasmussen. Intervenor Jamie Moeckly appeared through counsel, Josh Wurgler. No other appearances were made. Based upon the pleadings, affidavits, briefs, and having heard the parties' arguments, this court issued its bench decision at the hearing and now enters these Findings of Fact and Conclusions of Law regarding the same.

**FINDINGS OF FACT**

1. This action is a mortgage foreclosure action brought by Plaintiff against the Trust.

2. The former trustee of the Trust had granted a mortgage over Trust property to Plaintiff to secure a loan from Plaintiff to Matt and Kelley Beck individually.

3. The Becks defaulted, and Plaintiff commenced this mortgage foreclosure action.

4. Jamie Moeckly intervened in this action on behalf of the Trust to protect the interests of the Trust and beneficiaries, and she filed an Amended Answer raising the defense that the mortgage over Trust real estate is not valid.

5. This court entered its memorandum decision on December 4, 2020, granting Intervenor Moeckly's motion for summary judgment and denying Plaintiff's motion for summary judgment.

6. This court subsequently entered its Order and Judgment of Dismissal on December 22, 2020, dismissing Plaintiff's claims against the trustee and the Trust.

7. Intervenor Moeckly is the prevailing party with regard to Plaintiff's mortgage foreclosure action against the Trust.

8. Intervenor Moeckly has incurred attorney's fees in the amount of \$33,364.85 in her efforts to defend the Trust against Plaintiff's mortgage foreclosure action, and Moeckly moved this court to award her attorney's fees under SDCL 15-17-38.

9. Attorney Roy Wise, an experienced local attorney and litigator, has filed his affidavit regarding the reasonableness of the hourly rates of counsel for Intervenor Moeckly, which this court incorporates by this reference and accepts. Plaintiff did not contest the reasonableness of the rates for Intervenor Moeckly's attorneys. Consequently, the court finds that their respective hourly rates are reasonable for attorneys of similar qualifications and experience in this area.

10. Attorney Wise also testified via his affidavit that the time and efforts of counsel in this case are reasonable, and the court agrees and so finds. This court has reviewed the Affidavit of Josh Wurgler and its attached itemization of fees. This court finds those fees to be reasonable given the nature of the case and the amount and type of work involved, which included defending against two motions for summary judgment, filing a motion for summary judgment for Intervenor Moeckly, written discovery, depositions, and various other matters as outlined in the affidavit. However, Attorney Wurgler withdrew the request for \$356.50 of the fees. That includes fees for \$190.00 on 1/9/19 and fees for \$166.50 on 11/7/2018. Consequently, Intervenor Moeckly seeks fees for \$31,328.50 plus sales tax at 6.5%, which is \$2,036.35, for a total fee award of \$33,364.85.

11. Any Finding of Fact found to be a Conclusion of Law shall be treated as if set forth under the appropriate heading.

## CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter and the parties.

2. Attorney's fees may be taxed as disbursements in a mortgage foreclosure case pursuant to SDCL 15-17-38, which provides:

The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. *However, attorneys' fees may be taxed as disbursements if allowed by specific statute.* The court, if appropriate, in the interests of justice, may award payment of attorneys' fees in all cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony. The court may award the fees before or after judgment or order. The court may award attorneys' fees from trusts administered through the court as well as in probate and guardianship proceedings. *Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement.*

(Emphasis added.)

3. With attorney's fees, South Dakota generally follows the American Rule, which is that each side bears its own attorney's fees. *See, e.g., Berggren v. Schonebaum*, 2017 S.D. 89, ¶ 9, 905 N.W.2d 563, 565 ("For purposes of awarding attorney fees, South Dakota subscribes to the 'American Rule.'"). However, an exception to the rule permits attorney's fees when authorized by statute. *Id.* ("[A]ttorney's fees may be charged against a party if authorized by statute.").

4. To determine whether a statute permits recovery of attorney's fees from an opposing party, the South Dakota Supreme Court "has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Id.* (Citation omitted.)

5. The language of SDCL 15-17-38 contains a clear grant of power unequivocally authorizing attorney's fees in mortgage foreclosure actions, which the South Dakota Supreme Court confirmed in *Kimball Inv. Land, Ltd. v. Chmela*:

The last sentence of SDCL 15-17-38 provides: "[a]ttorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement." This is specific statutory authorization for an award of attorneys' fees in mortgage foreclosures and provides the authorization for the circuit court's award of attorney's fees to Kimball.



*Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 24, 604 N.W.2d 289, 296.

6. The court concludes that the case brought by Plains Commerce Bank against the Trust is a mortgage foreclosure action.

7. Intervenor Moeckly's defense of the Trust resulted in this court's ruling that the mortgage cannot be foreclosed because it is invalid.

8. The end result of Intervenor Moeckly's defense is the dismissal of Plains Commerce Bank's mortgage foreclosure action.

9. The court concludes that Intervenor Moeckly is therefore the prevailing party over Plains Commerce Bank in the mortgage foreclosure action.

10. Because it is a mortgage foreclosure action, attorney's fees are available to Intervenor Moeckly under SDCL 15-17-38.

11. In *Brooks v. Milbank Ins. Co.*, the South Dakota Supreme Court required an itemization of attorney's fees so the trial court can assess whether the time spent on the matter was reasonable as well as whether the hourly rate was reasonable. *Brooks v. Milbank Ins. Co.*, 2000 S.D. 16, ¶ 21, 605 N.W.2d 173, 179 (holding that the trial court must review itemized attorney's fee statements for reasonableness).

12. This court concludes that Intervenor Moeckly has properly submitted information relevant to her attorneys' hourly rates and the work they performed on her behalf.

13. This court concludes that the hourly rates are reasonable and that the work performed was reasonable given the history and nature of the case.

14. The court awards Intervenor Moeckly's revised requested attorney's fees in the amount of \$33,364.85.

15. Any Conclusion of Law found to be a Finding of Fact shall be treated as if set forth under the appropriate heading.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Attest:  
Young, Rebecca  
Clerk/Deputy



Signed: 2/16/2021 4:02:54 PM

The Honorable Richard Sommers

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

PLAINS COMMERCE BANK, \*

06CIV18-000055

Plaintiff, \*

vs. \*

MATTHEW A. BECK, a married person; \*

KELLEY R. BECK, a married person; \*

MATTHEW A. BECK, Trustee of the B&B \*

FARMS TRUST, u/t/a November 1, 1999; \*

BROWN COUNTY, a governmental \*

instrumentality of the State of South \*

Dakota; MARSHALL COUNTY, a \*

governmental instrumentality of the State of \*

South Dakota; DEERE & COMPANY, a \*

corporation, \*

Defendants, \*

and \*

JAMIE MOECKLY, \*

Intervenor. \*

\* \* \* \* \*

PLAINTIFF'S STATEMENT OF  
UNDISPUTED MATERIAL FACTS

Plaintiff Plains Commerce Bank hereby submits this Statement of Undisputed Material Facts pursuant to SDCL 15-6-56(c)(1). All deposition testimony and other materials referenced herein, with the exception of filed pleadings, are attached to the Affidavit of Reed Rasmussen in Support of Plaintiff Plains Commerce Bank's Motion for Summary Judgment. Prior to the commencement of this litigation, depositions were taken *In the Matter of the Revocable Trust of Gary J. Beck and Betty Beck*, 06TRU18-000002. Depositions from both that case and the case at issue will be cited. Jamie Moeckly was deposed in both cases. Her deposition in the Trust litigation will be referred to as Moeckly I followed by the page number. Her deposition in this case will be referred to as Moeckly II followed by the page number. Depositions of Matthew, Betty, Brian, and Kelley Beck were all taken in the Trust litigation. Their depositions will be referenced by their last name, along with the first letter of their first name. Brian's first name will be referenced as Br.

1. On November 1, 1999, Gary J. Beck and Betty Beck executed a trust agreement which named themselves as Grantors and their son, Matthew Beck, as Trustee, for the trust which was named the B&B Farms Trust. (EX A).

2. The real estate owned by Gary and Betty Beck, located in Brown County, was transferred to the B&B Farms Trust. (Moeckly II 18; EX 1, pp PCB 246-47).

3. The farmland was the only asset in the B&B Trust. (Moeckly II 18).

4. After graduating from college, Matthew came back to help run the family farm and help with the farm's debt. (Moeckly II 27-28, M. Beck 11-13; B. Beck 70-71; Br. Beck 27, 29).

5. The purpose for the Trust was to protect the farmland from being used to settle debts related to nursing home bills and to keep the farm in the family. (B. Beck 17; Moeckly 49, K. Beck 14).

6. Gary and Betty Beck were the primary beneficiaries of the Trust with their children, Brian Beck, Jamie Moeckly, and Matthew Beck, designated as secondary beneficiaries. (Moeckly II 25-26; EX A, ¶¶ 2.1 and 2.2).

7. The Trust allows for its real estate assets to be mortgaged to secure debts of the Trust. (EX A, ¶ 4.1).

8. Upon the death of the Grantors, the assets of the Trust are to be divided equally between the secondary beneficiaries or their issue subject to Matthew's option to purchase all or some of the Trust's real estate. (EX A, ¶ 4.3, and Article VII).

9. Paragraph 5.8 of the Trust provides that the Trustee has the following authority:

To execute and deliver necessary instruments pursuant to the provisions of SDCL 55-1A-35 and acts amendatory thereto with the additional power that no party to any such instrument in writing signed by the Trustee should be obligated to inquire into its validity or be bound to see to the application by the Trustee of any money or other property paid or delivered to him by such party pursuant to the terms of any such instruments.

10. It was the desire of the Grantors that the Trust property remain as an asset of the Trust during the lifetime of Gary Beck. (EX A, ¶ 6.1).

11. Gary Beck died in September 2019. (Moeckly II 18-19).

12. The Trustee was authorized to sell, option, or dispose of any interest in the real estate of the Trust during the lifetime of Gary Beck with the unanimous consent of the primary beneficiaries. (EX A, ¶ 6.2).

13. In September 2015, the primary and secondary beneficiaries were asked to sign a document consenting to Matthew's purchase of Trust land. Jamie refused to sign. (Moeckly II 10, 20-21, 70).

14. In November 2015, Jamie along with the other beneficiaries agreed to sign a document entitled "Consent to Mortgage of Real Estate Owned by Trust." (EX G, pp. PCB 135-36; EX G, pp. PCB 137-38; EX H; EX I).

15. Gary and Betty confirmed their approval of the execution of the mortgage in an "Agreement dated January 29, 2018." (EX J, ¶ 3).

16. The Consent to Mortgage signed by Jamie Moeckly acknowledged that she understood the Trustee had the authority or discretion to mortgage or encumber the Trust property, and that the proposed mortgage to Plains Commerce Bank benefited the Trustee and not all the Trust beneficiaries. (EX H).

17. Jamie signed the Consent to Mortgage in an effort to protect the Trust and her parent's interest in the Trust as well as to hopefully repair her relationship with her parents. (Moeckly II 30-31).

18. The Consent to Mortgage was limited to mortgages not to exceed \$800,000. (EX H).

19. Jamie and Brian understood the \$800,000 limit represented approximately one-third of the value of the Trust land, which would equal Matthew's share of the Trust's assets upon the deaths of Gary and Betty. (Moeckly I 12; Moeckly II 57; Br. Beck 28-29).

20. The Trust property was appraised at a value of \$3,659,000, as of July 28, 2015. (EX L).

21. On November 25, 2015, Matthew signed an \$800,000 mortgage in his capacity as Trustee of B&B Farms Trust in favor of Plains Commerce Bank. (EX M).

22. The mortgage provided the Trust land as collateral for a \$1,855,000 loan to Matthew and Kelley Beck. (EX M).

23. Matthew and Kelley defaulted on their loan which resulted in the Bank commencing this foreclosure action in January 2018. (Complaint).

24. On June 1, 2018, Intervenor filed a Motion to Intervene in this case on behalf of B&B Farms Trust.

25. Intervenor's Motion to Intervene was granted on September 4, 2018, which resulted in her being substituted for Matthew as Trustee of the B&B Farms Trust.

26. Dacotah Bank was named as a Successor Trustee in November 2018. (Moeckly II 16).

27. Jamie filed an Amended Answer on behalf of B&B Farms Trust alleging that Matthew did not have the authority to encumber the Trust's estate. (Amended Answer, ¶ 4).

28. Alternatively, Jamie alleged that the mortgages, security agreements, and encumbrances are unenforceable as to any obligation above an aggregate amount of \$800,000. (Amended Answer, ¶ 5).

29. Alternatively, Jamie alleged Matthew and Kelley's personal property and real estate should be foreclosed upon before any foreclosure of Trust assets. (Amended Answer, ¶ 6).

30. Matthew and Kelley's personal property and real estate have been foreclosed upon. (Moeckly II 54; Order Granting Partial Summary Judgment dated September 4, 2018).

31. Jamie is not pursuing this matter because she thinks she is entitled to anything. She only wants to preserve the land her father received from his grandfather. (Moeckly I 24; Moeckly II 67-68).

Dated this 9th day of July, 2020.

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

/s/ Reed Rasmussen

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Attorneys for Plaintiff

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

Defendants.

06CIV18-000055

**INTERVENOR MOECKLY'S  
RESPONSE TO PLAINTIFF'S  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS**

Intervenor Moeckly, for her response to Plaintiff's Statement of Undisputed

Material Facts, states:

1. On November 1, 1999, Gary J. Beck and Betty Beck executed a trust agreement which named themselves as Grantors and their son, Matthew Beck, as Trustee, for the trust which was named the B&B Farms Trust. (EX A).

**RESPONSE:** No dispute.

2. The real estate owned by Gary and Betty Beck, located in Brown County, was transferred to the B&B Farms Trust. (Moeckly II 18; EX 1, pp PCB 246-47).

**RESPONSE:** No dispute.

3. The farmland was the only asset in the B&B Trust. (Moeckly II 18).

**RESPONSE:** No dispute.

4. After graduating from college, Matthew came back to help run the family farm and help with the farm's debt. (Moeckly II 27-28, M. Beck 11-13; B. Beck 70-71; Br. Beck 27, 29).

**RESPONSE:** Dispute. At the time he became trustee and assumed fiduciary responsibilities to manage the trust farmland strictly for the benefit of the beneficiaries, Matt also purchased 560 acres from his parents that he farmed. (See Rasmussen Aff., Ex. C, M. Beck Depo 12:23 – 13:11.) “[H]elp with the farm’s debt” is too vague to serve as a material fact. If it means that trustee Matt Beck had a fiduciary duty to manage the land in trust with diligence and in good faith, then no dispute. If it means that Matt Beck personally assumed debt related to the farmland that had been put in trust, it is disputed. There is no evidence that Matt Beck assumed or took upon himself any of the farm’s debt.

5. The purpose for the Trust was to protect the farmland from being used to settle debts related to nursing home bills and to keep the farm in the family. (B. Beck 17; Moeckly 49, K. Beck 14).

**RESPONSE:** That is part of the story: Gary and Betty also placed the land in trust to prevent banks from getting at the land. (Betty Depo 17:10-14.) Attorney Danny R. Smeins represented Gary and Betty. (Affidavit of Danny R. Smeins.) Gary and Betty had resolved to do what they could to protect their interests in their farmland and preserve an opportunity for their son, Matt Beck, to farm, while they retained the income from the farm. (Affidavit of Danny R. Smeins.)

At that time, Matt had could home and was going to start farming with them on land that Gary and Betty had sold to him. (Affidavit of Danny R. Smeins.) Attorney Smeins was concerned that the trust would get entangled in Matt Beck’s own farming operation and, as parents, they would want to help him out. (Affidavit of Danny R. Smeins.) We put the trust together as an attempt to head off a number of financial problems and preserve the farmland as an asset for the family, rather than being used to pay for future nursing home care. (Affidavit of Danny R. Smeins.)

The spendthrift clause of the trust was important as Gary and Betty did not want the farmland being liable for anyone’s debts, not Gary’s, not Betty’s, not any of the kids’. They also needed the income for their own needs. (Affidavit of Danny R. Smeins.)

The spendthrift clause was specifically designed to keep the land held in trust from being encumbered for anyone’s debts. It was put in place to protect Gary and Betty from Matt getting into financial trouble with the farm, and to provide steady

income for Gary and Betty as they got to retirement age without the worry that the farm could be lost to creditors. (Affidavit of Danny R. Smeins.)

6. Gary and Betty Beck were the primary beneficiaries of the Trust with their children, Brian Beck, Jamie Moeckly, and Matthew Beck, designated as secondary beneficiaries. (Moeckly II 25-26; EX A, ¶¶ 2.1 and 2.2).

**RESPONSE:** No dispute.

7. The Trust allows for its real estate assets to be mortgaged to secure debts of the Trust. (EX A, ¶ 4.1).

**RESPONSE:** Dispute. The Trust provision the Bank refers to here (Article 4.1) only gave the trustee permission to mortgage for a limited time period, namely, "at the time of creation of the Trust," which was 1999. Trustee Matt Beck did not enter into the Plains Commerce Bank mortgage until 2015. (See Complaint, Exhibit D.) Also, the debt at issue in this case is not a "debt of the Trust," which is required by Article 4.1. Rather, the debt belongs to Matt and Kelley Beck alone. (See Complaint, ¶¶ 3-4 and Exhibits A and B.)

Further, Article VIII, entitled "Protection of Trust Fund," is a spendthrift provision that specifically divested both trustee and beneficiaries of the power to use the Trust Estate to secure personal debts. That provision is as follows:

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

(Ex. A, Article VIII.) It is undisputed that the spendthrift provision has not been revoked or modified in any manner and remains an enforceable part of the Trust Agreement.

8. Upon the death of the Grantors, the assets of the Trust are to be divided equally between the secondary beneficiaries or their issue subject to Matthew's option to purchase all or some of the Trust's real estate. (EX A, ¶ 4.3, and Article VII).

**RESPONSE:** No dispute.



9. Paragraph 5.8 of the Trust provides that the Trustee has the following authority:

To execute and deliver necessary instruments pursuant to the provisions of SDCL 55-1A-35 and acts amendatory thereto with the additional power that no party to any such instrument in writing signed by the Trustee should be obligated to inquire into its validity or be bound to see to the application by the Trustee of any money or other property paid or delivered to him by such party pursuant to the terms of any such instruments.

**RESPONSE:** No dispute that Article 5.8 is so worded. Dispute that this gave trustee Matt Beck authority to violate the spendthrift clause or to violate his fiduciary duties by self-dealing. When a loan involves a trust, Plains Commerce Bank asks for a copy of the trust agreement, which it then turns over to the bank's counsel for review. (Wurgler Aff.<sup>1</sup>, Ex. D, Vilhauer Depo 29:17 — 30:12.) Lance Vilhauer reviews the trust documents to see whether there are restrictions or limits on whether the trust assets can be used for collateral. (Wurgler Aff., Ex. D, Vilhauer Depo 31:7-10.) Lance Vilhauer knew that the trust agreement must give the trustee the ability to use the trust assets for lending purposes. (Wurgler Aff., Ex. D, Vilhauer Depo 31:11-14.) When a trust seeks a loan, Plains Commerce Bank is aware that you need to know who the trustee is and what is spelled out in the trust. (Wurgler Aff., Ex. D, Vilhauer Depo 30:13-16.) Matt Beck sent a copy of the B&B Farms Trust Agreement to Lance Vilhauer. (Wurgler Aff., Ex. E, Matt Depo 54:11-12.) Lance Vilhauer reviewed the B&B Farms Trust agreement. (Wurgler Aff., Ex. D, Vilhauer Depo 33:1-3.) It was a "red flag" to Lance Vilhauer that Matthew was trying to self-deal under the trust. (Wurgler Aff., Ex. D, Vilhauer Depo 33:4-18.) Lance Vilhauer knew Matt could not self-deal under the trust agreement. (Wurgler Aff., Ex. D, Vilhauer Depo 33:4-18.)

10. It was the desire of the Grantors that the Trust property remain as an asset of the Trust during the lifetime of Gary Beck. (EX A, ¶ 6.1 ).

**RESPONSE:** No dispute that was one of several desires of the Grantors.

11. Gary Beck died in September 2019. (Moeckly II 18-19).

**RESPONSE:** No dispute.

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<sup>1</sup> "Wurgler Aff." refers to *Affidavit of Josh Wurgler Supporting Intervenor Moeckly's Motion for Partial Summary Judgment*.

12. The Trustee was authorized to sell, option, or dispose of any interest in the real estate of the Trust during the lifetime of Gary Beck with the unanimous consent of the primary beneficiaries. (EX A, ¶ 6.2).

**RESPONSE:** Dispute. Article 6.2 specifically states as follows:

The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of GARY J. BECK except upon the unanimous written consent of both the primary beneficiaries.

The way the Bank rephrases the Article – turning it from a negative to a positive phrase – misses the nuance and emphasis of the grantors.

13. In September 2015, the primary and secondary beneficiaries were asked to sign a document consenting to Matthew's purchase of Trust land. Jamie refused to sign. (Moeckly II 10, 20-21, 70).

**RESPONSE:** No dispute.

14. In November 2015, Jamie along with the other beneficiaries agreed to sign a document entitled "Consent to Mortgage of Real Estate Owned by Trust." (EX G, pp. PCB 135-36; EX G, pp. PCB 137-38; EX H; EX I).

**RESPONSE:** No dispute Jamie and other beneficiaries signed the document. Dispute that Betty and Brian's consent was valid. Dispute that Jamie's consent was valid.

Beginning with Betty, it was not until a year or year and a half prior to her deposition (held October 3, 2018) that Betty had any knowledge that Matt had debt problems. (Wurgler Aff., Ex. B, Betty Depo 41:5-8.) Betty would have wanted to know if Matt was having debt problems while he was trustee over the property. (Wurgler Aff., Ex. B, Betty Depo 41:9-12.) Betty did not know until her October 3, 2018, deposition that Matt had a debt of approximately \$2.1 million. (Wurgler Aff., Ex. B, Betty Depo 45:2-5.) Matt's personal debt of about \$2.1 million is something Betty probably would have wanted to know about. (Wurgler Aff., Ex. B, Betty Depo 47:5-8.)

Brian understood that by signing the "Consent to Mortgage" document, he was allowing Matt to mortgage his third of the trust. (Wurgler Aff., Ex. G, Brian Depo 11:13-14; 15:21-23.) But Brian did not see the spendthrift clause in the Trust Agreement until after January 15, 2018, when he first saw the Trust Agreement. (Wurgler Aff., Ex. G, Brian Depo 11:4-7.)

Betty told Jamie that if Jamie did not sign the consent to sale papers, she could not be a part of Betty's life any longer. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 20:8-18.) After that, Jamie had an office conference with Danny in which he told her Matt had about \$500,000 of debt and he wanted a loan with the bank. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 10:12-14.) Gary told Jamie she was probably going to hell if she did not do as he asked. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 23:4-15.) Jamie thought that if she signed the consent to mortgage, she would be protecting the Trust and her parents by helping Matt get back on his feet. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 31:24 – 32:5.) Jamie did not think the consent to mortgage allowed interest, charges, penalties, etc. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 35:18-21; 47:7 – 48:3.) When she was asked to sign the consent to mortgage, Jamie never saw or had an opportunity to review the mortgage or the guaranty. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 68:9-25.) At the time she signed the consent to mortgage, Jamie had not seen a copy of the Trust Agreement, nor did she know any of the terms of the Trust Agreement. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 69:1-6.) Jamie had tried to get a copy of the Trust Agreement from Danny Smeins by email and by phone, but she never received one. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 69:7-18.) Jamie never saw a copy of the Trust Agreement until after January 2018. (Wurgler Aff., Ex. H, Moeckly Depo (2nd) 17:11-18.)

15. Gary and Betty confirmed their approval of the execution of the mortgage in an "Agreement dated January 29, 2018." (EX J, ¶ 3).

**RESPONSE:** Dispute. Gary did not sign the document. Betty signed his name purportedly under a power of attorney. (See Ex. J, signature page.) Further, the "Agreement dated January 29, 2018" was drafted by attorney Gordon Nielsen. (Second Wurgler Aff., Ex. J, Hearing Transcript 38:12-18.) In part, Mr. Nielsen drafted the document to protect himself in what has turned into an extensive conflict of interest with regard to his representation. (See ¶ 11 of the "Agreement," indemnifying "Trustee's Attorneys.")

The Bank is foreclosing against Matt and Kelley Beck personally and against the Trust that Matt was trustee over. Mr. Nielsen noticed his appearance for Matt and Kelley. (See Notice filed 2/27/2018.) He then filed an Answer on their behalf (See Answer filed 2/27/2018) and a separate Answer for the trustee (See Answer filed 3/21/2018).

Matt and Kelley's personal interests are directly adverse to the Trust's interests. Further, they are adverse to the beneficiaries' interests. Yet Mr. Nielsen drafted the "Agreement dated January 29, 2018," which purports to absolve Matt Beck of personal liability to the Trust and its beneficiaries as well as absolving "Trustee's Attorneys" of any liability.

The "Agreement" also exposes Gary and Betty Beck to great financial risk. They put their land in the trust in 1999 to protect it from being used to pay for nursing home care. (See Statement of Fact No. 5, above.) Under the Trust, which is irrevocable, the income was to be paid to Gary and Betty, which of course would have been subject to payment toward nursing home care. However, the Agreement approves the Trustee's self-dealing use of the income, absolves Matt of liability, and thereby exposes Gary and Betty to liability related to nursing home expenses. (See 3<sup>rd</sup> Whereas clause and ¶¶ 2, 6, and 7.)

Gary and Betty's "approval" is also void under SDCL 55-2-8, which states, "All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence." The South Dakota Supreme Court used SDCL 55-2-8 to shut down a similar argument by a self-dealing trustee who claimed the beneficiary consented to the self-dealing: "Therefore, any claimed 'consent' by Clara is presumed to be entered into without 'sufficient consideration and under undue influence.' Consequently, Tamara's argument fails." *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 19, 605 N.W.2d 818, 823.

16. The Consent to Mortgage signed by Jamie Moeckly acknowledged that she understood the Trustee had the authority or discretion to mortgage or encumber the Trust property, and that the proposed mortgage to Plains Commerce Bank benefited the Trustee and not all the Trust beneficiaries. (EX H).

**RESPONSE:** No dispute that the Consent to Mortgage contains those statements.

17. Jamie signed the Consent to Mortgage in an effort to protect the Trust and her parent's interest in the Trust as well as to hopefully repair her relationship with her parents. (Moeckly II 30-31).

**RESPONSE:** No dispute.

18. The Consent to Mortgage was limited to mortgages not to exceed \$800,000. (EX H).

**RESPONSE:** No dispute the "Consent to Mortgage" contains that language.

19. Jamie and Brian understood the \$800,000 limit represented approximately one-third of the value of the Trust land, which would equal Matthew's share of the Trust's assets upon the deaths of Gary and Betty. (Moeckly I 12; Moeckly II 57; Br. Beck 28-29).

**RESPONSE:** No dispute.

20. The Trust property was appraised at a value of \$3,659,000, as of July 28, 2015. (EX L).

**RESPONSE:** No dispute.

21. On November 25, 2015, Matthew signed an \$800,000 mortgage in his capacity as Trustee of B&B Farms Trust in favor of Plains Commerce Bank. (EX M).

**RESPONSE:** No dispute that the mortgage secured \$800,000 of the personal loan to Matt and Kelley Beck and thereby put the Trust at risk for that amount, but dispute the implication that the risk to the Trust was *limited to* \$800,000 under the mortgage's terms. In addition to the \$800,000 secured by the Trust real estate, the mortgage also provides for interest, attorney's fees, expenses, collection and foreclosure costs, etc., none of which were mentioned, much less explained, in the Consent to Mortgage documents. (See language of the Consent to Mortgage documents, Rasmussen Aff., Exhibit H.) Neither did the Consent to Mortgage state that the Bank would claim the rights to all rental income from the trust farmland, and that Betty would therefore need to beg from the Bank to obtain funds for her basic living expenses, or that Betty would need to account to the Bank whenever it permitted her to use some of the trust income to live off of. (See Affidavit of Trust Officer Cassie Backman; see also Second Wurgler Aff., Ex. N, Email.) Nor did the Consent explain that, for the years 2017 and 2018, the Bank would take approximately \$140,000 of the trust rental income for itself, leaving nothing for Betty. (Second Wurgler Aff., Ex. M, Removal Trans 24:24 – 25:10; 26:3-25.)

22. The mortgage provided the Trust land as collateral for a \$1,855,000 loan to Matthew and Kelley Beck. (EX M).

**RESPONSE:** No dispute.

23. Matthew and Kelley defaulted on their loan which resulted in the Bank commencing this foreclosure action in January 2018. (Complaint).

**RESPONSE:** No dispute that Matt and Kelley Beck immediately defaulted on their loan obligations to the Bank. (See Second Wurgler Aff., Ex. B., Vilhauer Depo 54:19-22; 94:15-18.)

24. On June 1, 2018, Intervenor filed a Motion to Intervene in this case on behalf of B&B Farms Trust.

**RESPONSE:** No dispute.

25. Intervenor's Motion to Intervene was granted on September 4, 2018, which resulted in her being substituted for Matthew as Trustee of the B&B Farms Trust.

**RESPONSE:** Immaterial dispute. The court's Order in this case (filed 9/5/2018) specifically substituted Moeckly in for Matt Beck as trustee "in this action." It also directed that Moeckly, "in her capacity as intervenor to protect the Trust, shall defend this action in the best interests of the Trust and beneficiaries."

26. Dacotah Bank was named as a Successor Trustee in November 2018. (Moeckly II 16).

**RESPONSE:** Immaterial dispute. In the separate file 06TRU18-000002, the court's Order (filed 11/14/2018) named Dacotah Bank as Successor Trustee, but it did not modify the court's 9/5/2018 Order in *this* case directing Moeckly to protect the Trust's interests in this case.

27. Jamie filed an Amended Answer on behalf of B&B Farms Trust alleging that Matthew did not have the authority to encumber the Trust's estate. (Amended Answer, ¶ 4).

**RESPONSE:** No dispute.

28. Alternatively, Jamie alleged that the mortgages, security agreements, and encumbrances are unenforceable as to any obligation above an aggregate amount of \$800,000. (Amended Answer, ¶ 5).

**RESPONSE:** No dispute.

29. Alternatively, Jamie alleged Matthew and Kelley's personal property and real estate should be foreclosed upon before any foreclosure of Trust assets. (Amended Answer, ¶ 6).

**RESPONSE:** No dispute.

30. Matthew and Kelley's personal property and real estate have been foreclosed upon. (Moeckly II 54; Order Granting Partial Summary Judgment dated September 4, 2018).

**RESPONSE:** Dispute that the Bank foreclosed on Matt and Kelley's personal real estate in a proper manner. As noted in the court's September 4, 2018, Order, ¶ 2, their real estate was to be "sold at *public sale* as provided by law . . ." (Emphasis added.) The court further instructed the Bank that "[it] may become the purchaser on said sale by *bidding the fair market value of the real property* and may apply that amount towards the judgment awarded it against Defendants, Matthew A. Beck and Kelley R. Beck, husband and wife . . ." (Emphasis added.) The Bank violated both of those orders.

First, it never sold the Matt and Kelley real estate at a public sale. Instead Matt and Kelley deeded their land directly to the Bank. Granted, the Bank attempted to sell some of the land at an auction, but the Bank permitted Matt to "no-sale" the auction, which would otherwise have resulted in a winning bid of \$1,200 per acre for Matt and Kelley's Marshall County land.

Second, the Bank did not "bid[] the fair market value of the real property." Again, it simply took the deeds to the Matt and Kelley property in January 2019. The Bank's own appraisal of the Becks' Marshall County land showed it to have a value of \$1,164,600.00 as of August 7, 2015 (Second Wurgler Aff., Ex. L, PCB 546-550). The Beck Brown County land was appraised at a value of \$1,724,900.00 as of July 28, 2015. (Second Wurgler Aff., Ex. L, PCB 475-478.) The Bank took that land from the Becks without paying a dime for it, much less bidding on it.

Apparently, the Bank has now sold the Becks' real estate for a song. The Bank sold the Becks' Marshall County land for an aggregate price of \$454,000.00. (Second Wurgler Aff., Ex. L, PCB 630-631.) The Bank sold the Becks' Brown County land for an aggregate price of \$462,120.00. (Second Wurgler Aff., Ex. L, PCB 633-634.)

Per the mortgage that is being disputed in this case, Plains Commerce Bank is claiming a security interest in the rents derived from the trust land (Backman Aff.), and the Bank has also taken a great deal of income belonging to the Trust. In 2017, trustee Matt Beck rented out the trust land for \$61,250 and used that lease payment to pay on the Bank's mortgage. (Second Wurgler Aff., Ex. M, Removal Trans 24:24 – 25:10.) In 2018, the trust received a lease payment of \$78,900, which Matt withdrew and paid the Bank's mortgage and taxes. (Second Wurgler Aff., Ex. M, Removal Trans 26:3-25.) With the Bank taking the rental payments, nothing is left to support Betty Beck, now a widow, and has reduced her to a beggar; she needs to go to the Bank, hat in hand, to ask it to permit her some of the trust income for basic needs. (Backman Aff.) Betty is in her late 70s or early 80s. (Backman Aff.) Her monthly Social Security check is \$1004. (Backman Aff.) Betty has the following urgent financial needs: a grave marker for her husband's grave; payments on a new furnace; installing a new hot water heater; electric bill; medical expenses; automobile maintenance; leaking roof; new windows; repainting of home to eliminate mildew. (Backman Aff.) Trust Officer Backman had to ask permission from the Bank to release rental proceeds so they can be used for the roof, windows,

and grave marker. The Bank consented, so long as the expenditures are reasonable with documentation provided to the Bank. (Backman Aff.; see also Second Wurgler Aff., Ex. N, Email.)

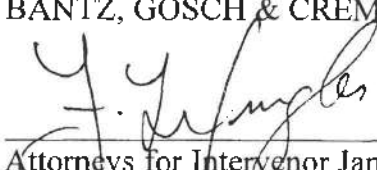
31. Jamie is not pursuing this matter because she thinks she is entitled to anything. She only wants to preserve the land her father received from his grandfather. (Moeckly I 24; Moeckly II 67-68).

**RESPONSE:** No dispute, but Jamie is also under a fiduciary obligation to protect the trust and beneficiaries, particularly her mother Betty, who is still living and depending upon the trust for her basic needs.

This response is supported and accompanied by *Intervenor Moeckly's Brief in Response to Plaintiff's Motion for Summary Judgment and Second Affidavit of Josh Wurgler in Response to Plaintiff's Motion for Summary Judgment.*

Dated this 24th day of July, 2020.

BANTZ, GOSCH & CREMER, L.L.C.

  
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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

Defendants.

06CIV18-000055

**INTERVENOR MOECKLY'S  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS SUPPORTING  
MOTION FOR SUMMARY  
JUDGMENT**

Under SDCL 15-6-56, Intervenor Moeckly submits this statement of undisputed material facts in support of her motion for summary judgment. The references to exhibits refer to those exhibits attached to the Affidavit of Josh Wurgler Supporting Intervenor Moeckly's Motion for Summary Judgment.

1. Gary and Betty Beck established their "B & B Farms Trust" trust on November 1, 1999, and they are named as the present beneficiaries. (Ex. A, Trust Agreement, pp. 7-8.)

2. The Trust is an irrevocable trust. (Ex. A, Trust Agreement, Article III.)

3. They appointed Matthew Beck, their youngest child, as trustee. (**Ex. A**, Trust Agreement, p. 1.)

4. Gary and Betty put the land in trust because they did not want banks or the government getting their land to pay for nursing home care. (**Ex. B**, Betty Depo 17:3-16.)

5. It was important for Betty and Gary that the farm stay intact for the family. (**Ex. B**, Betty Depo 29:2-6; 32:6-8.)

6. The secondary beneficiaries are Betty and Gary's children: Brian Beck, Jamie Moeckly, and Matthew Beck. (**Ex. A**, Trust Agreement, p. 1.)

7. In 2015, Matthew was in financial trouble, so he sought financing from Plains Commerce Bank to pay off his other lenders. (**Ex. C**, Motion Hearing Trans. 19:10-13.)

8. It was not until a year or year and a half prior to her deposition (held October 3, 2018) that Betty, as one of the primary beneficiaries, had any knowledge that Matt had debt problems. (**Ex. B**, Betty Depo 41:5-8.)

9. Betty would have wanted to know if Matt was having debt problems while he was trustee over the property. (**Ex. B**, Betty Depo 41:9-12.)

10. Betty did not know until her October 3, 2018, deposition that Matt had a debt of approximately \$2.1 million. (**Ex. B**, Betty Depo 45:2-5.)

11. Matt's personal debt of about \$2.1 million is something Betty probably would have wanted to know about. (**Ex. B**, Betty Depo 47:5-8.)

12. Lance Vilhauer was the Plains Commerce Bank employee who processed Matt's loan request. (**Ex. D**, Vilhauer Depo 14:3-14; 18:15-20.)

13. When a loan involves a trust, Plains Commerce Bank asks for a copy of the trust agreement, which it then turns over to the bank's counsel for review. (**Ex. D**, Vilhauer Depo 29:17 – 30:12.)

14. Lance Vilhauer reviews the trust documents to see whether there are restrictions or limits on whether the trust assets can be used for collateral. (**Ex. D**, Vilhauer Depo 31:7-10.)

15. Lance Vilhauer knew that the trust agreement must give the trustee the ability to use the trust assets for lending purposes. (Ex. D, Vilhauer Depo 31:11-14.)

16. When a trust seeks a loan, Plains Commerce Bank is aware that you need to know who the trustee is and what is spelled out in the trust. (Ex. D, Vilhauer Depo 30:13-16.)

17. Matt Beck sent a copy of the B&B Farms Trust Agreement to Lance Vilhauer. (Ex. E, Matt Depo 54:11-12.)

18. Lance Vilhauer reviewed the B&B Farms Trust agreement. (Ex. D, Vilhauer Depo 33:1-3.)

19. It was a “red flag” to Lance Vilhauer that Matthew was trying to self-deal under the trust. (Ex. D, Vilhauer Depo 33:4-18.)

20. Lance Vilhauer knew Matt could not self-deal under the trust agreement. (Ex. D, Vilhauer Depo 33:4-18.)

21. Plains Commerce Bank considered loaning Matt the money, but only if he mortgaged the property owned by the Trust. (Ex. D, Vilhauer Depo 36:10 – 37:17; 38:20-23.)

22. Plains Commerce Bank decided that Matt could mortgage the trust land if the beneficiaries consented to the mortgage. (Ex. D, Vilhauer Depo 41:22-25; 42:25 – 43:4.)

23. Attorney Danny Smeins drafted the “Consent to Mortgage of Trust Real Estate Owned by Trust” documents for the beneficiaries and secondary beneficiaries to sign. (Ex. E, Matt Beck Depo 54:24 – 55:4.)

24. The “Consent” states that the signers “hereby consent to the Trustee mortgaging or encumbering the following real estate to Plains Commerce Bank, Aberdeen, South Dakota: [legal description omitted]. I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to Plains Commerce Bank benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, Matthew Beck. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and

new mortgages up to the limits set forth herein.” (Ex. F, “Consent to Mortgage of Trust Real Estate Owned by Trust.”)

25. Plains Commerce Bank understood the “Consents” to permit an \$800,000 mortgage principal amount plus any other terms and conditions found in the mortgage. (Ex. D, Vilhauer Depo 80:19-25.)

26. With regard to the “Consents,” Betty Beck understood that the trust land would be obligated to just \$800,000. (Ex. B, Betty Depo 58:14-24.)

27. Brian Beck reviewed the “Consent to Mortgage” with Danny Smeins. (Ex. G, Brian Depo 11:13-22.)

28. Brian understood from Danny Smeins that by signing the “Consent to Mortgage” document, he was allowing Matt to mortgage his third of the trust. (Ex. G, Brian Depo 11:13-14; 15:21-23.)

29. Brian understood from Danny Smeins the \$800,000 number in the “Consent to Mortgage” was Matt’s one-third of the value of the Trust land. (Ex. G, Brian Depo 15:25 – 16:14.)

30. Brian understood the mortgage on Trust land was to be for Matt personally and not for the Trust. (Ex. G, Brian Depo 17:2-4.)

31. Brian did not see a copy of the Trust Agreement until after January 15, 2018. (Ex. G, Brian Depo 11:4-7.)

32. Jamie did not know there was a trust for the family farm until October 2015. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 9:4-16.)

33. Jamie’s mother, Betty, told Jamie to speak with attorney Danny Smeins to sign some papers because they wanted to sell their land to Matt. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 9:14-16.)

34. Betty told Jamie that if Jamie did not sign the consent to sale papers, she could not be a part of Betty’s life any longer. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 20:8-18.)

35. Jamie called Danny Smeins, and Danny told Jamie that Betty and Gary wanted to dissolve the trust and sell the land to Matt. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:1-6.)

36. After that, Jamie had an office conference with Danny in which he told her Matt had about \$500,000 of debt and he wanted a loan with the bank. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:12-14.)

37. They discussed a consent to sell the land, determined that was not a good option, and then discussed the consent to mortgage. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:14-17.)

38. Jamie's dad, Gary, came to her house in October or November 2015 after Betty had been there, and he was upset that Jamie had not signed the papers. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:4-15.)

39. Gary told Jamie she was probably going to hell if she did not do as he asked. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:4-15.)

40. Jamie and her parents had had difficulties in their relationship prior to that point, although she got together with her parents just about every week until they wanted her to sign the papers. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:16 – 24:6.)

41. With the consent to mortgage, Jamie knew her parents would not talk to her any longer if she refused to sign it. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 32:6-9.)

42. Jamie signed the consent to mortgage so Matt could take his note with Plains Commerce Bank, which she thought was the best way to protect the Trust and her parents' interest, and to patch things up with her parents. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 31:16-23.)

43. Jamie thought that if she signed the consent to mortgage, she would be protecting the Trust and her parents by helping Matt get back on his feet. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 31:24 – 32:5.)

44. Jamie thought the consent to mortgage meant Matt could take a loan up to \$800,000 and use \$800,000 value of the trust to do that, but not any more than that. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 36:13-17.)

45. Jamie did not think the consent to mortgage allowed interest, charges, penalties, etc. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 35:18-21; 47:7 – 48:3.)

46. Jamie believed from speaking with Danny that just Matthew's third of the Trust would be affected. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 43:5-12; 57:8-24.)

47. When she was asked to sign the consent to mortgage, Jamie never saw or had an opportunity to review the mortgage or the guaranty. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 68:9-25.)

48. At the time she signed the consent to mortgage, Jamie had not seen a copy of the Trust Agreement, nor did she know any of the terms of the Trust Agreement. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 69:1-6.)

49. Jamie had tried to get a copy of the Trust Agreement from Danny Smeins by email and by phone, but he never gave her one. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 69:7-18.)

50. Jamie never saw a copy of the Trust Agreement until after January 2018. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 17:11-18.)

51. The Trust has a spendthrift provision that states:

ARTICLE VIII.  
PROTECTION OF TRUST FUND

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

(**Ex. A**, Trust Agreement, Article VIII.)

52. Article VI expresses the grantors' (Gary and Betty) "desire to have the real estate retained as an asset of the Trust during the life of Gary J. Beck." (**Ex. A**, Trust Agreement, Article VI.)

53. The Trust Agreement states that the "Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of Gary J. Beck except upon the unanimous written consent of both the primary beneficiaries." (**Ex. A**, Trust Agreement, Article VI.)

54. There is no evidence that the Trust has ever been modified.

55. The Trust does not contain any language authorizing the trustee to self-deal. (Ex. A, Trust Agreement.)

56. Gary Beck died in September 2019. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 18:19 – 19:3.)

57. On November 25, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$1,855,000.00. (Ex. I, Complaint ¶ 3 and Exhibit A to same.)

58. On December 14, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$370,000.00. (Ex. I, Complaint ¶ 4 and Exhibit B to same.)

59. On November 25, 2015, trustee Matt Beck executed a mortgage to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (Ex. I, Complaint ¶ 6 and Exhibit D to same.)

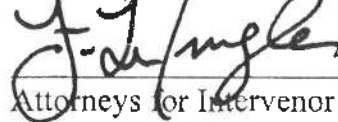
60. Also on November 25, 2015, trustee Matt Beck executed a Guaranty to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (Ex. I, Complaint ¶ 10 and Exhibit H to same.)

61. Matt Beck mortgaged the Trust land to secure \$800,000 of the approximately \$2 million loan from Plains Commerce Bank. (Ex. C, Motion Hearing Trans. 19:24-20:2.)

62. Jamie's desire has been to protect her "grandpa's land," to not have it be sold, and to keep it in the family. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 65:11-18; 66:14-19; 67:18 – 68:1.)

Dated this 10th day of July, 2020.

BANTZ, GOSCH & CREMER, L.L.C.



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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

PLAINS COMMERCE BANK, \*

06CIV18-000055

Plaintiff, \*

vs. \*

MATTHEW A. BECK, a married person; \*

KELLEY R. BECK, a married person; \*

MATTHEW A. BECK, Trustee of the \*

B&B FARMS TRUST, u/t/a November 1, \*

1999; BROWN COUNTY, a governmental \*

instrumentality of the State of South \*

Dakota; MARSHALL COUNTY, a \*

governmental instrumentality of the State \*

of South Dakota; DEERE & COMPANY, a \*

corporation, \*

Defendants, \*

and \*

JAMIE MOECKLY, \*

Intervenor. \*

\* \* \* \* \*

Pursuant to SDCL 15-6-56(c)(2), Plaintiff Plains Commerce Bank, Inc. hereby responds to Intervenor Moeckly's Statement of Undisputed Material Facts. Citations to the record in this document will be the same as used in the pleadings filed by Plaintiff in support of its Motion for Summary Judgment.

SDCL 15-6-56(c)(2) requires a party opposing a Motion for Summary Judgment to include a separate Statement of Material Facts as to which the opposing party contends a genuine



issue exists to be tried. Plaintiff does not believe there are any material issues of fact which need to be tried and that Plaintiff's previously filed Motion for Summary Judgment should be granted.

1. Plaintiff generally agrees with this statement, but notes that Gary and Betty Beck were named as the primary beneficiaries. (EX A, ¶ 2.1).

2. Agree.

3. Agree.

4. Plaintiff agrees that this paragraph correctly references testimony given by Betty Beck, but that there is also testimony that one of the reasons for the Trust was an attempt to keep the farm in the family. (Moeckly II 49).

5. Agree.

6. Agree.

7. Agree.

8. Agree.

9. Betty's actual testimony is that she "probably" would have wanted to know if Matt was having debt problems.

10. Plaintiff agrees that this paragraph correctly references testimony given by Betty Beck, but it should be noted that she emphasized on several occasions during her deposition that she had problems with her memory. (*See, e.g.*, B. Beck 50, 74-75).

11. Agree.

12. Agree.

13. Agree.

14. Agree.

15. Agree.

16. Agree.

17. Agree.

18. Agree.

19. Mr. Vilhauer's actual testimony was that Plains Commerce counsel told him that self-dealing was a "potential red flag."

20. Agree.

21. Agree.

22. Mr. Vilhauer's actual testimony was that Plains Commerce counsel suggested that consents be obtained before the Trust land was used as collateral.

23. Agree.

24. Agree.

25. Agree.

26. Plaintiff agrees that this paragraph correctly references testimony given by Betty Beck, but she also testified that it was "agreed that the trust land could have a mortgage on it in an amount of \$800,000." (B. Beck 58).

27. Agree.

28. Agree.

29. Agree.

30. Agree.

31. Agree.

32. Agree.

33. Agree.

34. Agree.

35. Agree.

36. Agree.

37. Agree.

38. Plaintiff agrees that this paragraph correctly references testimony given by Jamie Moeckly. It should, however, be noted that the paper Jamie refused to sign was the Consent to Sell, not the Consent to Mortgage. (Moeckly II 9-10, 19-23, 30-33, 69-71).

39. Agree.

40. Agree.

41. Jamie's actual testimony was that her parents "probably" wouldn't talk to her if she did not sign the Consent to Mortgage. She further testified that signing the form did not improve her relationship with her parents. (Moeckly II 32).

42. Agree.

43. Agree.

44. Deny. The cited portion of Jamie's deposition does not support the statement contained in this paragraph. Jamie testified that she understood Matt could use \$800,000 of value in the Trust to get a loan. She did not think about how various other charges, such as interest and penalties, would play into it. (Moeckly II 35).

45. Deny. Jamie testified she did not know how interest and penalties would be applied and no one told her they would not be included. (Moeckly II 35, 47). In addition, from her personal experience, she knew that mortgages typically included interest, fees, etc. (Moeckly II 46-47).

46. Agree.

47. Plaintiff agrees that this paragraph correctly references testimony given by Jamie Moeckly but she also testified that she never asked to see the mortgage before signing the consent. (Moeckly II 63-64).

48. Plaintiff agrees this paragraph correctly references testimony given by Jamie Moeckly. It should be noted, however, that Ms. Moeckly never testified that she requested a copy of the Trust Agreement from Plaintiff or that Plaintiff took any steps to prevent her from obtaining a copy.

49. Plaintiff agrees that this paragraph correctly references testimony given by Jamie Moeckly. She testified she asked for a copy of the Trust Agreement from Danny Smeins' office but never personally talked to Mr. Smeins about this request. (Moeckly II 69). In addition, she testified that both her husband and son discussed with her the need to see a copy of the Trust, but nevertheless, she voluntarily signed the Consent to Mortgage without seeing it. (Moeckly I 15-16).

50. Agree.

51. Agree.

52. Agree.

53. Agree.

54. Deny. Plaintiff agrees the Trust was never formally amended, but Plaintiff denies that the Consent to Mortgage documents did not modify or alter the Trust pursuant to Article III of the Trust. (EX A, Article III).

55. Whereas the Trust does not contain specific language authorizing the Trustee to self-deal, the Trust allows for its real estate assets to be mortgaged to secure debts of the Trust. (EX A, ¶ 4.1). Before the Trust was signed, the farm had always struggled financially and had

even gone through bankruptcy. (B. Beck 6, 15, 59). Matt purchased land from his parents to pay down debt. (B. Beck 19-21). Matt took on part of the farm's preexisting debt and some of that debt was still present after the loan from Plains Commerce was obtained. (B. Beck 70-71). In addition, the Trustee was authorized to sell, option, or dispose of any interest in the real estate of the Trust during the lifetime of Gary Beck with unanimous consent of the primary beneficiaries. (EX A, ¶ 6.2). Gary and Betty Beck both signed the Consent to Mortgage. (EX I). Moreover, Article III of the Trust allows the Trust to be altered by unanimous consent of the beneficiaries, which occurred when all of the primary and secondary beneficiaries signed a Consent to Mortgage specifically authorizing Matthew Beck to engage in a self-dealing transaction. (EX A, Article III; EX G, pp. PCB 135-36; EX G, pp. PCB 137-38; EX H; EX I).

56. Agree.

57. Agree.

58. Agree.

59. Agree.

60. Plaintiff agrees Matt executed a guaranty on behalf of the Trust to secure the loans to him and his wife. Plaintiff is not attempting to enforce the Trust's guaranty.

61. It is agreed that the principal amount secured by the mortgage will not exceed \$800,000, but the mortgage provides that, "[a]ny limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument." (EX M, p. 2).

62. Plaintiff agrees that this paragraph correctly references testimony given by Jamie Moeckly but, it should be noted, after her mother dies there is no guarantee the land will be kept in the family. (EX A, ¶ 4.3 and Article VII).

Dated this 24th day of July, 2020.

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

/s/ Reed Rasmussen

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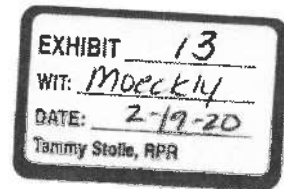
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Attorneys for Plaintiff



## TRUST AGREEMENT

THIS TRUST AGREEMENT, made this 15<sup>th</sup> day of November, 1999, by and between GARY J. BECK and BETTY BECK of 41044 109<sup>th</sup> St., Hecla, SD 57446-6105 (hereinafter called "Grantors") and MATTHEW BECK of 41044 109<sup>th</sup> St., Hecla, SD 57446-6105 (hereinafter called "Trustee").

WITNESSETH:

WHEREAS, Grantors desire to establish a trust known as the "B & B FARMS TRUST" covering the assets described in Exhibit "A", attached hereto and by this reference made a part hereof as if fully set forth herein, and all additions thereto of any nature, and the Trustee is willing to act as Trustee thereof.

NOW THEREFORE, in consideration of the premises, it is hereby agreed by and between the parties hereto as follows:

### ARTICLE I. PROPERTY SUBJECT TO TRUST

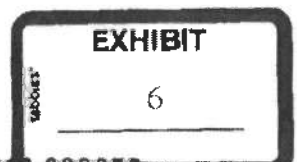
The Trustee agrees to receive, if and when tendered to him, all assets described in Exhibit "A". The Trustee furthermore agrees to accept and administer hereunder any cash, securities and other property transferred to the Trust. Grantors, or any other person transferring assets to the Trust or causing insurance to be made subject to the Trust, shall upon request deliver to the Trustee, or the appropriate insurer such instruments of transfer or assurance as may reasonable be requested. The Trustee accepts the Trust hereby created and agrees to hold, manage, control, invest and reinvest the Trust Estate in accordance with the authority hereinafter conferred, shall collect and receive the income therefrom, and after deducting all necessary expenses incidental to the administration of the Trust shall dispose of the income and principal of the Trust upon the terms and conditions set forth herein.

### ARTICLE II. IDENTIFICATION AND DEFINITIONS

**2.1 Primary Beneficiaries.** The primary beneficiaries of the Trust are the Grantors; namely, GARY J. BECK and BETTY J. BECK.

**2.2 Secondary Beneficiaries.** The secondary beneficiaries of the Trust are the issues of Grantors; namely, BRIAN BECK, JAMIE MOECKLY and MATTHEW BECK.

**2.3 Issue.** "Child" or "children" of a person as used herein shall include only the legitimate natural sons or daughters of such person and also those who become sons or daughters of such person and also those who become sons or daughters through legal adoption. "Grandchild" or "grandchildren" of a person as used herein shall include only the legitimate natural sons or daughters of a child of such person and also those



who become sons or daughters of a child of such person through legal adoption.

### ARTICLE III. TERM OF THE TRUST

This Trust shall be irrevocable for the natural lives of GARY J. BECK and BETTY J. BECK. After the death of both GARY J. BECK and BETTY J. BECK, the Trust shall or may be revoked with the consent of a majority of the secondary beneficiaries of the Trust. This Trust may not be altered or amended by Grantors during the lifetime of GARY J. BECK and BETTY J. BECK except upon unanimous consent of the primary and secondary beneficiaries except as to appointment of a successor Trustee pursuant to Article VIII below. After the death of both GARY J. BECK and BETTY J. BECK, the Trust may be altered or amended by a majority of the secondary beneficiaries.

### ARTICLE IV. ADMINISTRATION AND DISTRIBUTION OF THE TRUST

4.1 Disposition During the Lives of GARY J. BECK and BETTY J. BECK. During the lifetime of GARY J. BECK and BETTY J. BECK, the Trustee shall collect, receive, receipt for and manage the principal and income of the Trust, and after paying the proper charges and expenses of the Trust Estate, the Trust shall hold and distribute the net income from the Trust Estate in the manner set forth below:

The net income shall be paid to the primary beneficiaries in quarterly or other convenient installments, but at least annually.

Grantors acknowledge that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust. It is understood by the Grantors that the Trustee shall apply as much of the income of the Trust Estate to the retirement of this debt as he deems prudent, and the retirement of the debt is to be given priority over income distributions to the beneficiaries of the Trust.

4.2 Disposition of Trust Funds. All assets of the Trust of every kind or nature shall be administered and distributed by the Trustee upon the terms and conditions set forth in the succeeding articles hereof.

4.3 Disposition Upon the Death of Both GARY J. BECK and BETTY J. BECK. Upon and after the death of both GARY J. BECK and BETTY J. BECK and after collection of other benefits payable to the Trust, the Trustee may hold, manage, allocate, distribute, or administer the then remaining assets of the Trust Estate. They shall be divided equally between the secondary beneficiaries, BRIAN BECK, JAMIE MOECKLY and MATTHEW BECK. If any of the them should predecease the second to die between Grantors, GARY J. BECK and BETTY J. BECK, then his/her share shall be



distributed equally to his/her issue by right of representation. In the event that any of the secondary beneficiaries should predecease the second to die between Grantors, GARY J. BECK and BETTY J. BECK, without issue, then in such event the amount allocated herein shall be distributed to the surviving beneficiaries or their issue.

4.4 If any part of the Trust Estate is not distributable under the provisions heretofore set forth, then the same shall be distributed to the heirs at law of the primary beneficiaries determined according to the laws of descent and succession in force in the State of South Dakota.

4.5 Despite the preceding provisions, the Trustee may elect to withhold any property otherwise distributable to a secondary beneficiary who has not reached the age of twenty-five (25) and may retain that property for that secondary beneficiary in a separate trust named for the secondary beneficiary in which his or her interest is indefeasibly vested to be distributed to the secondary beneficiary when he or she reaches the age of twenty-five (25), or before then if the Trustee so elects. The Trustee shall apply as much of the net income and principal of the Trust so retained as the Trustee believes desirable for the health, support and reasonable comfort, education, best interest and welfare of the secondary beneficiary for whom the trust is named, considering all the circumstances and facts deemed pertinent by the Trustee. Any undistributed net income shall be accumulated and added to the principal as from time to time determined by the Trustee.

#### ARTICLE V. TRUSTEE'S POWERS

The Trustee shall have the following authority to be exercised in his sole and absolute discretion:

5.1 To exercise that judgment and care under the circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

5.2 The Trustee shall invest and reinvest any and all funds coming into his possession for investment in such securities or properties, real or personal, as he, in his discretion, may deem proper and suitable and may commingle for investment all or any part of the funds of this Trust in any common trust fund or funds now or hereinafter maintained by such Trustee. The Trustee shall be under no obligation to change any investments which come into his hands from the Grantors because of their character or lack of diversification thereof but only when he deems it advisable to do so because of changing conditions and careful investigation and consideration.

5.3 The Trustee shall have full power and authority to vote all stocks and to

exercise all rights incident to the ownership of stocks, bonds or other securities or properties held in the Trust funds and to issue proxies to vote such stocks and to exercise such rights; and the Trustee shall have full power and authority to sell or exercise any subscription rights; to sell or retain any and all stock dividends; to consent to and join in or to oppose any reorganization, merger, consolidation or liquidation in respect to any corporation whose stock, bonds or other securities are a part of the Trust funds, including becoming a member of or depositing such securities with any stockholders' or bondholders' committee; and to accept and hold any securities pursuant to any plan of reorganization, merger, consolidation or liquidation and to otherwise exercise any and all rights and to deal in and with any such securities in the same manner and to the same extent as any individual owner.

5.4 To, at any time, render liquid the Trust Estate in whole or in part and hold cash or readily marketable securities of little or no yield for such period as he may deem advisable.

5.5 To make distribution of the principal of the Trust Estate in kind and to cause any share to be composed of cash, property or undivided fractional shares in property different in kind from any other share.

5.6 To determine what is principal or income of the Trust Estate; to determine what receipts or expenditures shall apply to depreciation, waste, obsolescence, income and principal; to determine what expenses should be amortized; to arrange for suitable reserves for taxes or other expenditures which must be paid from time to time; and to determine what the net income is for distribution to the Grantors or beneficiaries and to pay the same according to the terms hereof.

5.7 To make payments to or for the benefit of any minor pursuant to the provisions of SDCL 55-1A-29 and acts amendatory thereto with the additional power that Trustee shall not be obliged to see to the application of the funds so paid, but the receipt of such person shall be full acquittance of the Trustee.

5.8 To execute and deliver necessary instruments pursuant to the provisions of SDCL 55-1A-35 and acts amendatory thereto with the additional power that no party to any such instrument in writing signed by the Trustee shall be obliged to inquire into its validity or be bound to see to the application by the Trustee of any money or other property paid or delivered to him by such party pursuant to the terms of any such instruments.

5.9 To possess the entirety of powers granted by SDCL 55-1A-3 and all acts amendatory thereto which powers are incorporated into this Trust by reference thereto.

5.10 To do any and all things which are incidental or necessary to the exercise of the powers herein conferred upon the Trustee. The enumeration of specific powers and authorities shall be deemed an extension and not a limitation of such powers.

ARTICLE VI.  
**TRUSTEE'S POWERS AS TO SALE OF REAL ESTATE**

6.1 The real estate initially made part of this Trust is real estate which had been owned by GARY J. BECK and BETTY J. BECK, the parents of the secondary beneficiaries, who are still living at the time of the creation of this Trust. The Grantors desire to have the real estate retained as an asset of the Trust during the life of GARY J. BECK.

6.2 The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of GARY J. BECK except upon the unanimous written consent of both the primary beneficiaries.

6.3 After the death of GARY J. BECK, the Trustee may sell all or part of the real estate.

6.4 The Trustee in the sale of the real estate is subject to Article VII. below.

ARTICLE VII.  
**OPTION TO PURCHASE**

The Grantors further grant and confer on MATTHEW BECK an option or last right of refusal to purchase all or part of the real estate. The option price shall be the fair market value of the real estate as determined by a state certified appraisal of the real estate obtained by the Trustee. If any of the secondary beneficiaries should object to the appraised value, they may obtain their own state certified appraisal at their expense, and then the fair market value shall be the median value between the appraisals. In addition, at the election of MATTHEW BECK, the payment of the purchase price may be deferred by making, executing and delivering a contract for deed or promissory note and mortgage with interest thereon at the federal applicable rate for long-term obligations amortized over 25 years. The first payment shall be due one year from the date of closing. If MATTHEW BECK elects to exercise the option granted herein, he shall do so by notifying the Trustee or secondary beneficiaries within 120 days after the termination of the Trust.

ARTICLE VIII.  
**PROTECTION OF TRUST FUND**

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

ARTICLE IX.  
**RESIGNATION OR REMOVAL OF TRUSTEE**

9.1 **Resignation.** A Trustee at any time acting hereunder may resign by delivering his or her written resignation to Grantors. Such resignation shall take effect on such date not earlier than thirty (30) days after the date of such delivery of such written resignation as shall be specified in such instrument of resignation. In the event of the resignation, death or inability of MATTHEW BECK to act as Trustee, then in such event BRIAN BECK and JAMIE MOECKLY shall act as Co-Trustees. In the event of the resignation, death or inability of either one of them to act, the other may act on his/her own. Any successor Trustee shall be bound by all terms and conditions of this Trust.

ARTICLE X.  
**GENERAL PROVISIONS**

10.1 **Receipt of Payment.** No person need account for any payments made to him or her, and such person's receipt shall fully discharge the Trustee with respect to any such payment.

10.2 **Qualification of Trust.** Grantors waive any statutory or other legal requirement that the Trustee be qualified in any court, and no bond or surety shall be required of any Trustee.

10.3 **Protection of Third Parties.** No person dealing with any Trustee purporting to act hereunder need inquire into the authority of such Trustee to act, but any such person may rely upon the statement of such Trustee.

10.4 **Accounting.** From and after the creation of this Trust, the Trustee shall annually render a written account of the administration of the Trust showing receipts and disbursements of principal and income to each beneficiary then entitled to receive income therefrom. The first annual accounting shall be due one (1) year after the creation of the Trust. The written approval of any such account, or the failure of any beneficiary to object in writing to such account within thirty (30) days after the receipt of the same shall as to all matters shown therein be final and binding upon all persons (whether or not then in being) who are then or thereafter may become entitled to share in either the principal or income of the Trust.

10.5 **Applicable State Law.** This Agreement has been executed and delivered in the State of South Dakota, and all questions of law arising under this Agreement shall be determined in accordance with the laws of South Dakota.

10.6 **Captions.** The headings of articles and sections are included solely for convenience of reference. If any conflicts between any heading and the text of this

Agreement exist, the text shall control.

IN WITNESS WHEREOF, Grantors have hereunto set their hands, and Trustee has caused this instrument to be enacted by him.

  
GARY J. BECK, Grantor

  
BETTY J. BECK, Grantor

#### ACCEPTANCE BY TRUSTEE

MATTHEW BECK, Trustee under the foregoing Trust, accepts the Trust and agrees that he will faithfully administer and distribute the Trust according to its terms.

Dated this 1st day of *November*, 1999.

  
MATTHEW BECK, Trustee

STATE OF SOUTH DAKOTA )  
  : ss  
COUNTY OF MARSHALL )

On this the 1st day of *November*, 1999, before me, the undersigned officer, personally appeared GARY J. BECK and BETTY J. BECK, husband and wife, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same for the purposes therein contained.

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

(SEAL)

My Commission expires: *August 14, 2003*

  
Notary Public, South Dakota

SS.

)

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

Kingdon

My Commission expires: August 17, 2000

Prepared by:  
Law Office of Danny R. Smels, P.C.  
P.O. Box A  
Britton, SD 57430  
605-448-5964

---

**CONSENT TO MORTGAGE OF REAL ESTATE  
OWNED BY TRUST**

I, the undersigned, a secondary beneficiary of the **B & B FARMS TRUST** u/t/a dated November 1, 1999, hereby consent to the Trustee mortgaging or encumbering the following real estate to **PLAINS COMMERCE BANK**, Aberdeen, South Dakota:

Southwest Quarter (SW1/4), Section Fourteen (14), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

South Half (S1/2) and East Half of Northwest Quarter (E1/2NW1/4), Section Fifteen (15), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

Southeast Quarter of Northeast Quarter (SE1/4NE1/4), Southeast Quarter of Northwest Quarter (SE1/4NW1/4), Northwest Quarter of Southeast Quarter (NW1/4SE1/4), Section Sixteen (16), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to **PLAINS COMMERCE BANK** benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, **MATTHEW BECK**. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

Dated this 12 day of November, 2015.

Jamie Moeckly  
Jamie Moeckly

STATE OF SOUTH DAKOTA )  
                                  ) ss.  
COUNTY OF MARSHALL )

On this the 12 day of November, 2015, before me, the undersigned officer, personally appeared JAMIE MOECKLY, 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.

[Signature]

Notary Public, South Dakota

My commission expires: Aug 17, 2018



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Current through acts received as of February 17th of the 2021 General Session of the 96th South Dakota Legislative Assembly and Supreme Court Rule 20-06

**LexisNexis® South Dakota Codified Laws Annotated Title 55 Fiduciaries and Trusts (Chs. 55-1 — 55-19) Chapter 55-2 Trustees — Duties and Liabilities (§§ 55-2-1 — 55-2-23)**

**55-2-3. Trustee prohibited from participating in transactions involving interest of trustee adverse to beneficiary — Exceptions.**

Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

- (1) When the beneficiary does have the capacity to contract and, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits the trustee to do so;
- (2) When the beneficiary does not have the capacity to contract but the circuit court, upon the like information of the facts, grants the like permission;
- (3) When some of the beneficiaries have the capacity to contract and some do not have it and the former grant permission for themselves and the circuit court for the latter in the manner above prescribed; or
- (4) When the instrument creating the trust expressly grants permission to the trustee to buy, sell or lease property for the trust from or to the trust.

**History**

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

APPEAL NO. 29512 and 29560

PLAINS COMMERCE BANK

Plaintiff/Appellee

v.

MATTHEW A. BECK, a married person; KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the B&B FARMS TRUST, u/t/a November 1, 1999;  
BROWN COUNTY, a governmental instrumentality of the State of South Dakota;  
MARSHALL COUNTY, a governmental instrumentality of the State of South Dakota;  
DEERE & COMPANY, a corporation,

Defendants/Appellants

and

JAMIE MOECKLY

Intervenor

---

APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
BROWN COUNTY, SOUTH DAKOTA

---

HONORABLE RICHARD SOMMERS  
Circuit Court Judge

---

**BRIEF OF AMICUS CURIAE**

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NOTICE OF APPEAL FILED FEBRUARY 25, 2021

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## **INTEREST OF THE AMICUS CURIAE**

The South Dakota Bankers Association (“SDBA”) is a trade association comprised of almost all chartered banks in the state of South Dakota, and is principally interested in the atmosphere for banking operations in South Dakota. SDBA believes the Circuit Court’s decision conflicts with public policy and, if affirmed by this Court, could lead to lenders’ non-defaulting customers bearing increased costs that are attributable to defaulting debtors’ foreclosures.

## **SUMMARY OF ARGUMENT**

At issue before this Court is the Circuit Court’s decision to grant attorneys’ fees to a debtor in a foreclosure action. SDBA believes this decision is at odds with public policy regarding attorneys’ fees and regulated lenders. Although the Circuit Court found authority to grant attorneys’ fees in foreclosure actions through SDCL 15-17-38, the statutory construct outlined by the Legislature, including specifically SDCL 15-17-39 and SDCL 54-3-13, evidences a public policy that a defaulting debtor, and the property securing that debt, should bear the costs of the foreclosure or other collection action taken as a result of the debtor’s default. The costs of a foreclosure action, including attorneys’ fees, should not be passed along to the lender’s other non-defaulting customers. Thus, the Circuit Court’s decision to grant attorneys’ fees to the debtor in this case should be reversed.

## **ARGUMENT**

A trial court's award of attorneys’ fees is reviewed by this Court under the abuse of discretion standard. *In re South Dakota Microsoft Antitrust Litigation*, 707 N.W.2d 85, 97 (S.D. 2005) (citing *Anderson v. Aesoph*, 697 N.W.2d 25, 31 (S.D. 2005)).

The Circuit Court in this case determined that attorneys' fees should be awarded to the debtor in the underlying foreclosure action. South Dakota generally follows the American Rule regarding attorneys' fees, which is that each side bears its own attorneys' fees, unless there is a "clear legislative grant of power" to permit an award of attorneys' fee. *Dakota Services, Inc. v. Wieman Land & Auction Company*, 429 N.W.2d 480, 483 (S.D. 1988), citing *First Bank v. Haberer Dairy and Farm Equipment*, 412 N.W.2d 866, 874 (S.D. 1987). The Circuit Court relied on the authority of SDCL 15-17-38, which provides that "[a]ttorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or advertisement." The SDBA believes the Circuit Court failed to consider SDCL 15-17-39 and SDCL 54-3-13, the public policy evidenced by the aforementioned statutes, and the implications of this decision for SDBA's members and their customers.

SDCL 15-17-39 provides that "[a]ny provision contained in any note, bond, mortgage, or other evidence of debt that provides for payment of attorneys' fees in case of default of payment or foreclosure is against public policy and void, except as authorized by specific statute." Regulated lenders, SDBA members included, are exempted from this provision. SDCL 54-3-13 provides that "[r]egulated lenders and their assignees are further exempt from the prohibition, operation, and effect of § 15-17-39, and regulated lenders and their assignees may recover reasonable attorney's fees in the case of default of payment if provided for in the note, bond, mortgage, or other evidence of debt."

The public policy that is the foundation of this statutory construct is simple: defaulting debtors should bear the costs of their debts rather than the non-defaulting debtors. Regulated lenders provide services to many customers, and a majority of those

customers will not default on their notes, bonds, mortgages, or other debt. SDCL 54-3-13 allows regulated lenders to pass along to the defaulting customer the costs of attorneys' fees during foreclosure actions.

Furthermore, consumer lenders rely upon statistical credit scoring models to set loan interest rates commensurate with a borrowers' risk of defaulting on the loan, known as risk-based pricing. Michael Staten, PhD, Risk-Based Pricing in Consumer Lending, 11 J.L Econ. & Pol'y 33 (2005). In general, low-risk borrowers are demonstrably less costly to serve than high-risk borrowers because of their lower incidence of losses and the lower costs of servicing their delinquent accounts. *Id.*, citing Phillip E. Strahan, Borrower Risk and the Price and Nonprice Terms of Bank Loans, 90 Fed. Res. Bank of N.Y. Staff Reports (1999). If lenders are, in effect, forced to bear the additional costs of attorneys' fees, rather than individuals who default, the additional costs for high-risk borrowers would be essentially subsidized by low-risk borrowers. This result leads to an increase in the overall cost of credit, and in turn, decreases access to credit.

The underlying facts that led to this appeal is not incompatible with the logic of the above-described public policy. SDCL 54-3-13 is intended to avoid the circumstance where customers of regulated lenders are forced to bear the cost of attorney fees resulting from the default of another. The result of this decision conflicts with that public policy. Here, the Circuit Court ultimately determined that Appellant's mortgage over the Debtor's real estate was invalid and awarded attorneys' fees to the Debtor. These attorneys' fees, if this decision is upheld, will be spread among the Appellant's other customers. The Circuit Court made no mention of either SDCL 15-17-39 or SDCL 54-3-



13, nor did it consider in its decision the public policy implications that accompany these statutes.

Furthermore, although the outcome in this case may be harsh, the Legislature has considered the repercussions of having regulated lenders bear the costs of attorneys' fees. If this particular outcome is inequitable, that is an issue for the Legislature to take up, not the Court.

### CONCLUSION

The result of this decision sets a precedent that could limit access to credit by increasing the costs of credit, which is incompatible with the public policy that both SDCL 15-17-39 and SDCL 54-3-13 are rooted in, and which the Circuit Court failed to consider in its decision.

For the forgoing reasons, the SDBA respectfully requests that the judgment of the Court of Appeals be reversed.

Dated this 11th day of June, 2021.

MAY ADAM GERDES & THOMPSON  
LLP

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Brett Koenecke, of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 11th day of June, 2021, he delivered by United States mail, first class postage thereon prepaid, and/or email a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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### **CERTIFICATE OF COMPLIANCE**

Brett Koenecke, attorney for Amicus Curiae, hereby certifies that the foregoing Amicus Curiae Brief complies with the type volume limitation imposed by the Court by Order. Proportionally spaced typeface Times New Roman has been used. Amicus Curiae Brief of South Dakota Bankers Association contains 965 words and does not exceed 4 pages. Microsoft Word processing software has been used.

Dated this 11th day of June, 2021.

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

---

Appeal Nos. 29512 and 29560

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PLAINS COMMERCE BANK,

*Plaintiff and Appellant,*

v.

MATTHEW A. BECK, a married person; KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the B&B FARMS TRUST, u/t/a November 1,  
1999; BROWN COUNTY, a governmental instrumentality of the State of South  
Dakota; MARSHALL COUNTY, a governmental instrumentality of the State of  
South Dakota; DEERE & COMPANY, a corporation,

*Defendants,*

and

JAMIE MOECKLY,

*Intervenor and Appellee.*

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APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
BROWN COUNTY, SOUTH DAKOTA

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THE HONORABLE SCOTT P. MYREN (Appeal No. 29512)  
THE HONORABLE RICHARD A. SOMMERS (Appeal No. 29560)  
Circuit Court Judges

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Notice of Appeal for Case No. 29512 filed on the 12th day of January, 2021  
Notice of Appeal for Case No. 29560 filed on the 25th day of February, 2021

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**REQUEST FOR ORAL ARGUMENT**

Intervenor and Appellee Jamie Moeckly also requests oral argument.



## **PRELIMINARY STATEMENT**

For consistency, this brief follows Appellant's conventions in referencing the parties and the Trust. Citations to the settled record and other documents are as follows:

Clerk's Index / Settled Record: "CI"

Plains Commerce's Appendix: "App"

Moeckly's Appendix: "JMAp"

## **JURISDICTIONAL STATEMENT**

Moeckly does not dispute the Bank's Jurisdictional Statement.

## **STATEMENT OF THE ISSUES**

1. In 1999, Gary and Betty Beck put their farmland into an irrevocable trust naming themselves as primary beneficiaries and their children Brian Beck, Jamie Moeckly, and Matt Beck as secondary beneficiaries. Matt was appointed Trustee. The Trust contains a spendthrift clause forbidding use of the Trust estate for a beneficiary's debts. In 2015, Trustee Matt mortgaged the Trust's farmland to secure a \$2 million personal loan from Plains Commerce to Matt and his wife, Kelley. Did the Trust's spendthrift clause forbid using the Trust Estate to secure the personal debts of beneficiary Matt Beck and his wife Kelley?

The circuit court ruled that the mortgage violated the spendthrift provision and exceeded Trustee Matt's authority thus rendering the mortgage void as to the Trust.

*In re Florence Y. Wallbaum Revocable Living Tr. Agreement*,  
2012 S.D. 18, 813 N.W.2d 111

*Matter of Cleopatra Cameron Gift Tr., Dated May 26, 1998*,  
2019 S.D. 35, 931 N.W.2d 244

*In re Est. of Stevenson*, 2000 S.D. 24, 605 N.W.2d 818

SDCL 55-1-35

SDCL 55-1-37

SDCL 55-1-41

2. The Trust document has no clear and unmistakable provision authorizing self-dealing. Was it impermissible self-dealing when Trustee Matt mortgaged the Trust land as security for the personal loans of himself and his wife or did an exception to the rule against self-dealing apply?

The circuit court ruled that Trustee Matt's mortgage constituted unauthorized self-dealing and no exception applied.

*In re Est. of Stevenson*, 2000 S.D. 24, 605 N.W.2d 818

SDCL 55-2-3(1)

SDCL 55-2-8

3. Plains Commerce obtained and reviewed a copy of the Trust document prior to issuing personal loans to Matt and Kelley. The Bank knew that the trust document must give the trustee the ability to use trust assets for lending purposes. Could the Bank rely on a Certificate of Trust to accept the mortgage over Trust land even though it had reviewed the Trust document itself that forbade such mortgages?

The circuit court ruled that the Bank could not rely on the Certificate of Trust when it had received, reviewed, and knew the actual terms of the Trust document.

SDCL 55-4-51.1

SDCL 55-4-53

SDCL 55-4-54

4. When Trustee Matt mortgaged the Trust Estate to Plains Commerce Bank, the beneficiaries signed documents called "Consent to Mortgage" that purported to consent to Trustee Matt granting the mortgage for his personal debts. Do the "Consents" constitute alterations or amendments to the Trust document?

The circuit court ruled that the "Consents" were not amendments to the Trust document.

Black's Law Dictionary, 6th ed. (1990)

5. Plains Commerce Bank commenced this mortgage foreclosure action to foreclose on Trust real estate. The circuit court ruled that the mortgage was void and dismissed the Bank's action against the Trust. SDCL 15-17-38 permits attorney's fees to be taxed as disbursements in mortgage foreclosures by action. Did the circuit court abuse its discretion in awarding attorney's fees to Intervenor Moeckly when she prevailed over the Bank in its mortgage foreclosure action?

The circuit court awarded attorney's fees to Moeckly.

*Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, 687 N.W.2d 507

*Ctr. of Life Church v. Nelson*, 2018 S.D. 42, 913 N.W.2d 105

*Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289

*Eagle Ridge Estate Home Owners Association, Inc. v. Anderson*, 2013 S.D. 21, 827 N.W.2d 859

SDCL 15-17-38

6. *Amicus Curiae* South Dakota Bankers Association argues that defaulting debtors must bear the costs of foreclosures resulting from the default. Is the Trust a defaulting debtor when the circuit court decided the mortgage was void and the Trust had no obligation to the Bank?

This argument was never presented to the circuit court.

*Argus Leader v. Hagen*, 2007 S.D. 96, 739 N.W.2d 475

*AMCO Ins. Co. v. Emps. Mut. Cas. Co.*, 2014 S.D. 20, 845 N.W.2d 918

*In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, 675 N.W.2d 222

*Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, 604 N.W.2d 289

SDCL 15-17-39

SDCL 54-3-13

## **STATEMENT OF THE CASE**

Plains Commerce Bank foreclosed on a mortgage on Brown County farmland (JMApp089, Complaint) held in the irrevocable B&B Farms Trust

(JMAApp001, ¶ 2, citing JMAApp011). Because the grantors did not want banks or the government to get their land to pay for nursing home care (JMAApp002, ¶ 4, citing JMAApp021), they included an unambiguous spendthrift clause in the Trust (JMAApp006, ¶ 51, citing JMAApp014).

Despite the spendthrift clause, which the Bank knew about (JMAApp003, ¶ 18, citing JMAApp042), Trustee Matt Beck mortgaged the Trust's land to secure \$2 million in personal loans to himself and his wife, Kelley (JMAApp007, ¶ 61, citing JMAApp033). Matt and Kelley immediately defaulted, and the Bank foreclosed. (App 34, ¶ 23, citing CI 1039-1040.)

Judge Scott P. Myren decided this case on cross motions for summary judgment. (App 1-2.) The deciding factor to the court was the clear protection intended and provided by the spendthrift provision to ensure "no individual beneficiary could threaten the security of the assets of the trust by their actions." (App 8, Circuit Court's Memorandum Opinion.) The circuit court entered judgment against the Bank, holding the mortgage void and unenforceable. (App 1-2.) The Bank appeals that decision.

Moeckly moved for attorney's fees under SDCL 15-17-38. (CI 1174.) The matter was heard by Judge Richard Sommers, who granted Moeckly's motion (App 17-18) and entered Findings of Fact and Conclusions of Law (App, 19-22). The Bank appeals that decision.

## STATEMENT OF FACTS

Gary and Betty Beck established their “B & B Farms Trust” on November 1, 1999. (JMAApp001, ¶ 1, citing JMAApp016-017.) They are named as the beneficiaries. (JMAApp 001, ¶ 1, citing JMAApp010.) The Trust is irrevocable. (JMAApp001, ¶ 2, citing JMAApp011.) They appointed Matthew Beck as trustee. (JMAApp002, ¶ 3, citing JMAApp010.) Gary and Betty put the land in trust because they did not want banks or the government getting their land to pay for nursing home care. (JMAApp002, ¶ 4, citing JMAApp021.) It was important for Betty and Gary that the farm stay intact for the family. (JMAApp002, ¶ 5, citing JMAApp022-023.)

The Trust’s Article VIII is a spendthrift provision. (JMAApp006, ¶ 51, citing JMAApp014.) The Trust does not contain any language authorizing the trustee to self-deal. (JMAApp007, ¶ 55, citing JMAApp010-017.) There is no evidence that the Trust has ever been modified. (JMAApp006, ¶ 54.)

The secondary beneficiaries are Betty and Gary’s children: Brian Beck, Jamie Moeckly, and Matthew Beck. (JMAApp002, ¶ 6, citing JMAApp010.) In 2015, Matthew was in financial trouble, so he sought financing from Plains Commerce Bank to pay off his other lenders. (JMAApp002, ¶ 7, citing JMAApp033.)

Lance Vilhauer was the Plains Commerce Bank employee who processed Matt’s loan request. (JMAApp002, ¶ 12, citing JMAApp039-040.) When a loan involves a trust, Plains Commerce Bank asks for a copy of the

trust agreement, which it then turns over to the bank's counsel for review. (JMAp002, ¶ 13, citing JMAp041.) Lance Vilhauer reviews the trust documents to see whether there are restrictions or limits on whether the trust assets can be used for collateral. (JMAp002, ¶ 14, citing JMAp041.) Lance Vilhauer knew that the trust agreement must give the trustee the ability to use the trust assets for lending purposes. (JMAp003, ¶ 15, citing JMAp041.)

When a trust seeks a loan, the Bank is aware that you need to know who the trustee is and what is spelled out in the trust. (JMAp003, ¶ 16, citing JMAp041.) Matt Beck sent a copy of the B&B Farms Trust Agreement to Lance Vilhauer. (JMAp003, ¶ 17, citing JMAp049.) Lance Vilhauer reviewed the B&B Farms Trust agreement. (JMAp003, ¶ 18, citing JMAp042.) It was a "red flag" to Lance Vilhauer that Matthew was trying to self-deal under the trust. (JMAp003, ¶ 19, citing JMAp042.) Lance Vilhauer knew Matt could not self-deal under the trust agreement. (JMAp003, ¶ 20, citing JMAp042.)

The Bank considered loaning Matt the money, but only if he mortgaged the Trust's property. (JMAp003, ¶ 21, citing JMAp043.) The Bank decided that Matt could mortgage the trust land if the beneficiaries consented to the mortgage. (JMAp003, ¶ 22, citing JMAp044.)

It was not until a year or year and a half prior to her deposition (held October 3, 2018) that Betty, as one of the primary beneficiaries, had any knowledge that Matt had debt problems. (JMAp002, ¶ 8, citing JMAp024.)

Betty would have wanted to know if Matt was having debt problems while he was trustee over the property. (JMAApp002, ¶ 9, citing JMAApp024.) Betty did not know until her October 3, 2018, deposition that Matt had a debt of approximately \$2.1 million. (JMAApp002, ¶ 10, citing JMAApp025.) Matt's personal debt of about \$2.1 million is something Betty probably would have wanted to know about. (JMAApp002, ¶ 11, citing JMAApp026.)

Attorney Danny Smeins drafted the "Consent to Mortgage of Trust Real Estate Owned by Trust" documents for the beneficiaries and secondary beneficiaries to sign. (JMAApp003, ¶ 23, citing JMAApp049-050.) In part, the "Consent" states:

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to Plains Commerce Bank benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, Matthew Beck. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00.

(JMAApp003, ¶ 24, citing JMAApp062-063.)

The Bank understood the "Consents" to permit an \$800,000 mortgage principal amount plus any other terms and conditions found in the mortgage. (JMAApp004, ¶ 25, citing JMAApp045.) However, Betty Beck understood that the trust land would be obligated to just \$800,000. (JMAApp004, ¶ 26, citing JMAApp027.)

Brian Beck reviewed the “Consent to Mortgage” with Danny Smeins. (JMAp004, ¶ 27, citing JMAp068.) Brian understood from Danny Smeins that by signing the “Consent to Mortgage” document, he was allowing Matt to mortgage his third of the trust. (JMAp004, ¶ 28, citing JMAp068-069.) Brian understood from Danny Smeins the \$800,000 number in the “Consent to Mortgage” was Matt’s one-third of the value of the Trust land. (JMAp004, ¶ 29, citing JMAp069-070.) Brian understood the mortgage on Trust land was to be for Matt personally and not for the Trust. (JMAp004, ¶ 30, citing JMAp071.) Brian did not see a copy of the Trust Agreement until after January 15, 2018. (JMAp004, ¶ 31, citing JMAp068.)

Jamie did not know there was a trust for the family farm until October 2015. (JMAp004, ¶ 32, citing JMAp076.) Jamie’s mother, Betty, told Jamie to speak with attorney Danny Smeins to sign some papers because they wanted to sell their land to Matt. (JMAp004, ¶ 33, citing JMAp076.) Betty told Jamie that if Jamie did not sign the consent to sale papers, she could not be a part of Betty’s life any longer. (JMAp004, ¶ 34, citing JMAp078.)

Jamie’s dad, Gary, came to her house in October or November 2015 after Betty had been there, and he was upset that Jamie had not signed the papers. (JMAp005, ¶ 38, citing JMAp078.) Gary told Jamie she was probably going to hell if she did not do as he asked. (JMAp005, ¶ 39, citing JMAp078.) Jamie and her parents had had difficulties in their relationship prior to that point, although she got together with her parents just about every



week until they wanted her to sign the papers. (JMAp005, ¶ 40, citing JMAp078-079.) With the consent to mortgage, Jamie knew her parents would not talk to her any longer if she refused to sign it. (JMAp005, ¶ 41, citing JMAp081.)

Jamie had an office conference with Danny Smeins in which he told her Matt had about \$500,000 of debt. (JMAp005, ¶ 36, citing JMAp076.) Jamie signed the consent to mortgage so Matt could take his note with Plains Commerce Bank, which she thought was the best way to protect the Trust and her parents' interest, and to patch things up with her parents. (JMAp005, ¶ 42, citing JMAp080.) Jamie thought that if she signed the consent to mortgage, she would be protecting the Trust and her parents by helping Matt get back on his feet. (JMAp005, ¶ 43, citing JMAp080-081.) Jamie thought the consent to mortgage meant Matt could take a loan up to \$800,000 and use \$800,000 value of the trust to do that, but not any more than that. (JMAp005, ¶ 44, citing JMAp082.) Jamie did not think the consent to mortgage allowed interest, charges, penalties, etc. (JMAp005, ¶ 45, citing JMAp081, 084-085.) Jamie believed from speaking with Mr. Smeins that just Matthew's third of the Trust would be affected. (JMAp005, ¶ 46, citing JMAp083, 086.)

When she was asked to sign the consent to mortgage, Jamie never saw or had an opportunity to review the mortgage or the guaranty. (JMAp006, ¶ 47, citing JMAp088.) At the time she signed the consent to mortgage, Jamie had not seen a copy of the Trust Agreement, nor did she know any of the terms of

the Trust Agreement. (JMAApp006, ¶ 48, citing JMAApp088.) Jamie had tried to get a copy of the Trust Agreement from Mr. Smeins by email and by phone, but he never gave her one. (JMAApp006, ¶ 49, citing JMAApp088.) Jamie never saw a copy of the Trust Agreement until after January 2018. (JMAApp006, ¶ 50, citing JMAApp077.)

On November 25, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$1,855,000.00. (JMAApp007, ¶ 57, citing JMAApp090, JMAApp098-101.) On December 14, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$370,000.00. (JMAApp007, ¶ 58, citing JMAApp090, JMAApp102-105.) On November 25, 2015, trustee Matt Beck executed a mortgage to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (JMAApp007, ¶ 59, citing JMAApp090, JMAApp106-121.) Also on that date, trustee Matt executed a Guaranty to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (JMAApp007, ¶ 60, citing JMAApp093, JMAApp122-125.)

Matt Beck mortgaged the Trust land to secure \$800,000 of the approximately \$2 million loan from Plains Commerce Bank. (JMAApp007, ¶ 61, citing JMAApp033-034.) Jamie's desire has been to protect her "grandpa's land," to not have it be sold, and to keep it in the family. (JMAApp007, ¶ 62, citing JMAApp087-088.)

## STANDARD OF REVIEW

The grant of a summary judgment motion is subject to de novo review. *In re the Matheny Family Trust*, 2015 S.D. 5, ¶ 7, 859 N.W.2d 609, 611. “We will affirm the circuit court on summary judgment if it is correct for any reason.” *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 13, 719 N.W.2d 780, 785 (citation omitted).

On appeal, this Court will “determine only whether a genuine issue of material fact exists and whether the law was correctly applied.” *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101. “If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.” *Id.*

“Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one.” *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 S.D. 100, ¶ 10, 740 N.W.2d 115, 119 (quoting *Kimball Inv. Land, Ltd. v. Chmela*, 200 S.D. 6, ¶ 7, 604 N.W.2d 289, 292). Here, both sides moved for summary judgment.

## ARGUMENT

This case raises important concerns about spendthrift provisions in irrevocable trusts. Here, the B&B Farms Trust has a spendthrift clause that explicitly prohibited using the Trust estate for a beneficiary’s personal debts.

Both Trustee Matt and Plains Commerce Bank disregarded the spendthrift protection and entered into a self-dealing mortgage that put the Trust estate at risk for a beneficiary's personal debts. The circuit court correctly determined that the spendthrift provision controls under statutory mandate and South Dakota Supreme Court case law.

**1. The Trust's spendthrift clause prohibited mortgaging the Trust estate to secure a beneficiary's personal debts, thus rendering the mortgage void and unenforceable.**

The Bank addresses the irrevocable Trust's spendthrift provision in abbreviated fashion mid-way through its appellate brief. However, the unambiguous spendthrift provision is the central issue in this case.

Gary and Betty protected their farm from banks and the government (JMAp002, ¶ 4) by adding a spendthrift clause at Article VIII, forbidding the use of the Trust estate for a beneficiary's debts:

ARTICLE VIII.  
PROTECTION OF TRUST FUND

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

(JMAp006, ¶ 51.)

When interpreting a trust, courts must ensure “that the intentions and wishes of the trustor are honored.” *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 20, 813 N.W.2d 111, 117. “If the language of the trust instrument makes the intention of the settlor clear, it is our duty ‘to declare and enforce it.’” *Id.* (citation omitted).

Article VIII’s second clause broadly and unequivocally forbids making the Trust Estate liable for beneficiary Matt’s personal debts. Yet that is what happened. The Trust’s only asset – land – was mortgaged for beneficiary Matt’s debt. It also secured Kelley’s debt, who neither had nor has any interest in the Trust. They defaulted, now the Bank wants to hold the Trust liable for their debts. The second clause forbids holding the Trust liable. Unlike the third clause (discussed below), there is no exception in this clause; it is an absolute prohibition.

Article VIII’s third clause states that beneficiary Matt cannot “transfer,” “encumber,” or in any manner “anticipate or dispose” of his future interest in the Trust Estate *prior to* receiving a distribution. Where the second clause protects the principal and income from liability, the third clause prohibits a beneficiary from, generally, encumbering or disposing of his interest prior to its distribution. Matt has received no distribution from the Trust, and he will not receive one until Betty dies. (*See* Article 4.3, App 53.) So when Matt signed the mortgage in 2015, he had no distribution or any other interest to encumber.

The Bank relies on this third clause to justify Trustee Matt's self-dealing mortgage. But the Bank offers contradictory interpretations of that clause, particularly which beneficiary is referred to in the phrase "no beneficiary shall have . . . ." The Bank has maintained that the \$800,000 mortgage amount represented beneficiary *Matt's* future share of the Trust. It did so on page 7 of its Brief: "Jamie and Brian understood the \$800,000 represented approximately one-third of the value of the Trust land, *which would equal Matt's share upon the deaths of Gary and Betty.*" (Emphasis added.) The Bank again so admitted on page 14 of its Brief: "Jamie understood that Matt was to pay Plains Commerce with personal funds and if he was unable to do so, *the Bank would be paid from Matt's share of the Trust.*" (Emphasis added.) Those admissions were undisputed material facts the Bank agreed to in summary judgment. (See App 41, ¶ 29, admitted to at App 47; see also App 42, ¶ 46, admitted to at App 42.)

Yet in Section III of its Brief, particularly page 23, the Bank changes course, implying that beneficiaries *Gary and Betty* were disposing of their distribution interests in the Trust Estate. But either way the Bank tries to interpret it, the third clause prohibits what happened. Beneficiary Matt could not encumber or dispose of an interest he would not have till his parents died. Nor could Gary and Betty dispose of an interest in land that had not been distributed to them.

Notably, the third clause refers to the same beneficiary throughout, “No beneficiary shall have any power . . . other than by power of appointment or withdrawal expressly granted hereunder . . . to anticipate or dispose of his or her interest . . . .” If Matt wanted to dispose of *his* future interest, *he* must have an expressly granted power to do it. That is, the beneficiary whose interest is to be disposed must be the beneficiary with the power of appointment or withdrawal. But the Bank’s position is that Gary and Betty could exercise Article 6.2 enabling a different beneficiary – Matt – to leverage his future interest. That is not how the third clause reads. It refers to the same beneficiary. The “express grant” must be *to the beneficiary* disposing of *that same beneficiary’s* interest.

The third clause’s “power of appointment” exception applies only when the beneficiary 1) has a power of appointment 2) expressly granted in the Trust 3) to do the prohibited act. All three of those elements fail here. Nowhere does the Trust expressly grant a power of appointment or withdrawal to beneficiaries Matt, Gary, or Betty. With no express grant, the exception clause does not apply in this case.

The spendthrift provision at Article VIII is clear and reveals the trustors’ intent to prevent beneficiaries from encumbering the farmland. A court must declare and enforce that intent. As this Court emphasized, “[o]ur Legislature has placed formidable barriers between creditor claims and trust funds protected

by a spendthrift provision.” *Matter of Cleopatra Cameron Gift Tr.*, 2019 S.D. 35, ¶ 26, 931 N.W.2d 244, 251.

One barrier is SDCL 55-1-37, stating that spendthrift provisions apply to both “distribution interests and remainder interests.” That statute also emphasizes that a spendthrift provision is a “material provision of a trust.” Another barrier is SDCL 55-1-35: “A declaration in a trust that the interest of a beneficiary shall be held subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of a beneficial interest by a beneficiary to the maximum extent provided by law.” And a third barrier: “If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level.” SDCL 55-1-41. Nor may a court order “a trustee to distribute past due mandatory distributions directly to a creditor.” *Id.*

In 2015, when the Bank decided to loan money to Matt, those statutes protected the Trust from creditors like the Bank. Trustee Matt and the Bank disregarded them, and the very situation the spendthrift provision was designed to avoid was realized.

In *Cleopatra Cameron Gift Trust*, this Court held that a California child support order could not be enforced against a South Dakota spendthrift trust despite the Full Faith and Credit Clause of the United States Constitution. *Cleopatra Cameron Gift Tr.*, 2019 S.D. 35, ¶ 1, 931 N.W.2d at 245-46. How much less should a mortgage and guaranty be enforced against the B&B Farms



Trust with its spendthrift provision. The provision removes from beneficiaries the power to transfer, encumber, or to dispose of their interest in the Trust. So Matt's mortgage was forbidden by the Trust Agreement and is void and unenforceable against the Trust.

**A. The Trust's Article 6.2 does not override the spendthrift clause.**

In Section III of its Brief, the Bank claims the Trust, at Article 6.2, authorized Trustee Matt to mortgage Trust property for his personal gain. That article states:

The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of GARY J. BECK except upon the unanimous written consent of both the primary beneficiaries.

(App 56.) But the Bank's argument that Trustee Matt can use Article 6.2 to avoid the spendthrift clause and self-deal divorces Article 6.2 from clearly settled fiduciary duty law. A trustee's general power to deal with trust property is *not* license to self-deal – “the powers must always be used for the trust and its beneficiaries, not for the trustee.” *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 17, 605 N.W.2d 818, 822. If the power to self-deal is not specifically articulated, that power does not exist. *Bienash v. Moller*, 2006 S.D. 78, ¶ 14, 721 N.W.2d 431, 435.

Rather than benefitting himself, Trustee Matt “is bound to act in the highest good faith toward his beneficiary . . . .” *In re Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d at 821 (quoting SDCL 55-2-1). Nor may Trustee

Matt “use or deal with the trust property for h[er] own profit or for any other purpose unconnected with the trust.” *Id.* (quoting SDCL 55–2–2). And as a fiduciary, he “must act with utmost good faith and avoid any act of self-dealing that places his personal interest in conflict with h[er] obligations to the beneficiaries.” *Id.* (quoting *American State Bank v. Adkins*, 458 N.W.2d 807, 811 (S.D.1990)). That law is the lens through which Article 6.2 must be interpreted. With written consent, the general power to sell, option, or dispose must be exercised for the beneficiaries’ benefit alone.

In *Estate of Stevenson*, the trustee had relied on a trust provision giving her power to lease trust farmland to justify leasing that property to her husband. 2000 S.D. 24, ¶ 17, 605 N.W.2d at 822. This Court held the leases void, explaining, “Although these provisions provide the trustee the powers to deal with the trust property as if it were her own, the powers must always be used for the trust and its beneficiaries, not for the trustee.” *Id.* As with the trust provisions discussed in *Estate of Stevenson*, Article 6.2 does not clearly and unmistakably permit beneficiary Matt to dispose of his future interest in the Trust. It is no more than a general provision giving Matt a trustee’s standard authority over the trust property – assuming unanimous written consent – which use, as always, carries with it the responsibility of being “wholly for the benefit of the trust.” *Estate of Stevenson*, 2000 S.D. 24, ¶ 9, 605 N.W.2d at 820–21.

Further, on Article 6.2, the Bank’s adopts a contradictory position, which is essentially this: Under Article VIII, while no beneficiary can use trust assets

for personal debts, Article 6.2 permits that very act so long as Gary and Betty agree. But Gary and Betty cannot agree to something under Article 6.2 that they expressly said they *do not* agree to in Article VIII. Each provision must be given full application.

A more natural reading of the two provisions – that harmonizes them, rather than sets them in contradiction – is that Article 6.2 enables Gary and Betty to authorize the trustee to sell, option, or dispose of interests in real estate *for the benefit of the trust*, while Article VIII forbids spendthrift actions that are inherently *not* for the benefit of the trust. So both provisions have the same goal: protect the trust estate – the opposite of what Matt did.

**B. The Trust’s Article 4.1 does not override the spendthrift clause.**

The Bank contends that Trustee Matt had power to mortgage Trust land under Article 4.1, which states in pertinent part:

Granters acknowledge that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust.

The Bank is wrong for two reasons. First, bad timing: Article 4.1 specifically mentions debt “secured by real estate at the time of creation of the Trust.” The Trust was created in 1999. Trustee Matt did not mortgage the trust land until 2015 for his and his wife’s \$2 million debt incurred in 2015. (See App 44, ¶¶ 57-59, admitted by the Bank at App 50; also see App 25, ¶ 22, and response to it at App 34.)

Second, the debt at issue is not a “debt of the trust.” The debt belongs to Matt and Kelley Beck; they alone gave the promissory notes of over \$2 million for which the Trust land was mortgaged. There is no dispute of fact on that point. (See App 44, ¶¶ 57-59, admitted by the Bank at App 50.) In the Bank’s Statement of Undisputed Material Fact, it makes no claim that Plains Commerce was financing debt of the Trust, even stating in SUMF No. 22 that “[t]he mortgage provided the Trust land as collateral for a \$1,855,000 loan to Matthew and Kelley Beck.” (App 25, admitted to at App 34.) In response to Moeckly’s Statement of Undisputed Material Facts, the Bank wrote, “Plaintiff does not believe there are any material issues of fact which need to be tried . . . .” (App 46, top of page.) The debt indisputably belonged to Matt and Kelley alone.

The Bank confirmed that point at the summary judgment motions hearing. The circuit court directly asked counsel for Plains Commerce, “Do you think that there is a factual dispute over whether the money that Matthew was securing by the mortgage was debt of the estate?” (JMAp128, p. 5:7-9.) Counsel responded, “I don't think there is a -- no, I don't think there is a material factual dispute that should preclude summary judgment for either, frankly, for either side.” (JMAp128, p. 5:16-18.)

Yet in this appeal, the Bank belatedly attempts to argue a factual dispute about who the debt belonged to when it did *not* do so in summary judgment. (See Bank’s Brief, p. 24, arguing a dispute of fact.) This is improper. A-G-E

Corp. attempted to do the same thing in *A-G-E Corp. v. State*, 2006 S.D. 66, 719 N.W.2d 780. This Court noted, “[n]or did A–G–E argue below that genuine issues of material fact existed. Now on appeal, A–G–E asserts for the first time that such issues existed.” This Court found A-G-E Corp’s about-face improper: “This Court does not review issues raised for the first time on appeal. Therefore, this issue is not properly before the Court and will not be addressed.” *A-G-E Corp. v. State*, 2006 S.D. 66, ¶¶ 18-19, 719 N.W.2d 780, 786.

As there are no disputes of fact, the circuit court’s analysis is accurate and should be affirmed in this appeal:

If the mortgage in question in this suit is not for “debt of the estate” or debt secured by the real estate at the time of the creation of the trust” it did not fall within the trustee’s mortgage authority under Article IV of the trust. There is no legitimate factual dispute that the loan secured by Matthew was not debt which fell within either of those two categories. Accordingly, Provision 4.1 did not authorize Matthew Beck to mortgage the trust property in the circumstances evidenced by this case.

**2. The Trust did not clearly and unmistakably authorize Trustee Matt to enter the self-dealing mortgage.**

On page 8 of its Brief, the Bank acknowledges that the Trust has no “clear and unmistakable language” authorizing self-dealing as *Estate of Stevenson* would require. 2000 S.D. 24, ¶ 15, 605 N.W.2d at 822. But the Bank argues that SDCL 55-2-3(1), enabled the trustee to grant the self-dealing mortgage. That is, the Bank claims the beneficiaries could approve Trustee Matt’s self-dealing transaction if they had full knowledge of his motives and all

other facts which might affect their decision, and, here, the Consents show that the beneficiaries approved of Trustee Matt's actions. The Bank's argument fails for two reasons: the beneficiaries did not have full knowledge of Trustee Matt's motives with all other facts concerning the transaction and the Bank cannot overcome the presumption of undue influence at SDCL 55-2-8.

First, the Bank has acknowledged that the beneficiaries did not have full knowledge of the motives or facts. In its response to Moeckly's Statement of Undisputed Material Facts, the Bank largely agreed that Betty, Brian, and Jamie *lacked* material information related to the mortgage. (See App 41-43, ¶¶ 25-50, with responses at 47-49.)

If the beneficiaries here did not have "full knowledge" of Matt Beck's motives or the important facts, then the Consents fail the strict standard of SDCL 55-2-3(1), requiring full knowledge of the trustee's motives and all other facts which might affect their decision.

Betty Beck would have wanted to know if Matt was having debt problems while he was trustee over the property (JMAp002, ¶ 8, admitted by the Bank at App 46), but she did not know until October 3, 2018, deposition (nearly three years after she signed the "Consent") that Matt had an approximate debt of \$2 million. (JMAp002, ¶ 10, admitted by the Bank at App 46.) She would have wanted to know about that. (JMAp002, ¶ 11, admitted by the Bank at App 46.)

Brian Beck understood from Danny Smeins that by signing the “Consent to Mortgage” document, he was allowing Matt to mortgage his third of the trust. (JMAp004, ¶¶ 28-29, admitted by the Bank at App 47.) However, Brian Beck did not see a copy of the Trust Agreement until 2018 (JMAp004, ¶ 31, admitted by the Bank at App 47), and so he could not have known that the mortgage directly violated the spendthrift provision.

Jamie did not even know there was a trust until October 2015, when she was being asked to sign the consents. (JMAp004, ¶ 32, admitted by the Bank at App 47.) She tried to get a copy of the Trust Agreement, but never received one. (JMAp006, ¶ 49, admitted by the Bank at App 49.) She did not see a copy of the Trust Agreement until after January 2018. (JMAp006, ¶ 50, admitted by the Bank at App 49.) She never saw a copy of the mortgage referred to in the “Consent” (JMAp006, ¶ 47, admitted by the Bank at App 49), and she did not think the consent to mortgage allowed interest, charges, penalties, etc. (JMAp005, ¶ 45, Bank’s response at App 48 – the Bank says it denies this fact, but a close reading shows it actually agrees with it.) Jamie thought Matt was only dealing with a debt of about \$500,000. (JMAp005, ¶ 36, admitted by the Bank at App 48.) She thought that if she signed the “Consent,” it was the best way to protect the Trust and her parents (JMAp005, ¶¶ 42-43, admitted by the Bank at App 48), who, incidentally, had threatened never to speak to her again if she refused to sign. (JMAp004-005, ¶¶ 34, 39, admitted by the Bank at App 47-48.)

Jamie's desire has always been to protect her "grandpa's land" and keep it in the family. (JMAp007, ¶ 62, admitted by the Bank at App 50.) She thought the "Consent" would protect the trust land. It actually exposed it to danger. Because she believed the "Consent" when it claimed that Matt had authority to mortgage the land for personal gain, Jamie took the only protective measure she thought was available to her, which was to limit the exposure to \$800,000. If she had been provided with the Trust Agreement, she would have realized that she could have shut this terrible deal down entirely. She would also have realized the extent of her own interests in the trust as a secondary beneficiary and could have protected them. However, she was not given any of that material information, and she decided to sign the "Consent" with a misunderstanding of the facts and motives.

While SDCL 55-2-3(1) provides an avenue by which a trustee may participate in a transaction that is adverse to a beneficiary's interest, it cannot override the Trust Agreement's specific prohibition on beneficiaries encumbering the trust fund. Even if it could overcome the spendthrift provision, before the beneficiaries could provide legitimate consent to the proposed transaction, they had to be fully informed. They indisputably were not. The "Consent" fails to meet the strict requirements of SDCL 55-2-3(1), so Trustee Matt's attempt to self-deal and side-step the spendthrift clause was prohibited.



Further, the circuit court determined that the Bank had not overcome the presumption of undue influence and lack of consideration that attends transactions between a trustee and his beneficiary. *See* SDCL 55-2-8; *Estate of Stevenson*, 2000 S.D. 24, ¶ 19, 605 N.W.2d at 823 (“SDCL 55–2–8 provides that when a trustee obtains an advantage from the beneficiary, it is presumed that the beneficiary entered into the transaction ‘without sufficient consideration and under undue influence . . . .’”). Here, the circuit court reviewed Brian, Betty, and Jamie’s *lack of knowledge* and ruled as follows:

Clearly, based on those undisputed factual matters alone, this court must conclude that the beneficiaries of the Trust did not have "full knowledge of the facts concerning the transaction," and together with the presumption in SDCL § 55-2-8, cannot be said to have validly consented to Matthew Beck mortgaging the Trust assets. Those undisputed facts alone make it impossible for Matthew Beck to overcome the presumption in SDCL 55-2-8.

(App 14.) The circuit court’s ruling should be affirmed.

**3. Plains Commerce Bank possessed and had reviewed the actual Trust document, so it could not rely on the Certificate of Trust.**

In Section II, p. 17, of the Bank’s Brief, it argues that it “had a right to rely upon the Certificate of Trust which stated the Trustee had the authority to mortgage real estate.” But whether the Trustee had authority to mortgage the Trust real estate is not the right question; rather, it is whether the Trustee had the right to self-deal with Trust real estate for his and his wife’s exclusive benefit when that land was held in an irrevocable spendthrift Trust that the Bank knew about.

In summary judgment, the Bank did not dispute that it had a copy of the Trust Agreement, which it reviewed and sent to its counsel. (See App 39, ¶¶ 12-20, admitted by the Bank at App 46-47.) The Bank acknowledged that its counsel advised that the beneficiaries' consent be obtained before the Trust land was used as collateral. (App 40, ¶ 22, and Bank's response at App 47.) The Bank did not rely on the Certificate of Trust, further evidenced by its plan to get the consent of the beneficiaries. Without reliance on the Certificate of Trust, SDCL 55-4-53 and 54 are inapplicable.

But even if the Bank did rely on the Certificate, the Bank knew that just because the Certificate of Trust lists a power to mortgage does not mean the Trustee can self-deal with Trust property. (App 40, ¶ 20, admitted by the Bank at App 47.) The Bank, in fact, considered Matt's attempt to self-deal under the Trust to be a potential red flag. (App 40, ¶ 19, admitted by the Bank at App 47.) So the Bank knew Matt could not self-deal under the Trust Agreement or the Certificate of Trust.

SDCL 55-4-51.1 holds the Bank liable for its knowledge of what the Trust Agreement prohibited:

Until amended or revoked, or until the full trust instrument or will is recorded, filed, *or presented*, a certificate of trust is conclusive proof as to the matters contained in it and any party may rely upon the certificate, *except a party dealing directly with the trustee or trustees who have actual knowledge of the facts to the contrary.*

SDCL 55-4-51.1 (version as it existed in 2015; emphasis added). Because the Bank had been presented with the full Trust Agreement, reviewed it, and had sent it to counsel, it had actual knowledge of facts that contradicted the 2007 Certificate of Trust. Therefore, the Bank knew that the purported power to mortgage noted in the 2007 Certificate of Trust was, if not erroneous, at most a generic power to mortgage rather than a license to self-deal.

**4. The “Consent to Mortgage” document did not alter or amend the Trust document.**

In Section V of its Brief, the Bank argues that “the consent of the beneficiaries did amount to an alteration of the Trust,” which the Bank claims was permitted by the Trust’s Article III. Article III provides in part:

This Trust may not be altered or amended by Grantors during the lifetime of GARY J. BECK and BETTY J. BECK except upon unanimous consent of the primary and secondary beneficiaries except as to appointment of a successor Trustee pursuant to Article VIII below.

The Bank’s claims are deficient for several reasons. First, the Consent document has no language that can be construed as “altering” the Trust. Rather, it is called a “Consent,” and it does nothing more than indicate the signer’s alleged “consent” to the proposed mortgage.

Second, an “alteration” to a trust should specify what is being altered, yet, in that regard, the Consent is silent. “Alter” is defined by Black’s Law Dictionary, 6th ed. (1990), as:

To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without

substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish.”

The primary idea is one of “change.” But the Consent does not even refer to or quote language from the Trust, much less alter any of it. Any alteration to permit the mortgage would need to address the spendthrift provision, which prohibited Matt from mortgaging his future interest in the Trust. The Consent does not do so. Rather, the Consent – by using the present tense – states that the Trust *already permitted* the mortgage Matt intended to grant: “I am aware and understand that the Trustee *has authority or discretion to mortgage . . .*” (App 60 (emphasis added).) If the Consent claims the Trustee already has power to enter a self-dealing mortgage, then the Consent’s purpose is manifestly *not* to alter the Trust to create that power.

The third defect is that the Trust’s Article III refers to *two* required actions before the Trust can be altered: an alteration “by Grantors” that is consented to, unanimously, by all beneficiaries. We have the “Consents,” but where is the Grantors’ alteration? There is no such document. There is no such provision in the Consent. The Consent was not an alteration to the Trust.

Fourth, there is no evidence that the Bank considered the Consent to be an alteration of the Trust. Instead, the Bank decided that Matt could mortgage the trust land if the beneficiaries consented to the mortgage. (JMA003, ¶ 22,

citing JMAp044.) There was no other strategy involved, as the Bank's representative, Lance Vilhauer, testified:

Q: So as I understand it then, just kind of a summary, the strategy in terms of getting the trust land available for collateral was to get these consents, and was there any other strategy involved there?

A: No.

(JMAp044, Lance Vilhauer Depo 42:25 – 43:4.)

The Consents did not alter or amend the Trust.

**5. The circuit court properly awarded attorney's fees under the statutory authority of SDCL 15-17-38.**

The circuit court awarded attorney's fees to Moeckly under the last sentence of SDCL 15-17-38: "Attorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement."

"An award of attorney fees is reviewed under the abuse of discretion standard." *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 24, 687 N.W.2d 507, 513. In applying the abuse of discretion standard, this Court does "not determine whether we would have made the same decision as the circuit court;" rather, this Court's function "is to protect litigants from conclusions [that] exceed the bounds of reason." *Ctr. of Life Church v. Nelson*, 2018 S.D. 42, ¶ 41, 913 N.W.2d 105, 116 (citation omitted).

"[A]ttorney's fees may be charged against a party if authorized by statute." *Berggren v. Schonebaum*, 2017 S.D. 89, ¶ 9, 905 N.W.2d 563, 565.

To determine whether a statute permits recovery of attorney's fees from an opposing party, the South Dakota Supreme Court "has rigorously followed the

rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power.” *Id.* (citation omitted).

This Court’s decision in *Kimball Inv. Land, Ltd. v. Chmela* confirms that SDCL 15-17-38 clearly grants power to authorize attorney’s fees in mortgage foreclosure actions:

The last sentence of SDCL 15–17–38 . . . is specific statutory authorization for an award of attorneys' fees in mortgage foreclosures and provides the authorization for the circuit court's award of attorney's fees to Kimball.

*Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 24, 604 N.W.2d 289, 296.

In opposing attorney’s fees to Moeckly, the Bank argues that this case “started as a mortgage foreclosure but then changed to something else.” (Bank’s Brief, 28.) This case never “changed to something else.” There was no amendment to the pleadings. There was no bifurcation splitting the case into separate cases. There was no separate action filed. The Bank began this case as a mortgage foreclosure action (see the Complaint at CI 3), and it tried to end the case when it moved for summary judgment on its foreclosure action:

Plaintiff Plains Commerce Bank hereby moves the Court, pursuant to SDCL 15-6-56(a), for entry of summary judgment in its favor on all claims and causes of actions.

(CI 373.) The circuit court granted summary judgment to Moeckly, which had the final effect of dismissing the Bank’s mortgage foreclosure action. (App 1-2.)

The Bank says this case “became more in the nature of a declaratory judgment action,” and “[a]fter Jamie intervened, the focus of the case changed dramatically.” (Bank’s Brief, p. 28.) This is wrong. The focus of the case has always been whether the Bank could foreclose on its mortgages. Questioning whether the mortgage is valid is a reasonable place to start. Whether the Bank could foreclose depended on whether Trustee Matt could mortgage. Even if there is a question about trust law, that inquiry is incidental to the original suit, not independent of it. And fees are available given the nature of the original suit.

The South Dakota Supreme Court case of *Toft v. Toft* supports that idea by analogy. In *Toft*, Mother and Father filed for divorce. 2006 S.D. 91, ¶ 4-6, 723 N.W.2d 546, 548. Grandparents filed a separate custody action and then later intervened in the divorce case to argue their custody matter. *Id.*, 2006 S.D. 91, ¶ 4-6, 21, 723 N.W.2d at 548, 553. Father contested a custody award to Grandparents. *Id.*, 2006 S.D. 91, ¶ 9, 723 N.W.2d at 549. Grandparents lost, and Father sought attorney’s fees under SDCL 15-17-38. *Id.*, 2006 S.D. 91, ¶ 23, 723 N.W.2d at 554. Grandparents argued that Father could not get fees because guardianship matters were not listed in SDCL 15-17-38, which was true at that time. *Id.*, 2006 S.D. 91, ¶ 19, 723 N.W.2d at 552. The trial court disagreed, awarding fees to Father, and this Court affirmed, holding “because Father's motions were decided in a divorce proceeding in which Grandparents were parties, SDCL 15–17–38 authorized an award of attorney's fees.” *Id.* The

Court also noted that Father's custody dispute "is a supplementary proceeding incidental to the original suit. It is not an independent proceeding or the commencement of a new action." *Id.*, 2006 S.D. 91, ¶ 21, 723 N.W.2d at 553.

In the same way here, even if the mortgage's validity involved trust law, it was still decided in the mortgage foreclosure action. It was not an independent proceeding or new action. So attorney's fees are available to Intervenor Moeckly under the fee statute, just like they were in *Toft*.

The Bank asserts on pages 28-29 of its Brief that "SDCL 15-17-38 only allows for the recovery of fees on the foreclosure action itself, not on different issues raised in an action in which a foreclosure is also pending," and that "the dispute regarding Matt's authority . . . is in effect, a separate proceeding." Those assertions are not based on any legal authority, procedural or otherwise; therefore, those assertions are waived. *Moeckly v. Hanson*, 2020 S.D. 45, ¶ 31, 947 N.W.2d 630, 639 ("Hanson cites no authority in this portion of the brief. As such, he has waived the issue.")

Next, standing on the erroneous assumption that the validity of the mortgage is a "separate proceeding" from the mortgage foreclosure, the Bank points out several cases for the proposition that attorney's fees cannot be awarded in separate proceedings.

The Bank relies on *First Fed. Sav. & Loan Ass'n of Rapid City v. Clark Inv. Co.*, which permitted attorney's fees in a Hughes County mortgage foreclosure action, while denying fees for defending *a separate declaratory*



*judgment action* in Pennington County. 322 N.W.2d 258, fn. 8 (S.D. 1982) (“The declaratory judgment action was initiated by appellants against appellee in Pennington County but was dismissed by Judge Davis on December 22, 1980, and part of the case file transferred to Hughes County. The record is not clear, but it appears the declaratory judgment action was dismissed because this foreclosure action was pending in Hughes County.”). That situation is not analogous to this case, where there is only a mortgage foreclosure action and no declaratory judgment action, much less a separate one in another county.

The Bank notes *Charlson v. Charlson*, which actually supports *Moeckly’s* position. In that case, the South Dakota Supreme Court denied attorney’s fees in an entirely separate declaratory judgment action concerned with a pre-marital agreement, with the Court holding that an appeal from a declaratory judgment action was not the kind of case listed in SDCL 15-17-38. *Charlson v. Charlson*, 2017 S.D. 11, ¶ 37, 892 N.W.2d 903, 913 (“This appeal concerns none of the types of cases listed . . .”). The Court reasoned that,

[h]ere, in contrast, Angela's declaratory action *is not a supplemental action incidental to the original suit for divorce* in Minnesota, and the South Dakota circuit court's jurisdiction over Angela's action *did not arise out of the parties' divorce proceedings*.

*Id.* The implication of *Charlson* is that if the declaratory judgment action had been brought in the divorce proceeding, then it *would* concern a case listed under SDCL 15-17-38, and attorney’s fees could be awarded.

The Bank argues that “the interests of justice” must be considered when awarding attorney’s fees in mortgage foreclosure actions. Though SDCL 15-17-38 does have the language “interests of justice,” that language specifically applies to “cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony.” In contrast, the statute places no such requirement on an award of fees in mortgage foreclosures. Nor was such a requirement considered in the *Kimball Inv. Land, Ltd.* case, which, after holding that SDCL 15-17-38 permits attorney’s fees in mortgage foreclosure actions, summarily affirmed the circuit court’s award of attorney’s fees to Kimball under that statute. *Kimball Inv. Land, Ltd.*, 2000 S.D. 6, ¶ 26, 604 N.W.2d at 296.

The Bank also argues that the circuit court did not address several factors listed in *Eagle Ridge Estate Home Owners Association, Inc. v. Anderson*, which noted:

The award of attorney fees must be reasonable for the services rendered. There are a number of factors to be considered by a trial court in determining a reasonable award of attorney fees in civil cases:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;

- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

2013 S.D. 21, ¶ 28, 827 N.W.2d 859, 867 (internal quotations omitted). But Moeckly is not required to satisfy every one of those factors. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 30, 687 N.W.2d 507, 514 (“The fee should not be based on any one single factor but all of these matters should be taken into consideration. The only requirement is that the fee which the court fixes in each case must be reasonable for the services rendered.”).

The circuit court’s Findings of Fact and Conclusions of Law do not cite *Eagle Ridge*, but they readily satisfy all its factors but Factor 2. The circuit court considered and adopted as fact the affidavit of Mr. Roy Wise, an experienced litigator in trust and foreclosure matters. (See Findings and Conclusions at App 20; see affidavit of Roy Wise at CI 1183, ¶ 3.) As to *Eagle Ridge* Factor 1, Attorney Wise’s affidavit noted that this “is a case of some complexity,” and confirmed that the “time put into the motions, depositions, and communication between client and counsel was reasonable.” (Wise Aff. at CI 1184, ¶ 6.) Mr. Wise provided that opinion based on a review of the Wurgler Affidavit compared to his experience in similar litigation cases. (Wise Aff. at CI 1184, ¶ 5-6.) Mr. Wise noted that, per Factors 3 and 7, that the hourly rates of Moeckly’s counsel are reasonable given this locale and given counsel’s qualifications. (Wise Aff. at CI 1183, ¶¶ 2-4.) That consideration

also goes to Factor 8 on the nature of the fee – here, a fixed hourly rate. The Bank did not contest the reasonableness of the rates. (App 20, ¶ 9.)

The Wurgler Affidavit, also reviewed by the circuit court, itemized the fees. The circuit court found them reasonable given the nature of the case, the amount of work involved, and the type of work involved (App 20, ¶ 10), which is relevant to Factors 1, 4, 5, and 6.

The circuit court examined the history of the case and the result obtained by Moeckly (App 19-20, ¶¶ 1-7), which are applicable to Factors 1, 4, 5, and 6. The circuit court found the Wurgler Affidavit’s explanation of the work performed to be reasonable, which work included litigating a three-year case, resisting a summary judgment motion in 2018, written discovery, depositions, filing a motion for summary judgment in 2020, and resisting the Bank’s 2020 summary judgment motion. (App 20, ¶ 10; Affidavit of Josh Wurgler at CI 1186, ¶ 3.) The court reviewed the Wurgler fee itemization. (App 20, ¶ 10.)

The circuit court concluded that this case is a mortgage foreclosure action, that fees are available to Moeckly under SDCL 15-17-38, that Moeckly had properly submitted information relevant to her attorney’s fees and the work performed, and finally that the fees were reasonable given the history and nature of the case. (App 22, ¶¶ 6-13.)

The circuit court’s Findings of Fact and Conclusions of Law properly and adequately demonstrated the court’s reasoning for awarding fees in a

manner that comports with the case law. The circuit court did not abuse its discretion in awarding fees.

**6. *Amicus curiae* South Dakota Bankers Association wrongly ignores clear statutory language while advancing inapplicable public policy arguments.**

Although the South Dakota Bankers Association (“SDBA”) contends “the Circuit Court failed to consider” various public policy implications (SDBA Brief, p. 2), the truth is that those arguments were never presented to the circuit court. They are raised, now, for the first time on appeal. As this Court routinely declines to consider new arguments on appeal, Moeckly asks the Court to decline here as well. *See, e.g. State v. Little Long*, 2021 S.D. 38, fn. 9, \_\_\_ N.W.2d \_\_\_ (“The circuit court did not, accordingly, have an opportunity to consider the issue, and we decline to address the argument for the first time on appeal.”); *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 34, 739 N.W.2d 475, 484 (declining to consider for the first time on appeal an argument raised by amicus curiae that had not been raised below).

Regardless, the SDBA brief provides no assistance in deciding this appeal because the SDBA builds its argument upon a crucial misunderstanding – the idea that “defaulting debtors should bear the costs of their debts rather than the non-defaulting debtors.” (SDBA Brief, p. 2.) Because the circuit court ruled the mortgage is void, the Trust is not a “defaulting debtor.” It owes no debt to the Bank. There are no “costs of [its] debts” for which it can be held responsible. It is even a dubious proposition that the Trust was ever a debtor.

*See, e.g.*, JMAp090 (Complaint, ¶¶ 3-4) and JMAp098 and 102 (Promissory Notes) and JMAp107 (Mortgage, Section 4.A.) designating Matt and Kelley as the borrowers, not the Trust.

Former Trustee Matt improperly mortgaged Trust land, the Bank improperly accepted the mortgage, the circuit court voided the mortgage, leaving the Trust with no obligation to the Bank. The SDBA makes no attempt to square its proposed public policy with the egregious facts of this case where the Bank blatantly disregarded the spendthrift provision and accepted a self-dealing mortgage from the trustee, which it knew was a red flag. Banks should be held accountable for their improper conduct, and not, as the SDBA proposes, to avoid the consequence by passing these attorney's fees on to its other customers, rather than satisfy them from its own profits.

The SDBA asks this Court to enforce the SDBA's perceived public policy (which it claims is found in SDCL 15-17-39 and 54-3-13) despite the clear legislative intent that "[a]ttorneys' fees may be taxed as disbursements on mortgage foreclosures either by action or by advertisement." SDCL 15-17-38. Using a separate public policy to override a statute ignores a cardinal rule of statutory interpretation, which is that a court must "do no more than declare the existence of a policy revealed to them by a process of interpretation of statutory and constitutional provisions . . . ." *AMCO Ins. Co. v. Emps. Mut. Cas. Co.*, 2014 S.D. 20, ¶ 10, 845 N.W.2d 918, 922 (citation and internal quotes omitted). "When the language in a statute is clear, certain and unambiguous, there is no

reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *In re W. River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 21, 675 N.W.2d 222, 228 (citation omitted).

Further, neither SDCL 15-17-39 nor 54-3-13 stand for the public policy the SDBA reads into them. SDCL 15-17-39 says it is against public policy for a debt instrument to provide for payment of attorney's fees in a default or foreclosure. This Court considered that statute in *Kimball Investment Land, Ltd.*, supra, but still held that SDCL 15-17-38, which Moeckly has relied on, permits attorney's fees in mortgage foreclosure cases. 2000 S.D. 6, ¶ 24, 604 N.W.2d at 296. SDCL 54-3-13 simply exempts regulated lenders from the restrictions of SDCL 15-17-39. The statutes nowhere claim to stand for the public policy that the SDBA advocates.

Given the SDBA's new argument on appeal, its inaccurate position that the Trust is a defaulting debtor, its disregard of the clear statutory language permitting attorney's fees in mortgage foreclosures, and its advocacy for a public policy position that cannot be justified from the statutory language, Moeckly urges this Court to disregard the SDBA's position in this appeal.

### **CONCLUSION**

This case will have an effect on the clear protections provided by spendthrift clauses in every South Dakota trust that contains one. If affirmed, this case will strengthen spendthrift protections. If reversed, this case will blaze a trail upon which all manner of abuses will arrive at the many South Dakota

family farms held in irrevocable spendthrift trusts – farms that grantors put into trust for protection from banks and spendthrift children.

Can an external “Consent to Mortgage” document override the clear terms of a trust’s spendthrift provision? Jamie respectfully urges this Court to reject that idea. If a trustee can grant a self-dealing mortgage, one specifically prohibited by a spendthrift provision, upon the strength of a misleading “Consent” document given by beneficiaries ignorant of the information necessary to make a reasoned decision, then spendthrift provisions will no longer provide their intended protection.

The South Dakota Legislature decided that attorney’s fees should be available in mortgage foreclosure cases, like this one. Jamie’s efforts to protect the Trust prevented the Bank foreclosing on a void mortgage for an amount over \$800,000. Jamie respectfully asks this Court to affirm the award of attorney’s fees.

Respectfully submitted,

**BANTZ, GOSCH & CREMER, L.L.C.**

/s/ Josh Wurgler

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## **CERTIFICATE OF COMPLIANCE**

Under SDCL 15-26A-66(b), I certify that this Appellee's Brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,437 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 20th day of July, 2021.

/s/ Josh Wurgler  
Josh Wurgler

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on this 20th day of July, 2021, a true and correct copy of the foregoing brief in the matter of *Plains Commerce Bank v. Beck, et al.* was served by emailing one copy and by mailing (first-class, U.S. Mail) the original and two copies to:

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

Defendants.

06CIV18-000055

**INTERVENOR MOECKLY'S  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS SUPPORTING  
MOTION FOR SUMMARY  
JUDGMENT**

Under SDCL 15-6-56, Intervenor Moeckly submits this statement of undisputed material facts in support of her motion for summary judgment. The references to exhibits refer to those exhibits attached to the Affidavit of Josh Wurgler Supporting Intervenor Moeckly's Motion for Summary Judgment.

1. Gary and Betty Beck established their "B & B Farms Trust" trust on November 1, 1999, and they are named as the present beneficiaries. (Ex. A, Trust Agreement, pp. 7-8.)

2. The Trust is an irrevocable trust. (Ex. A, Trust Agreement, Article III.)

**JMApp001**

3. They appointed Matthew Beck, their youngest child, as trustee. (**Ex. A**, Trust Agreement, p. 1.)

4. Gary and Betty put the land in trust because they did not want banks or the government getting their land to pay for nursing home care. (**Ex. B**, Betty Depo 17:3-16.)

5. It was important for Betty and Gary that the farm stay intact for the family. (**Ex. B**, Betty Depo 29:2-6; 32:6-8.)

6. The secondary beneficiaries are Betty and Gary's children: Brian Beck, Jamie Moeckly, and Matthew Beck. (**Ex. A**, Trust Agreement, p. 1.)

7. In 2015, Matthew was in financial trouble, so he sought financing from Plains Commerce Bank to pay off his other lenders. (**Ex. C**, Motion Hearing Trans. 19:10-13.)

8. It was not until a year or year and a half prior to her deposition (held October 3, 2018) that Betty, as one of the primary beneficiaries, had any knowledge that Matt had debt problems. (**Ex. B**, Betty Depo 41:5-8.)

9. Betty would have wanted to know if Matt was having debt problems while he was trustee over the property. (**Ex. B**, Betty Depo 41:9-12.)

10. Betty did not know until her October 3, 2018, deposition that Matt had a debt of approximately \$2.1 million. (**Ex. B**, Betty Depo 45:2-5.)

11. Matt's personal debt of about \$2.1 million is something Betty probably would have wanted to know about. (**Ex. B**, Betty Depo 47:5-8.)

12. Lance Vilhauer was the Plains Commerce Bank employee who processed Matt's loan request. (**Ex. D**, Vilhauer Depo 14:3-14; 18:15-20.)

13. When a loan involves a trust, Plains Commerce Bank asks for a copy of the trust agreement, which it then turns over to the bank's counsel for review. (**Ex. D**, Vilhauer Depo 29:17 – 30:12.)

14. Lance Vilhauer reviews the trust documents to see whether there are restrictions or limits on whether the trust assets can be used for collateral. (**Ex. D**, Vilhauer Depo 31:7-10.)

15. Lance Vilhauer knew that the trust agreement must give the trustee the ability to use the trust assets for lending purposes. (Ex. D, Vilhauer Depo 31:11-14.)

16. When a trust seeks a loan, Plains Commerce Bank is aware that you need to know who the trustee is and what is spelled out in the trust. (Ex. D, Vilhauer Depo 30:13-16.)

17. Matt Beck sent a copy of the B&B Farms Trust Agreement to Lance Vilhauer. (Ex. E, Matt Depo 54:11-12.)

18. Lance Vilhauer reviewed the B&B Farms Trust agreement. (Ex. D, Vilhauer Depo 33:1-3.)

19. It was a “red flag” to Lance Vilhauer that Matthew was trying to self-deal under the trust. (Ex. D, Vilhauer Depo 33:4-18.)

20. Lance Vilhauer knew Matt could not self-deal under the trust agreement. (Ex. D, Vilhauer Depo 33:4-18.)

21. Plains Commerce Bank considered loaning Matt the money, but only if he mortgaged the property owned by the Trust. (Ex. D, Vilhauer Depo 36:10 – 37:17; 38:20-23.)

22. Plains Commerce Bank decided that Matt could mortgage the trust land if the beneficiaries consented to the mortgage. (Ex. D, Vilhauer Depo 41:22-25; 42:25 – 43:4.)

23. Attorney Danny Smeins drafted the “Consent to Mortgage of Trust Real Estate Owned by Trust” documents for the beneficiaries and secondary beneficiaries to sign. (Ex. E, Matt Beck Depo 54:24 – 55:4.)

24. The “Consent” states that the signers “hereby consent to the Trustee mortgaging or encumbering the following real estate to Plains Commerce Bank, Aberdeen, South Dakota: [legal description omitted]. I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to Plains Commerce Bank benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, Matthew Beck. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and

new mortgages up to the limits set forth herein.” (Ex. F, “Consent to Mortgage of Trust Real Estate Owned by Trust.”)

25. Plains Commerce Bank understood the “Consents” to permit an \$800,000 mortgage principal amount plus any other terms and conditions found in the mortgage. (Ex. D, Vilhauer Depo 80:19-25.)

26. With regard to the “Consents,” Betty Beck understood that the trust land would be obligated to just \$800,000. (Ex. B, Betty Depo 58:14-24.)

27. Brian Beck reviewed the “Consent to Mortgage” with Danny Smeins. (Ex. G, Brian Depo 11:13-22.)

28. Brian understood from Danny Smeins that by signing the “Consent to Mortgage” document, he was allowing Matt to mortgage his third of the trust. (Ex. G, Brian Depo 11:13-14; 15:21-23.)

29. Brian understood from Danny Smeins the \$800,000 number in the “Consent to Mortgage” was Matt’s one-third of the value of the Trust land. (Ex. G, Brian Depo 15:25 – 16:14.)

30. Brian understood the mortgage on Trust land was to be for Matt personally and not for the Trust. (Ex. G, Brian Depo 17:2-4.)

31. Brian did not see a copy of the Trust Agreement until after January 15, 2018. (Ex. G, Brian Depo 11:4-7.)

32. Jamie did not know there was a trust for the family farm until October 2015. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 9:4-16.)

33. Jamie’s mother, Betty, told Jamie to speak with attorney Danny Smeins to sign some papers because they wanted to sell their land to Matt. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 9:14-16.)

34. Betty told Jamie that if Jamie did not sign the consent to sale papers, she could not be a part of Betty’s life any longer. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 20:8-18.)

35. Jamie called Danny Smeins, and Danny told Jamie that Betty and Gary wanted to dissolve the trust and sell the land to Matt. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:1-6.)

36. After that, Jamie had an office conference with Danny in which he told her Matt had about \$500,000 of debt and he wanted a loan with the bank. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:12-14.)

37. They discussed a consent to sell the land, determined that was not a good option, and then discussed the consent to mortgage. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 10:14-17.)

38. Jamie's dad, Gary, came to her house in October or November 2015 after Betty had been there, and he was upset that Jamie had not signed the papers. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:4-15.)

39. Gary told Jamie she was probably going to hell if she did not do as he asked. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:4-15.)

40. Jamie and her parents had had difficulties in their relationship prior to that point, although she got together with her parents just about every week until they wanted her to sign the papers. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 23:16 – 24:6.)

41. With the consent to mortgage, Jamie knew her parents would not talk to her any longer if she refused to sign it. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 32:6-9.)

42. Jamie signed the consent to mortgage so Matt could take his note with Plains Commerce Bank, which she thought was the best way to protect the Trust and her parents' interest, and to patch things up with her parents. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 31:16-23.)

43. Jamie thought that if she signed the consent to mortgage, she would be protecting the Trust and her parents by helping Matt get back on his feet. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 31:24 – 32:5.)

44. Jamie thought the consent to mortgage meant Matt could take a loan up to \$800,000 and use \$800,000 value of the trust to do that, but not any more than that. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 36:13-17.)

45. Jamie did not think the consent to mortgage allowed interest, charges, penalties, etc. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 35:18-21; 47:7 – 48:3.)

46. Jamie believed from speaking with Danny that just Matthew's third of the Trust would be affected. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 43:5-12; 57:8-24.)



47. When she was asked to sign the consent to mortgage, Jamie never saw or had an opportunity to review the mortgage or the guaranty. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 68:9-25.)

48. At the time she signed the consent to mortgage, Jamie had not seen a copy of the Trust Agreement, nor did she know any of the terms of the Trust Agreement. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 69:1-6.)

49. Jamie had tried to get a copy of the Trust Agreement from Danny Smeins by email and by phone, but he never gave her one. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 69:7-18.)

50. Jamie never saw a copy of the Trust Agreement until after January 2018. (**Ex. H**, Moeckly Depo (2<sup>nd</sup>) 17:11-18.)

51. The Trust has a spendthrift provision that states:

ARTICLE VIII.  
PROTECTION OF TRUST FUND

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

(**Ex. A**, Trust Agreement, Article VIII.)

52. Article VI expresses the grantors' (Gary and Betty) "desire to have the real estate retained as an asset of the Trust during the life of Gary J. Beck." (**Ex. A**, Trust Agreement, Article VI.)

53. The Trust Agreement states that the "Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of Gary J. Beck except upon the unanimous written consent of both the primary beneficiaries." (**Ex. A**, Trust Agreement, Article VI.)

54. There is no evidence that the Trust has ever been modified.

55. The Trust does not contain any language authorizing the trustee to self-deal. (Ex. A, Trust Agreement.)

56. Gary Beck died in September 2019. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 18:19 – 19:3.)

57. On November 25, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$1,855,000.00. (Ex. I, Complaint ¶ 3 and Exhibit A to same.)

58. On December 14, 2015, Matt and Kelley Beck gave a promissory note to Plains Commerce Bank in the amount of \$370,000.00. (Ex. I, Complaint ¶ 4 and Exhibit B to same.)

59. On November 25, 2015, trustee Matt Beck executed a mortgage to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (Ex. I, Complaint ¶ 6 and Exhibit D to same.)

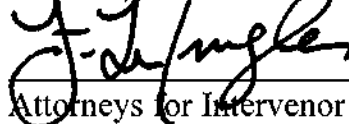
60. Also on November 25, 2015, trustee Matt Beck executed a Guaranty to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck. (Ex. I, Complaint ¶ 10 and Exhibit H to same.)

61. Matt Beck mortgaged the Trust land to secure \$800,000 of the approximately \$2 million loan from Plains Commerce Bank. (Ex. C, Motion Hearing Trans. 19:24-20:2.)

62. Jamie's desire has been to protect her "grandpa's land," to not have it be sold, and to keep it in the family. (Ex. H, Moeckly Depo (2<sup>nd</sup>) 65:11-18; 66:14-19; 67:18 – 68:1.)

Dated this 10th day of July, 2020.

BANTZ, GOSCH & CREMER, L.L.C.



Attorneys for Intervenor Jamie Moeckly  
305 Sixth Avenue S.E.; P.O. Box 970  
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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

PLAINS COMMERCE BANK, INC., a  
banking corporation,

06CIV18-000055

Plaintiff,

vs.

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November  
1, 1999; BROWN COUNTY, a  
governmental instrumentality of the State  
of South Dakota; MARSHALL  
COUNTY, a governmental  
instrumentality of the State of South  
Dakota; DEERE & COMPANY, a  
corporation;

**AMENDED AFFIDAVIT OF JOSH  
WURGLER SUPPORTING  
INTERVENOR MOECKLY'S  
MOTION FOR  
SUMMARY JUDGMENT  
(NOTARY SIGNATURE AND  
STAMP ADDED)**

Defendants.

STATE OF SOUTH DAKOTA    )  
  )    SS  
COUNTY OF BROWN         )

Josh Wurgler, being first duly sworn, deposes and states as follows:

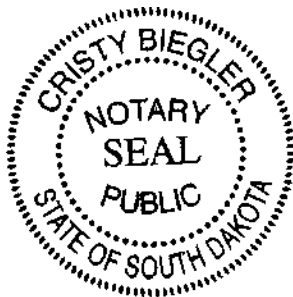
1. I am one of the attorneys for Jamie Moeckly in this case.
2. I am attaching the following exhibits in support of Jamie Moeckly's Motion for Summary Judgment:


Ex.	Description
A.	B&B Farms Trust Agreement
B.	Betty Beck, deposition excerpts
C.	Transcript from Motion to Intervene and Motion for Summary Judgment, August 10, 2018, excerpts
D.	Lance Vilhauer deposition, excerpts
E.	Matt Beck deposition, excerpts
F.	Plains Commerce Bank's Response to Acting Trustee Moeckly's Discovery Requests 1-17:  "Consent to Mortgage of Trust Real Estate Owned by Trust," Bates PCB 134-141
G.	Brian Beck deposition, excerpts
H.	Jamie Moeckly deposition (2 <sup>nd</sup> ), excerpts
I.	Complaint with attached Exhibits A, B, D, and H

Dated this 10th day of July, 2020.

  
Josh Wurgler

Subscribed and sworn to before me this 10th day of July, 2020.



  
Notary Public, South Dakota

My Commission Expires: 3/31/2023

## TRUST AGREEMENT

THIS TRUST AGREEMENT, made this 1st day of November, 1999, by and between GARY J. BECK and BETTY BECK of 41044 109<sup>th</sup> St., Hecla, SD 57446-6105 (hereinafter called "Grantors") and MATTHEW BECK of 41044 109<sup>th</sup> St., Hecla, SD 57446-6105 (hereinafter called "Trustee").

WITNESSETH:

WHEREAS, Grantors desire to establish a trust known as the "B & B FARMS TRUST" covering the assets described in Exhibit "A", attached hereto and by this reference made a part hereof as if fully set forth herein, and all additions thereto of any nature, and the Trustee is willing to act as Trustee thereof.

NOW THEREFORE, in consideration of the premises, it is hereby agreed by and between the parties hereto as follows:

### ARTICLE I. PROPERTY SUBJECT TO TRUST

The Trustee agrees to receive, if and when tendered to him, all assets described in Exhibit "A". The Trustee furthermore agrees to accept and administer hereunder any cash, securities and other property transferred to the Trust. Grantors, or any other person transferring assets to the Trust or causing insurance to be made subject to the Trust, shall upon request deliver to the Trustee, or the appropriate insurer such instruments of transfer or assurance as may reasonable be requested. The Trustee accepts the Trust hereby created and agrees to hold, manage, control, invest and reinvest the Trust Estate in accordance with the authority hereinafter conferred, shall collect and receive the income therefrom, and after deducting all necessary expenses incidental to the administration of the Trust shall dispose of the income and principal of the Trust upon the terms and conditions set forth herein.

### ARTICLE II. IDENTIFICATION AND DEFINITIONS

**2.1 Primary Beneficiaries.** The primary beneficiaries of the Trust are the Grantors; namely, GARY J. BECK and BETTY J. BECK.

**2.2 Secondary Beneficiaries.** The secondary beneficiaries of the Trust are the issues of Grantors; namely, BRIAN BECK, JAMIE MOECKLY and MATTHEW BECK.

**2.3 Issue.** "Child" or "children" of a person as used herein shall include only the legitimate natural sons or daughters of such person and also those who become sons or daughters of such person and also those who become sons or daughters through legal adoption. "Grandchild" or "grandchildren" of a person as used herein shall include only the legitimate natural sons or daughters of a child of such person and also those

EXHIBIT

Map010

who become sons or daughters of a child of such person through legal adoption.

**ARTICLE III.  
TERM OF THE TRUST**

This Trust shall be irrevocable for the natural lives of GARY J. BECK and BETTY J. BECK. After the death of both GARY J. BECK and BETTY J. BECK, the Trust shall or may be revoked with the consent of a majority of the secondary beneficiaries of the Trust. This Trust may not be altered or amended by Grantors during the lifetime of GARY J. BECK and BETTY J. BECK except upon unanimous consent of the primary and secondary beneficiaries except as to appointment of a successor Trustee pursuant to Article VIII below. After the death of both GARY J. BECK and BETTY J. BECK, the Trust may be altered or amended by a majority of the secondary beneficiaries.

**ARTICLE IV.  
ADMINISTRATION AND DISTRIBUTION OF THE TRUST**

**4.1 Disposition During the Lives of GARY J. BECK and BETTY J. BECK.** During the lifetime of GARY J. BECK and BETTY J. BECK, the Trustee shall collect, receive, receipt for and manage the principal and income of the Trust, and after paying the proper charges and expenses of the Trust Estate, the Trust shall hold and distribute the net income from the Trust Estate in the manner set forth below:

The net income shall be paid to the primary beneficiaries in quarterly or other convenient installments, but at least annually.

Grantors acknowledge that the real estate assets to be made part of the Trust may be mortgaged to secure debts of the Trust or debt secured by real estate at the time of creation of the Trust. It is understood by the Grantors that the Trustee shall apply as much of the income of the Trust Estate to the retirement of this debt as he deems prudent, and the retirement of the debt is to be given priority over income distributions to the beneficiaries of the Trust.

**4.2 Disposition of Trust Funds.** All assets of the Trust of every kind or nature shall be administered and distributed by the Trustee upon the terms and conditions set forth in the succeeding articles hereof.

**4.3 Disposition Upon the Death of Both GARY J. BECK and BETTY J. BECK.** Upon and after the death of both GARY J. BECK and BETTY J. BECK and after collection of other benefits payable to the Trust, the Trustee may hold, manage, allocate, distribute, or administer the then remaining assets of the Trust Estate. They shall be divided equally between the secondary beneficiaries, BRIAN BECK, JAMIE MOECKLY and MATTHEW BECK. If any of the them should predecease the second to die between Grantors, GARY J. BECK and BETTY J. BECK, then his/her share shall be

distributed equally to his/her issue by right of representation. In the event that any of the secondary beneficiaries should predecease the second to die between Grantors, GARY J. BECK and BETTY J. BECK, without issue, then in such event the amount allocated herein shall be distributed to the surviving beneficiaries or their issue.

4.4 If any part of the Trust Estate is not distributable under the provisions heretofore set forth, then the same shall be distributed to the heirs at law of the primary beneficiaries determined according to the laws of descent and succession in force in the State of South Dakota.

4.5 Despite the preceding provisions, the Trustee may elect to withhold any property otherwise distributable to a secondary beneficiary who has not reached the age of twenty-five (25) and may retain that property for that secondary beneficiary in a separate trust named for the secondary beneficiary in which his or her interest is indefeasibly vested to be distributed to the secondary beneficiary when he or she reaches the age of twenty-five (25), or before then if the Trustee so elects. The Trustee shall apply as much of the net income and principal of the Trust so retained as the Trustee believes desirable for the health, support and reasonable comfort, education, best interest and welfare of the secondary beneficiary for whom the trust is named, considering all the circumstances and facts deemed pertinent by the Trustee. Any undistributed net income shall be accumulated and added to the principal as from time to time determined by the Trustee.

#### **ARTICLE V. TRUSTEE'S POWERS**

The Trustee shall have the following authority to be exercised in his sole and absolute discretion:

5.1 To exercise that judgment and care under the circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

5.2 The Trustee shall invest and reinvest any and all funds coming into his possession for investment in such securities or properties, real or personal, as he, in his discretion, may deem proper and suitable and may commingle for investment all or any part of the funds of this Trust in any common trust fund or funds now or hereinafter maintained by such Trustee. The Trustee shall be under no obligation to change any investments which come into his hands from the Grantors because of their character or lack of diversification thereof but only when he deems it advisable to do so because of changing conditions and careful investigation and consideration.

5.3 The Trustee shall have full power and authority to vote all stocks and to

exercise all rights incident to the ownership of stocks, bonds or other securities or properties held in the Trust funds and to issue proxies to vote such stocks and to exercise such rights; and the Trustee shall have full power and authority to sell or exercise any subscription rights; to sell or retain any and all stock dividends; to consent to and join in or to oppose any reorganization, merger, consolidation or liquidation in respect to any corporation whose stock, bonds or other securities are a part of the Trust funds, including becoming a member of or depositing such securities with any stockholders' or bondholders' committee; and to accept and hold any securities pursuant to any plan of reorganization, merger, consolidation or liquidation and to otherwise exercise any and all rights and to deal in and with any such securities in the same manner and to the same extent as any individual owner.

5.4 To, at any time, render liquid the Trust Estate in whole or in part and hold cash or readily marketable securities of little or no yield for such period as he may deem advisable.

5.5 To make distribution of the principal of the Trust Estate in kind and to cause any share to be composed of cash, property or undivided fractional shares in property different in kind from any other share.

5.6 To determine what is principal or income of the Trust Estate; to determine what receipts or expenditures shall apply to depreciation, waste, obsolescence, income and principal; to determine what expenses should be amortized; to arrange for suitable reserves for taxes or other expenditures which must be paid from time to time; and to determine what the net income is for distribution to the Grantors or beneficiaries and to pay the same according to the terms hereof.

5.7 To make payments to or for the benefit of any minor pursuant to the provisions of SDCL 55-1A-29 and acts amendatory thereto with the additional power that Trustee shall not be obliged to see to the application of the funds so paid, but the receipt of such person shall be full acquittance of the Trustee.

5.8 To execute and deliver necessary instruments pursuant to the provisions of SDCL 55-1A-35 and acts amendatory thereto with the additional power that no party to any such instrument in writing signed by the Trustee shall be obliged to inquire into its validity or be bound to see to the application by the Trustee of any money or other property paid or delivered to him by such party pursuant to the terms of any such instruments.

5.9 To possess the entirety of powers granted by SDCL 55-1A-3 and all acts amendatory thereto which powers are incorporated into this Trust by reference thereto.

5.10 To do any and all things which are incidental or necessary to the exercise of the powers herein conferred upon the Trustee. The enumeration of specific powers and authorities shall be deemed an extension and not a limitation of such powers.



**ARTICLE VI.**  
**TRUSTEE'S POWERS AS TO SALE OF REAL ESTATE**

6.1 The real estate initially made part of this Trust is real estate which had been owned by GARY J. BECK and BETTY J. BECK, the parents of the secondary beneficiaries, who are still living at the time of the creation of this Trust. The Grantors desire to have the real estate retained as an asset of the Trust during the life of GARY J. BECK.

6.2 The Trustee is not authorized to sell, option or dispose of any interest in the real estate during the lifetime of GARY J. BECK except upon the unanimous written consent of both the primary beneficiaries.

6.3 After the death of GARY J. BECK, the Trustee may sell all or part of the real estate.

6.4 The Trustee in the sale of the real estate is subject to Article VII. below.

**ARTICLE VII.**  
**OPTION TO PURCHASE**

The Grantors further grant and confer on MATTHEW BECK an option or last right of refusal to purchase all or part of the real estate. The option price shall be the fair market value of the real estate as determined by a state certified appraisal of the real estate obtained by the Trustee. If any of the secondary beneficiaries should object to the appraised value, they may obtain their own state certified appraisal at their expense, and then the fair market value shall be the median value between the appraisals. In addition, at the election of MATTHEW BECK, the payment of the purchase price may be deferred by making, executing and delivering a contract for deed or promissory note and mortgage with interest thereon at the federal applicable rate for long-term obligations amortized over 25 years. The first payment shall be due one year from the date of closing. If MATTHEW BECK elects to exercise the option granted herein, he shall do so by notifying the Trustee or secondary beneficiaries within 120 days after the termination of the Trust.

**ARTICLE VIII.**  
**PROTECTION OF TRUST FUND**

No title in or to any Trust fund created under this Agreement shall vest in any beneficiary, and neither the principal nor the income of the Trust Estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to transfer, encumber or in any manner, other than by power of appointment or withdrawal expressly granted hereunder, to anticipate or dispose of his or her interest in any Trust Estate hereunder, or the income produced thereby, prior to the actual distribution thereof by the Trustee to such beneficiary.

ARTICLE IX.  
**RESIGNATION OR REMOVAL OF TRUSTEE**

9.1 **Resignation.** A Trustee at any time acting hereunder may resign by delivering his or her written resignation to Grantors. Such resignation shall take effect on such date not earlier than thirty (30) days after the date of such delivery of such written resignation as shall be specified in such instrument of resignation. In the event of the resignation, death or inability of MATTHEW BECK to act as Trustee, then in such event BRIAN BECK and JAMIE MOECKLY shall act as Co-Trustees. In the event of the resignation, death or inability of either one of them to act, the other may act on his/her own. Any successor Trustee shall be bound by all terms and conditions of this Trust.

ARTICLE X.  
**GENERAL PROVISIONS**

10.1 **Receipt of Payment.** No person need account for any payments made to him or her, and such person's receipt shall fully discharge the Trustee with respect to any such payment.

10.2 **Qualification of Trust.** Grantors waive any statutory or other legal requirement that the Trustee be qualified in any court, and no bond or surety shall be required of any Trustee.

10.3 **Protection of Third Parties.** No person dealing with any Trustee purporting to act hereunder need inquire into the authority of such Trustee to act, but any such person may rely upon the statement of such Trustee.

10.4 **Accounting.** From and after the creation of this Trust, the Trustee shall annually render a written account of the administration of the Trust showing receipts and disbursements of principal and income to each beneficiary then entitled to receive income therefrom. The first annual accounting shall be due one (1) year after the creation of the Trust. The written approval of any such account, or the failure of any beneficiary to object in writing to such account within thirty (30) days after the receipt of the same shall as to all matters shown therein be final and binding upon all persons (whether or not then in being) who are then or thereafter may become entitled to share in either the principal or income of the Trust.

10.5 **Applicable State Law.** This Agreement has been executed and delivered in the State of South Dakota, and all questions of law arising under this Agreement shall be determined in accordance with the laws of South Dakota.

10.6 **Captions.** The headings of articles and sections are included solely for convenience of reference. If any conflicts between any heading and the text of this

Agreement exist, the text shall control.

IN WITNESS WHEREOF, Grantors have hereunto set their hands, and Trustee has caused this instrument to be enacted by him.

  
GARY J. BECK, Grantor

  
BETTY J. BECK, Grantor

#### ACCEPTANCE BY TRUSTEE

MATTHEW BECK, Trustee under the foregoing Trust, accepts the Trust and agrees that he will faithfully administer and distribute the Trust according to its terms.

Dated this 1st day of November, 1999.

  
MATTHEW BECK, Trustee

STATE OF SOUTH DAKOTA )  
  : ss  
COUNTY OF MARSHALL )

On this the 1st day of November, 1999, before me, the undersigned officer, personally appeared GARY J. BECK and BETTY J. BECK, husband and wife, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same for the purposes therein contained.

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

(SEAL)

My Commission expires: August 14, 2000

  
Notary Public, South Dakota

:\$\$,

COUNTY OF MARSHALL )

On this the 1st day of November, 1999, before me, the undersigned officer, personally appeared MATTHEW BECK, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

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

(SEAL)

Wang J. Sun

Notary Public, South Dakota

My Commission expires: August 17, 2020

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT  
:SS  
COUNTY OF BROWN ) FIFTH JUDICIAL CIRCUIT  
\* \* \* \* \*  
)  
IN THE MATTER OF THE ) TRU 18-02  
IRREVOCABLE TRUST OF )  
GARY J. BECK AND BETTY BECK.)  
)

\* \* \* \* \*

**DEPOSITION OF BETTY BECK**

DATE & TIME: October 3, 2018  
10:00 a.m.

LOCATION: LAW OFFICES OF BANTZ, GOSCH & CREMER  
305 6TH AVENUE SE  
Aberdeen, SD 57401

APPEARANCES: For Jamie Moekley:  
  
Mr. Kenneth L. Gosch &  
Mr. Joshua Wurgler  
BANTZ, GOSCH & CREMER  
Attorneys at Law  
PO Box 970  
Aberdeen, SD 57402

For Matthew Beck:  
  
Mr. Gordon P. Nielsen  
DELANEY, NIELSEN, & SANNES  
Attorneys at Law  
PO Box 9  
Sisseton, SD 57262

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I N D E X

WITNESSES

PAGE

Betty Beck

Examination By Mr. Wurgler	3-57
Examination By Mr. Nielsen	58-71
Further Examination By Mr. Wurgler	71-76

E X H I B I T S

<u>EXHIBIT NO.</u>	<u>MARKED</u>	<u>OFFERED</u>	<u>RCVD</u>	<u>DENIED</u>
Exhibit No. 1	8			
Exhibit No. 2	38			
Exhibit No. 3	43			
Exhibit No. 4	48			
Exhibit No. 5	69			

1 BETTY BECK,  
2 called as a witness, being first duly sworn, testified as  
3 follows:

4 EXAMINATION

5 BY MR. WURGLER:

6 Q. Betty, where did you grow up at?

7 A. Langford.

8 Q. Langford. And is there a Langford High School out there, is  
9 that what you attended?

10 A. Yes.

11 Q. When did you graduate?

12 A. 1961.

13 Q. When did you meet Gary?

14 A. Oh, couple years later.

15 Q. Had you known about him at the time?

16 A. Yes.

17 Q. Where did you guys meet at?

18 A. At the Rainbow.

19 Q. What's the Rainbow?

20 A. It was a -- used to have dances there.

21 Q. So you're a good dancer?

22 A. Okay.

23 MR. GOSCH: My wife would have said, no, he's not.

24 MR. WURGLER: Kind of a lost art anyway.

25 Q. What year did you guys get married?

1       it?

2   A. I don't remember.

3   Q. Do you recall the reasons why you guys wanted to continue with  
4       the trust?

5   A. Because we didn't want a nursing home to get our land.

6   Q. And what was your understanding of how the nursing home would  
7       get your land if it wasn't in trust?

8   A. Well, if it wasn't in a trust and we had to go to the nursing  
9       home it would have to be sold to pay for our keep.

10   Q. And so it was your understanding that the trust would prevent  
11       the banks or the government from getting at your land and  
12       trying to take that as money to pay for your nursing home  
13       care?

14   A. Yes.

15   Q. And was that pretty important to you guys at that time?

16   A. Yes.

17   Q. How would you describe the debt situation, was it bad or  
18       tolerable in the '90s?

19   A. Tolerable, probably.

20   Q. Did you always have an operating loan?

21   A. There's -- some of those questions -- my husband usually took  
22       care of the main stuff and I really don't know the answers to  
23       some of those things.

24   Q. And that's a good answer, too. If you don't know I'm not  
25       asking you to make anything up, obviously. If you don't know,



- 1 understand some of it.
- 2 Q. Was it important for you and Gary that the farm stay intact
- 3 for the family?
- 4 A. Yes, very important.
- 5 Q. Is that still important for you today?
- 6 A. Yes.
- 7 Q. When the land got put into trust was there any livestock that
- 8 were a part of the trust, as well?
- 9 A. We had livestock at the time. I don't know if they were
- 10 included or anything. I don't know.
- 11 Q. And was it -- were you and Gary expecting to retire at that
- 12 point then?
- 13 A. No.
- 14 Q. Were you expecting to still make a living off of the farming
- 15 operation?
- 16 A. Yes.
- 17 Q. At what point would you say you and Gary just decided to step
- 18 back and retire from the farm?
- 19 A. Well, Gary helped Matthew on the farm until just the last
- 20 three, four years, probably.
- 21 Q. And I understand that your husband is in the nursing home?
- 22 A. Yes, he is.
- 23 Q. When did that happen?
- 24 A. July of last -- end of July, last year.
- 25 Q. Now going from about the year 2000 to the present, did Matt

- 1 A. Probably.
- 2 Q. So I guess I can understand it, is it true you and Gary have  
3 quite an attachment to these parcels then?
- 4 A. Well, I think attachments to family is more important than  
5 land and money.
- 6 Q. And so are you saying as long as that land stays in the family  
7 you guys would be happy?
- 8 A. Yes.
- 9 Q. So you wanted to sell 680 acres to Matt for \$300,000, and then  
10 underneath there it says, "We would also like to retain  
11 jointly \$10,000 income annually from this land." There is a  
12 date down by Matt's signature, do you see that?
- 13 A. Yes.
- 14 Q. Do you recall discussing this with Matt?
- 15 A. No, I don't.
- 16 Q. When was this presented to you?
- 17 A. I remember signing it but I guess we didn't really talk about  
18 it.
- 19 Q. Where did you sign it at?
- 20 A. At Danny's office, I think.
- 21 Q. Did Danny present this to you?
- 22 A. I don't remember.
- 23 Q. Were all three, you, Gary and Matt, present at the same time  
24 at the office?
- 25 A. Probably.

1 have you met with Matt? Do you meet with him weekly, do you  
2 talk with him daily? How often do you...

3 A. Well, he's right there on the farm so, I don't know. He comes  
4 in the house every so often. I don't know how often.

5 Q. And you are testifying to the best of your ability today that  
6 you had no knowledge that Matt had debt problems until this  
7 past year?

8 A. Yes, probably just the last year, year and a half.

9 Q. With your concern for keeping the farm in the family, would  
10 you have wanted to know whether he was having debt problems  
11 while he was Trustee over the property?

12 A. Probably.

13 Q. Did you ever ask him whether he was having debt problems --

14 A. No.

15 Q. -- before this hearing?

16 A. No.

17 Q. Just would like to pin down roughly when you last spoke to  
18 Danny. Did you speak with Danny after the family meeting here  
19 at my office?

20 A. No.

21 Q. Did you speak with Danny in the year before the family meeting  
22 here at my office?

23 A. I talked to him the 18th or 19th of January. That was the  
24 date after we got the first letter from you people.

25 Q. Is that the one that you have in Exhibit 2 in front of you?

1 fees, title reports and so on.

2 So you did not know until this moment that Matthew has  
3 approximately a \$2.1 million judgment --

4 A. No.

5 Q. -- debt against him? Do you know who saved the trust land and  
6 kept it away from the bank to this point?

7 A. No.

8 Q. Do you have any guesses?

9 A. No.

10 Q. Do you know that Jamie got involved with this lawsuit and  
11 stopped the bank currently from foreclosing on the trust land?

12 A. No, I didn't know that.

13 Q. Do you know who would own that land today if it were not for  
14 Jamie? Who do you think would own that land today if it  
15 wasn't for Jamie?

16 **MR. NIELSEN:** I'm going to object. Calls for a misstatement  
17 of the legalities of the situation, but you can answer if you  
18 know. There would be a redemption, et cetera.

19 Q. You can go ahead and answer even though he objected. Do you  
20 know who would own this land today --

21 A. I suppose the bank.

22 Q. And do you understand that that would be to pay off Matt's  
23 personal debts?

24 A. I don't know, I guess.

25 Q. Well, you read in paragraph 18 there, the \$2.1 million that

1 the right to go and take Matt's personal land and that we will  
2 argue on a different day whether the bank has the right to go  
3 after the trust land?

4 A. No.

5 Q. Now the fact that Matt has personal debt in the amount of  
6 about \$2.1 million, is that something you would have wanted to  
7 know over the course of this trust?

8 A. Probably.

9 Q. And I'm not sure of your husband's current frame of mind. Is  
10 he able to understand things like this?

11 A. I -- probably not. Some days he talks pretty sensibly and  
12 some days he doesn't, so...

13 Q. And I guess I'll round out that line of questioning with this;  
14 do you understand that Jamie is simply trying to protect the  
15 trust land so that it can stay in the family as opposed to  
16 being owned by the bank?

17 A. Yes.

18 Q. After the -- after the February 9, 2018, meeting here at my  
19 office did you follow up with Danny and let him know what had  
20 been talked about?

21 A. No.

22 Q. Who has represented Matt during the course of the trust, do  
23 you know?

24 A. No, I don't.

25 Q. Do you know whether Danny has given him legal advice?

1 A. I don't know.

2 **MR. WURGLER:** Nothing further, Mrs. Beck. Mr. Nielsen has a  
3 chance to ask you some questions.

4 **MR. NIELSEN:** Betty, I do have a few questions for you.

5 **THE WITNESS:** Okay.

6 EXAMINATION

7 BY MR. NIELSEN:

8 Q. Betty, I'm going to call your attention to page 22 of the  
9 document in front of you, Exhibit 1, do you see that?

10 A. Yes.

11 Q. And on page 22, about four lines from the bottom, I see a  
12 number there of 800,000. Do you see that?

13 A. Yes.

14 Q. Did you understand that with this Consent to Mortgage Real  
15 Estate that you and Gary and the kids agreed that the trust  
16 land could have a mortgage on it in an amount of 800,000?

17 A. Yes.

18 Q. You were asked questions about this morning about a debt of  
19 \$2.1 million, and that caused you some concern, didn't it?

20 A. Yes.

21 Q. But do you understand that the trust itself is obligated to  
22 just the 800,000; you understood that way back in 2015, didn't  
23 you?

24 A. Yes.

25 Q. When the land was put in trust in 1999, or when the trust was

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT  
2 :SS  
3 COUNTY OF BROWN ) FIFTH JUDICIAL CIRCUIT  
4 \* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*  
5 PLAINS COMMERCE BANK, INC., )  
6 a banking corporation ) CIV 18-55  
7 )  
8 Plaintiff, ) MOTION TO INTERVENE  
9 ) AND  
10 vs. ) MOTION FOR  
11 ) SUMMARY JUDGMENT  
12 )  
13 MATTHEW A. BECK, a married )  
14 person; KELLEY R. BECK, a )  
15 married person; MATTHEW A. BECK, )  
16 Trustee of the B&B FARMS TRUST, )  
17 u/t/a November 1, 1999; )  
18 BROWN COUNTY, a governmental )  
19 instrumentality of the State of )  
20 South Dakota; MARSHALL COUNTY, )  
21 a governmental instrumentality )  
22 of the State of South Dakota; )  
23 DEERE & COMPANY, a corporation )  
24 )  
25 Defendants. )  
\* \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*

15 DATE & TIME: August 10, 2018  
16 10:30 a.m.

17 BEFORE: THE HONORABLE SCOTT P. MYREN  
18 CIRCUIT COURT JUDGE  
19 Brown County Courthouse  
Aberdeen, South Dakota, 57401

20 LOCATION: BROWN COUNTY CIRCUIT COURTROOM  
21 BROWN COUNTY COURTHOUSE  
22 Aberdeen, South Dakota

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APPEARANCES:

For the Plaintiff:

Mr. Thomas J. Cogley  
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PO Box 759  
Aberdeen, SD 57402

For the Defendants:

Mr. Gordon P. Nielsen  
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For Jamie Moeckly, Intervenor:

Mr. Kennith L. Gosch & Mr. Joshua Wurgler  
Attorneys at Law  
PO Box 970  
Aberdeen, SD 57402



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I N D E X

WITNESSES

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Matthew Beck

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E X H I B I T S

<u>EXHIBIT NO.</u>	<u>MARKED</u>	<u>OFFERED</u>	<u>RCVD</u>	<u>DENIED</u>
Exhibit No. 1	21	21	22	
Exhibit No. 2	26	27	28	

1     **THE COURT:** We're on the record; Civil File 18-55, *Plains*  
2     *Commerce Bank versus Matthew Beck, Kelley Beck, B&B Farms*  
3     *Trust, Brown County, Marshall County and Deere & Company.*

4             I've got a number of different attorneys here. I'll let  
5     you start by -- any attorney or party that wishes to be heard,  
6     I'll have you identify yourself for the record, and that way  
7     I'll know who wasn't here. We'll start right here on my left.

8     **MR. NIELSEN:** Thank you, Your Honor. Gordon Nielsen appearing  
9     alongside or with Matthew Beck.

10    **MR. COGLEY:** Tom Cogley, Your Honor, appearing on behalf of  
11    Plains Commerce Bank.

12    **MR. GOSCH:** Ken Gosch and Josh Wurgler appearing on behalf of  
13    Jamie Moeckly.

14    **THE COURT:** Anyone else that was expecting to be heard? So it  
15    looks like no one has appeared -- and I'm not surprised -- for  
16    Brown County, Marshall County or Deere & Company.

17             Looking through the file I see that there are two things  
18    that I note that are noticed for hearing today; one is a  
19    motion to intervene, or alternative, and the other one is a  
20    motion for summary judgment. Let's start with the motion to  
21    intervene.

22    **MR. GOSCH:** Thank you, Your Honor. If I may, I'd like to  
23    start by calling a witness.

24    **THE COURT:** Go ahead.

25    **MR. GOSCH:** Call Matthew Beck.

1       **THE COURT:** Matthew come on up, raise your right hand.

2                               MATTHEW BECK,

3       called as a witness, being first duly sworn, testified as  
4       follows:

5       **THE COURT:** Have a seat.

6                               DIRECT EXAMINATION

7 BY MR. GOSCH:

8 Q. Matthew, state your name and address, please.

9 A. Matthew Beck, 10949 408th Avenue, Hecla, South Dakota.

10 Q. Your parents are Gary and Betty Beck?

11 A. Correct.

12 Q. And they had three children?

13 A. Correct.

14 Q. Name the three children, would you, please?

15 A. Brian, Jamie and myself.

16 Q. That would be Brian Beck, Jamie Moeckly and then yourself?

17 A. Yes.

18 Q. In 1999 your parents established a trust; is that correct?

19 A. Yes.

20 Q. The trust is already a part of the record, but I want to ask  
21       you a couple questions about it. Are you named as the Trustee  
22       in the trust?

23 A. Yes.

24 Q. And the trust owns 680 acres of cultivated land?

25 A. Correct.

1 Q. Now where in the heck is the money going? We started out at  
2 50,000, now we're at 1.2 million, and your parents are getting  
3 almost no income out of the trust. Where is this money going?

4 A. Expenses.

5 Q. Expenses for what?

6 A. Machinery. Inputs. Taxes.

7 Q. You're buying machinery? Is that machinery owned by the trust  
8 or by you?

9 A. Me.

10 Q. And so now we go to November of 2015 and you're in more  
11 financial trouble, and so you now go to Plains Commerce Bank  
12 and ask them for money to pay off your other lenders; correct?

13 A. Correct.

14 Q. And this time Plains Commerce Bank says to you, we won't give  
15 you that money unless you get a consent signed by the other  
16 beneficiaries saying it's okay to mortgage the land --

17 A. Correct.

18 Q. -- trust land; correct?

19 A. Correct.

20 Q. And they gave that to you, didn't they?

21 A. Uh-huh.

22 **THE COURT:** Is that a yes or a no.

23 **THE WITNESS:** Yes.

24 Q. And so following that, in November of 25, you gave a mortgage  
25 to Plains Commerce Bank pledging assets of the -- owned by the

- 1 trust to secure 800,000 of your \$2.2 million loan; correct?
- 2 A. Correct.
- 3 Q. What did the trust benefit from that?
- 4 A. Continue to operate.
- 5 Q. And then you signed a guarantee that says not only does the
- 6 trust have to pay back the 800,000 but the trust has to pay
- 7 all accrued interest, attorney's fees, collection costs when
- 8 allowed by law, and all other costs, fees and expenses;
- 9 correct?
- 10 A. Correct.
- 11 Q. And that you signed that guarantee as Trustee?
- 12 A. Correct.
- 13 Q. But the consent didn't authorize you to do that, did it?
- 14 A. I think it did.
- 15 Q. It just says that you can mortgage up to 800,000 but not over
- 16 that, and now you're giving the bank a document that says on
- 17 behalf of the trust, not only will we use -- the trust pay off
- 18 800,000 of Matt's debt, but the trust will also pay all the
- 19 costs and expenses and attorney's fees that the bank charges.
- 20 A. I'm pretty sure all that stuff is going to come out of my
- 21 checking account.
- 22 Q. Well, but that's not what the document says, is it?
- 23 A. I haven't seen the document.
- 24 Q. And the bank is suing you and the trust, and the bank is
- 25 asking that their attorney's fees, costs, expenses, interest

1 STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

2 COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

3

\* \* \* \* \*

4 PLAINS COMMERCE BANK,

\*

5

Plaintiff,

\*

06CIV18-000055

\*

6

vs.

\*

\*

7

MATTHEW A. BECK, a married person;\*

KELLEY R. BECK, a married person; \*

8

MATTHEW A. BECK, Trustee of the \*

B&B FARMS TRUST, u/t/a November 1, \*

9

1999; BROWN COUNTY, a governmental \*

instrumentality of the State of \*

10

South Dakota; MARSHALL COUNTY, a \*

governmental instrumentality of \*

11

the State of South Dakota; DEERE & \*

COMPANY, a corporation, \*

12

Defendants. \*

13

\* \* \* \* \*

14

15

# D E P O S I T I O N

16

O F

17

LANCE VILHAUER

18

January 17, 2020

19

9 o'clock, a.m.

20

21

22

Taken at:

Offices of Bantz, Gosch & Cremer, L.L.C.

23

305 Sixth Avenue Southeast

Aberdeen, South Dakota

24

25

Reporter: Tammy Stolle, RPR

EXHIBIT

D  
MApp035

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## I N D E X

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1 WHEREUPON,  
 2 the following proceedings were had, to wit:  
 3 LANCE VILHAUER, after being first duly sworn,  
 4 testified on his oath as follows:  
 5 EXAMINATION  
 6 BY MR. WURGLER:  
 7 Q. Well, could you start by giving me a little bit  
 8 about your background, where did you grow up at?  
 9 A. Grew up on a farm just west of Aberdeen by Mina  
 10 and went to high school at Warner, went to college at  
 11 Concordia College in Moorhead, Minnesota, and then entered  
 12 the lending industry in February of 2007. February of 2007  
 13 started working with Ag Country Farm Credit Services, and  
 14 then moved down to Aberdeen to work with Plains Commerce Bank  
 15 and have been there ever since.  
 16 Q. Okay. What degree did you get at Concordia?  
 17 A. Communications with a minor in business and a  
 18 minor in Spanish.  
 19 Q. Did your minor in business give you any leg up in  
 20 the banking industry that you eventually got into?  
 21 A. Some of the fundamentals. You know, some of the  
 22 accounting fundamentals, but that's about it.  
 23 Q. Okay. So everything that you've learned then  
 24 about how to do your job has been basically on-the-job  
 25 training or seminars, things like that?

1 A. Correct.  
 2 Q. Can you give me some description of that type of  
 3 training that you get when you first start off in the banking  
 4 industry back in '07?  
 5 A. Well, again, that was with a different industry  
 6 or a different company than I'm working for now currently.  
 7 You know, mainly credit analysis training. You know, Ag  
 8 Country had a very extensive credit analysis training.  
 9 That's the majority of it, and throughout the years, you do  
 10 go to various bank seminars that are put on, you know,  
 11 whether it's a one-day, or one or two or three day deal and  
 12 some training sessions like that maybe for a week, that kind  
 13 of stuff, and I'd say that's the majority of it.  
 14 Q. Who are some of the reputable training entities  
 15 out there that offer seminars or education of some sort?  
 16 A. Out at Spearfish, the South Dakota Bankers  
 17 Association I believe is who puts that on, and that's  
 18 actually a two-year program. You know, there's a starter  
 19 year, then there's a second year where they get a little more  
 20 in-depth, and again, majority of that is based on credit  
 21 analysis, underwriting.  
 22 Beyond that, I did complete, in Jamestown, that's  
 23 also a two-year program, I don't recall the name of that one,  
 24 but that is put on through the North Dakota Bankers  
 25 Association. Those are the two that come to mind at this

1 point in time.  
 2 Q. And you did go to the Spearfish two-year program?  
 3 A. Um-huh, correct.  
 4 Q. What years did you do that one?  
 5 A. I don't know off the top of my head.  
 6 Q. How about the Jamestown, do you remember that  
 7 one?  
 8 A. It would have been -- I believe it was 2016 and  
 9 2017 summer, I believe.  
 10 Q. And I'm sorry, what year did you start over at  
 11 Plains Commerce?  
 12 A. October of 2009.  
 13 Q. And so the idea of credit analysis training, how  
 14 would you describe that to a layperson who doesn't understand  
 15 what it is?  
 16 A. Sure. Credit analysis is being able to work with  
 17 the borrower to get financial statements from them, balance  
 18 sheets, financial statements, projections, and it is also  
 19 looking at historical data and also putting together a plan  
 20 for the upcoming year's projection to make sure the borrower  
 21 can -- just analyze their income and expense situation for  
 22 where they're currently at and where they're looking to be at  
 23 over the next year.  
 24 Q. Does that type of a training or that type of  
 25 analysis give you an idea and an insight into whether a

1 particular loan to somebody might be a good idea or a bad  
 2 idea?  
 3 A. Yes, that's fair to say.  
 4 Q. And what would you say are some of the most  
 5 important principles that you apply on a day-to-day basis  
 6 when you are looking at somebody who wants a loan from Plains  
 7 Commerce Bank?  
 8 A. Sure.  
 9 Q. For the ag industry.  
 10 A. Yep. It's just the five Cs; character, capital,  
 11 collateral, capacity, and conditions.  
 12 Q. Okay. Capital, collateral -- character, capital,  
 13 collateral?  
 14 A. Capacity.  
 15 Q. Capacity.  
 16 A. And conditions.  
 17 Q. What is capacity exactly?  
 18 A. Capacity is the ability to repay, so that would  
 19 be cash flow.  
 20 Q. And conditions, what do you mean when you say  
 21 that word?  
 22 A. Conditions are the rates and terms of the loan.  
 23 Q. These five Cs, are these something that you've  
 24 come up with on your own, or are they well-known in the  
 25 industry?

1 anywhere around the community, would they also be aware of  
2 these five Cs?

3 A. **Yes, they would.**

4 Q. So when you're doing these five Cs and you're  
5 trying to assess somebody who would like an ag loan, do you  
6 actually put a quantity to these? For instance, scale of one  
7 to five, high on character; scale of one to five, low on  
8 capital, and then you come up with a number and decide  
9 whether it's a safe risk, or is it more of a gut assessment?

10 A. **For all five of the categories, or did you  
11 specify one in particular?**

12 Q. Yeah, for all five of them. Once you've met with  
13 somebody who wants some money from the bank and you've got to  
14 make a decision whether that's a good idea or not, you  
15 analyze the five Cs, and then how do you decide whether this  
16 is a good decision?

17 A. **Yeah, there's a risk rating model that we use  
18 where after we key in all the information, there's a score  
19 that's received on those various categories which goes into  
20 an overall score.**

21 Q. And from the way you describe that, it sounds  
22 like a software program almost?

23 A. **Correct.**

24 Q. Is that what it is?

25 A. **Correct.**

1 Q. What's the name of the software?

2 A. **Moody's Analytics.**

3 Q. And I didn't see anything like that in your file  
4 on Matt Beck. Would you have done a Moody's analysis of him?

5 A. **We did.**

6 Q. Okay. And I've got your file here. We'll go  
7 through it, and if you see it in there, I'd ask you to point  
8 it out to me, but I didn't -- I don't recall seeing something  
9 like that. I probably just missed it though.

10 Do you recall in Matt Beck's case what his risk  
11 rating was?

12 A. **I don't.**

13 Q. How did you feel that he scored with regard to  
14 character?

15 Well, I'm sorry, let me back up. I'm jumping way  
16 ahead here. At some point you met Matt Beck. Do you recall  
17 roughly when that was?

18 A. **It would have been in the late winter or spring  
19 of 2015, I believe.**

20 Q. And you got introduced to him through a lending  
21 broker of some sort?

22 A. **Correct.**

23 Q. What was the name of that entity?

24 A. **I believe the name was Preservation Capital.**

25 Q. Are you familiar with that entity apart from Matt

1 Beck?

2 A. **No.**

3 Q. How did this lending entity, Preservation Capital  
4 we think, how did they connect you with Matt Beck?

5 A. **After receiving some preliminary documents from  
6 Preservation Capital, I requested that I would be able to  
7 talk with Matt directly to get to know him and that's how I  
8 met Matt.**

9 Q. Do you recall how many meetings you had with him  
10 leading up to the loans that were given to him?

11 A. **I do not.**

12 Q. Did you meet with his wife at all?

13 A. **I don't remember if I did or not.**

14 Q. Did you meet with Matt more than once?

15 A. **Yes.**

16 Q. Let's -- I'll go ahead and just mark this, Lance,  
17 as Exhibit 1. This is the Plains Commerce Bank discovery  
18 documents you guys sent over.

19 (Exhibit No. 1 was marked.)

20 Q. (BY MR. WUGLER) So I notice the first -- it  
21 looks like in the bottom right corner here, Lance, there's a  
22 number, PCB and then the number. Those are just for ease of  
23 reference and page numbers. It looks like pages 1 through 21  
24 are all handwritten notes. Can you look at those quick and  
25 just let me know if those are all your notes?

1 A. **(Witness reviewing exhibit.) Page 17 are notes I  
2 had in the file, but they were not prepared by me.**

3 Q. Do you know who prepared those?

4 A. **I believe it was Matt Beck.**

5 Q. Okay.

6 A. **Everything else, 1 through 21, looks to be mine.**

7 Q. All right. And these notes would have been  
8 prepared sometime after the late spring or winter of 2015, is  
9 that right?

10 A. **Yep.**

11 Q. Would you have made these notes during  
12 face-to-face meetings with Matt?

13 A. **Some probably were.**

14 Q. And it looked like you had several phone calls  
15 with him as well. Would you take notes on the phone like  
16 everybody else?

17 A. **Correct.**

18 Q. Okay. So you began meeting with Matt. Do you  
19 have any notes in here that you would say reflect your  
20 assessment of the five Cs related to Matt's request for a  
21 loan from the bank?

22 A. **Out of these 21 pages?**

23 Q. Yeah. If you do, we'll just take them one by  
24 one. I'd like to talk about them with you.

25 A. **Page one looks to be a potential breakdown of the**

1 loan funds at loan closing which would affect capital and  
2 capacity and collateral, and conditions for that matter.

3 Q. Page two -- well, let's start with page one. Do  
4 you happen to have a date for that one, just a rough date in  
5 mind?

6 A. I would guess it's close to the loan closing in  
7 the fall of 2015.

8 Q. Okay. And so on page 1 then, you've got a -- you  
9 note a couple of payoffs to Legendary Loan and to Legendary  
10 Lease. At the time you're talking with Matt Beck, did you  
11 know Bill Thovson at all?

12 A. Yes.

13 Q. What do you know about Bill Thovson?

14 A. I know he was the prior lender to Matt. That's  
15 all I know.

16 Q. Would you describe Bill Thovson as sort of an  
17 unorthodox ag lender in the sense that he's not associated  
18 with a bank, he's kind of on his own?

19 A. I would describe him as a private lender.

20 Q. Are there a number of those folks in the area?

21 A. That I don't know.

22 Q. In terms of private lenders, is he -- you know,  
23 there are people out there who offer loans to people who have  
24 very bad credit; for instance, in the automobile world  
25 there's other folks who don't take on those risky loans.

1 Where would Bill Thovson fall in the ag lending world? Is he  
2 sort of a lender of last resort almost?

3 A. That I would not know. You would have to ask  
4 him.

5 Q. Okay. So it looks like on page one we've got a  
6 \$1.9 million payoff to Bill Thovson that I'm assuming Matt  
7 reported to you, is that right?

8 A. I received payoffs from -- directly from Bill  
9 Thovson.

10 Q. And what -- can you tell me about the first  
11 conversation you had with Bill Thovson and what his  
12 assessment of the situation was with Matt Beck?

13 A. I don't recall discussions getting into the  
14 history of how the lending relationship went between Bill and  
15 Matt with Bill. Does that answer your question?

16 Q. Yeah, it does. Matt was not happy with Bill, was  
17 he, when he came to you guys?

18 A. I believe -- let's see. I believe Matt had told  
19 me that Bill was not giving him operating funds anymore and  
20 that was the reason why Matt was looking to refinance his  
21 debt some place else.

22 Q. Was Matt in default with Bill Thovson?

23 A. That I don't recall.

24 Q. Were there any foreclosure proceedings at all  
25 that you know of with Bill?

1 A. Not that I'm aware of.

2 Q. All right. And then you've got a broker fee here  
3 back on page 1, 35,000. Is that related to the folks who  
4 connected you and Matt Beck together?

5 A. Yes.

6 Q. Got Plains Commerce Bank fees. Do you know why  
7 Matt had a \$1.8 million loan with Legendary/Bill Thovson?  
8 What was that being used for?

9 A. I believe it was various items. Anywhere from  
10 machinery to cattle to operating to land debt.

11 Q. And the lease payoff, I assume Matt was leasing  
12 something from Bill Thovson. Do you know what?

13 A. I don't remember what exactly it was. If I was  
14 to guess, a piece of machinery of some sort.

15 Q. As you come down then, we've got a real estate  
16 loan listed at 1.855 million, and is that what you were  
17 thinking about extending to Matt with this writing here?

18 A. Yes, that would have been the real estate loan  
19 that Plains Commerce Bank would classify as the real estate  
20 loan for that amount.

21 Q. All right. And again for the layperson, if you  
22 talk about a real estate loan, what does that mean exactly?

23 A. It means debt that is being termed out for  
24 usually an amortization of twenty years or more.

25 Q. And the real estate part of that term "real

1 estate loan," does that just refer to the collateral for the  
2 debt?

3 A. No, real estate loan would refer to the loan  
4 itself.

5 Q. Okay. So it may or may not involve real estate  
6 but it's just one way you guys characterize it?

7 A. You'll have to repeat the question.

8 Q. The term "real estate loan," I'm just -- I'm  
9 trying to figure out why is it called that, I guess?

10 A. It's a real estate loan. It is called that for  
11 these simple notes, since that is debt that is termed out  
12 over twenty years and --

13 Q. But the debt may not necessarily be related to  
14 real estate; for instance, some could have been used to  
15 purchase cattle or machinery, is that right?

16 A. That is possible, yeah.

17 Q. All right. So then you've got \$110,000  
18 underneath the line that you drew there, and then the note,  
19 "advance from line of credit." And so you were thinking  
20 about giving Matt two loans; a real estate loan and a line of  
21 credit loan, is that right?

22 A. Correct.

23 Q. There's some numbers down below that starting  
24 with the 75,000 advance. Do you recall why Matt needed that  
25 \$75,000 advance?

- 1 we'd prefer to see someone's capital standing at 50 percent  
2 owner equity or higher.
- 3 Q. All right. And again for the layman here, when  
4 you talk about owner equity, does that mean if you look at  
5 all of the assets that they own and you want them to have  
6 50 percent ownership -- or excuse me, all of their equity in  
7 those assets should be 50 percent of their loan or higher, is  
8 that accurate?
- 9 A. The best way to describe owner equity percentage  
10 is a person's net worth divided by their total assets and you  
11 like to see that number at 50 percent or higher. What that  
12 means is, in layman's terms, for every \$1 of assets that  
13 person owns, they own free and clear 50 cents or more of each  
14 dollar.
- 15 Q. Okay. If you look on page 2, I notice things  
16 like LTV or loan to value ratios. Is that a similar concept  
17 or something different?
- 18 A. It's a -- it's similar in that it's a ratio, it's  
19 a percentage. There are different standards and different  
20 targets.
- 21 Q. Do you have the ability to look through your  
22 notes real quick here and tell me if you've got an owner  
23 equity ratio noted anywhere?
- 24 A. I don't believe there's one on these notes.
- 25 Q. Is there something in the file that you could

- 1 turn to and see that owner equity ratio?
- 2 A. Yes.
- 3 Q. Okay. What would you look at there?
- 4 A. The balance sheet.
- 5 Q. We'll flip through the file here in a bit, but  
6 I'll have you point out that balance sheet to me. Let's look  
7 over here on page 2 then. At what point did you realize  
8 you're dealing with a trustee of a trust as well as Matt in  
9 his personal capacity?
- 10 A. It was during the loan application process.
- 11 Q. Okay. And as an ag lender, you are aware that  
12 assets could be held in all forms of entities, right?
- 13 A. Correct.
- 14 Q. You've got businesses, you've got trusts, and so  
15 on and so forth, is that accurate?
- 16 A. Correct.
- 17 Q. Okay. What are the rules that you apply to a  
18 situation where there's a trust involved with seeking an ag  
19 loan?
- 20 A. We would need the -- a copy of the trust  
21 agreement and -- repeat the question again.
- 22 Q. When you're dealing with a loan situation that  
23 involves a trust, what principles do you apply to make sure  
24 that this is going to be a successful loan?
- 25 A. Sure. Again, we would ask for a copy of the

- 1 trust agreement itself. We would ask for -- It depends on  
2 what the loan request is for, you know, whether it's a loan  
3 for cattle or machinery or operating or land debt, you know,  
4 there's various requests which change our requirements to  
5 some extent.
- 6 Q. I'm going to have you focus on a situation like  
7 Matt's here, all the things that he was asking for. So you  
8 would get a copy of the trust agreement. What would you do  
9 when you got a copy of the trust agreement?
- 10 A. I would turn that over to the bank's counsel for  
11 review and guidance on what documents are needed to go  
12 forward.
- 13 Q. What things do you need to be aware of when a  
14 trust is involved with seeking a loan?
- 15 A. Who the trustee is and what is spelled out in the  
16 trust agreement.
- 17 Q. Okay. When you got a trust agreement, do you  
18 typically read those over yourself as well?
- 19 A. I will review them to a certain extent, but I'm  
20 depending on someone far more knowledgeable of them to review  
21 them than myself.
- 22 Q. When you review a trust agreement, what things  
23 are you looking for in there apart from who the trustee is in  
24 a situation where somebody wants a loan from you?
- 25 A. I would just be reviewing the whole document for

- 1 any applicable terms.
- 2 Q. Okay. So, for instance, you would be wondering  
3 does the trust agreement limit or restrict what the trust  
4 land or assets can be used for in terms of collateral, would  
5 you look for something like that?
- 6 A. Repeat that question again.
- 7 Q. Would you be looking through the trust agreement  
8 to see whether there are restrictions or limits on what the  
9 trust assets can be used for in terms of collateral?
- 10 A. Yes.
- 11 Q. Okay. So, for instance, a trustee has to have,  
12 under the trust agreement, the ability to use the trust  
13 assets for lending purposes, right?
- 14 A. Correct.
- 15 Q. Are you aware of the concept of self-dealing with  
16 regard to a trust or any other estate?
- 17 A. I have heard of that term.
- 18 Q. All right. What does that mean to you?
- 19 A. To me it -- it's a -- it's a caution concept that  
20 the trustee needs to make sure they're taking proper steps to  
21 not get personal gain without proper notice to all the  
22 beneficiaries of the trust.
- 23 Q. Okay. Have you ever been through a seminar or  
24 any other kind of training or education that describes what  
25 issues are in play when you're dealing with a trust seeking

- 1 money or a loan from a bank?
- 2 A. That I don't remember off the top of my head.
- 3 Q. Does this issue crop up on a regular year to year
- 4 basis in your, I don't want to call it a practice, but in
- 5 your occupation?
- 6 A. It's -- I would say it's -- I would say it's not
- 7 uncommon.
- 8 Q. I noticed on page 2 of Exhibit 1 here, your first
- 9 line there notes, "Brother and sister sign consent." Do you
- 10 know if that is a referral to the consent to sell the land or
- 11 the consent to mortgage the land?
- 12 A. That would be the consent to mortgage the land.
- 13 Q. Were you aware that Matt was trying to sell the
- 14 land to himself, the trust land?
- 15 A. I believe that came up as a potential option in
- 16 conversations. I don't believe it ever took much traction,
- 17 but I know it was just a thought that came out in
- 18 conversation.
- 19 Q. He notes that there are first and second
- 20 beneficiaries. Did you ever talk to any of the other
- 21 beneficiaries, for instance Gary and Betty, relating to Matt
- 22 seeking a \$2 million ag loan from Plains Commerce?
- 23 A. No, I did not.
- 24 Q. Did Matt tell you who the beneficiaries were?
- 25 A. I don't recall if he told me who they were.

- 1 A. I would say notice and approval.
- 2 Q. Okay.
- 3 A. From the beneficiaries.
- 4 Q. You mentioned that Matt could not self-deal was
- 5 one of the flags as you understood it. Were there any
- 6 others?
- 7 A. No, not that I can recall.
- 8 Q. Okay. Do you know whether it was an irrevocable
- 9 trust or a revocable trust?
- 10 A. I believe it was noted that this is an
- 11 irrevocable trust. I would have to double-check, but I think
- 12 that's what it is.
- 13 Q. Okay. Did you have any awareness of a
- 14 spendthrift clause in this trust?
- 15 A. I don't know what that is.
- 16 Q. Okay. So back to page 2 then, Matt presents the
- 17 trust to you. I presume he also presented to you a list of
- 18 what the trust assets were at some point, is that right?
- 19 A. The main thing we talked about was the land that
- 20 was held in the trust.
- 21 Q. And he wanted to know, on page 2 here, what the
- 22 mortgage amount could be for the trust land, is that right?
- 23 A. Say that again.
- 24 Q. Well, your second note here on page 2, Matt
- 25 wanted to know what the mortgage amount would be for the

- 1 Q. Do you recall reviewing the trust agreement in
- 2 this situation?
- 3 A. I recall reviewing it. I recall reviewing it.
- 4 Q. Okay. Did you notice any red flags with the
- 5 trust agreement that would have impacted your decision to
- 6 lend money using the trust land as collateral?
- 7 A. You mentioned red flags?
- 8 Q. Yeah.
- 9 A. The red flags were -- the potential red flags
- 10 were brought to my attention from our counsel.
- 11 Q. Okay. What was your understanding of what the
- 12 red flags are with relationship to this trust agreement?
- 13 A. It dealt with Matt as the trustee -- it dealt
- 14 with Matt as the trustee to make sure he was not
- 15 self-dealing.
- 16 Q. So your understanding was Matt could not
- 17 self-deal under the trust agreement?
- 18 A. Correct.
- 19 Q. Okay. And again, your understanding of
- 20 self-dealing is that a trustee has to take -- before a
- 21 trustee can benefit personally from the trust, he has to take
- 22 certain steps to make that acceptable, is that your
- 23 understanding then?
- 24 A. To notify all beneficiaries, correct.
- 25 Q. Oh, he just has to give notice?

- 1 trust land?
- 2 A. I wouldn't specify that just Matt wanted to know.
- 3 Q. Okay.
- 4 A. This note would be in regards to all the
- 5 beneficiaries as we gear towards signing the consent to
- 6 mortgage form. The beneficiaries wanted to know the mortgage
- 7 amount for the trust land.
- 8 Q. And who did you gain that information from?
- 9 A. I believe that came from a conversation with
- 10 Danny Smeins.
- 11 Q. Did Matt tell you that Danny was the one you
- 12 should talk to about this?
- 13 A. I believe so.
- 14 Q. Was Danny the one that you sent the trust
- 15 agreement to in terms of getting an attorney review?
- 16 A. No.
- 17 Q. Was that Tom Cogley?
- 18 A. Yes.
- 19 Q. Did you have a conversation with Danny Smeins
- 20 yourself about what could or could not be done under the
- 21 trust agreement?
- 22 A. No.
- 23 Q. Did Danny Smeins represent the bank in this
- 24 situation at all?
- 25 A. No.

1 Q. And so your second note here then, I'm trying to  
2 understand where this came from. Would this have been  
3 something Danny told you the beneficiaries want to know  
4 about?

5 A. I believe so.

6 Q. All right. And then did Danny ever indicate to  
7 you whether there were any issues with doing a mortgage of  
8 the trust land?

9 A. No.

10 Q. Without considering the trust -- and I want to  
11 make sure I've got this right. Did you consider how much you  
12 could lend -- first consider how much you could lend to Matt  
13 without the trust land, and then he mentioned the trust land  
14 and you decided whether there was more then to be lent to  
15 him, did it come in two parts like that, or how was your  
16 assessment of his overall asset situation?

17 A. No, the overall loan request amount was  
18 essentially the same amount from the beginning, and the trust  
19 land was mentioned right at the beginning as possible  
20 additional collateral for any loans.

21 Q. If you had just considered Matt's assets -- for  
22 instance on page 10, if you could turn there for me, please,  
23 in Exhibit 1.

24 So if you had just considered Matt's real estate  
25 assets, I'll put it that way, here on page 10 you did an

1 assessment of his real estate assets, is that right?

2 A. Correct.

3 Q. And then at the bottom, you've got the -- an  
4 assessment of the trust's real estate assets, correct?

5 A. Correct.

6 Q. Okay. So looking at Matt's Brown and Marshall  
7 County land, would those numbers have been sufficient to get  
8 a \$2 million loan from Plains Commerce Bank?

9 A. No.

10 Q. And why is that?

11 A. If that was all the collateral that would have  
12 been -- had been provided in reference to a \$1.855 million  
13 real estate loan, the collateral would have been  
14 insufficient.

15 Q. Is another way of putting that too, the bank  
16 would not have been protected if he had defaulted?

17 A. Correct.

18 Q. Okay. Keeping a finger there, please, Lance, we  
19 talked about page 4 already which has some mention of corn  
20 and calf sales. So if you combine his real estate  
21 collateral, his personal real estate collateral with his  
22 calves available, his corn available, would that have been  
23 sufficient to secure the bank for a \$1.855 million loan?

24 A. No.

25 Q. How much would you have been looking for in terms

1 of collateral, almost an exact dollar amount to the loan  
2 amount?

3 A. That's a starting point. There's still other  
4 factors that go into it. So -- repeat the question again.

5 Q. So if you considered together Matt's personal  
6 real estate collateral and the personal property collateral,  
7 I'll call it, that we see on page 4 of Exhibit 1, you said  
8 that that would not be sufficient for a nearly \$2 million  
9 loan?

10 A. Correct.

11 Q. And so then my follow-up question was, how much  
12 in terms of collateral value would you have wanted to see for  
13 a \$2 million loan?

14 A. Sure. And again it varies with each -- from loan  
15 to loan, but as a starting point on an ag land loan, the bank  
16 requires the long-term debt, real estate loan debt to be at  
17 60 percent loan to value, meaning for every one dollar of  
18 collateral value, as a starting point the bank would be  
19 willing to lend 60 cents against that dollar.

20 Q. All right. So from the get-go, the bank had to  
21 consider the trust land, otherwise there's no point in even  
22 communicating further, correct?

23 A. Correct.

24 Q. On page 10, it looks like there are some numbers  
25 put -- for instance, for the trust there, it's got 3500 bucks

1 per acre of cropland. Who supplied numbers like that in  
2 terms of a per acre value?

3 A. These were estimates of mine.

4 Q. Okay. Just -- that was the real estate situation  
5 at this time?

6 A. Yeah.

7 Q. Okay.

8 A. Yes.

9 Q. We had talked about folks you talked about with  
10 regard to the trust. You didn't talk to Gary and Betty about  
11 mortgaging, correct?

12 A. Correct.

13 Q. Did you talk to Brian Beck, the other brother?

14 A. I did not.

15 Q. Did you talk to Jamie Moeckly?

16 A. I did not.

17 Q. And then with Danny, could you characterize all  
18 of the conversations you had with Danny at this -- did you  
19 have many conversations with Danny, or just one?

20 A. Not a lot. You know, if I was to guess, two to  
21 three at most.

22 Q. At what point did you decide that the trust land  
23 could be used as a part of this loan for the collateral?

24 A. During the loan application process.

25 Q. Okay. And that would have been the late

- 1 approximate spring of '15?
- 2 **A. Yeah, late spring or early summer of 2015,**
- 3 **correct.**
- 4 **Q.** Okay. So you had decided -- was that -- and I
- 5 don't want to know what your attorney told you, but was that
- 6 based on the advice of counsel, or was that something you
- 7 decided after reading through the trust yourself?
- 8 **A. Specify that.**
- 9 **Q.** When you decided in the late spring of '15 that
- 10 the trust land could be used in this transaction, was that
- 11 based on advice of counsel, or was that something you decided
- 12 on your own after reading through the trust document?
- 13 **A. In the spring of 2015 it was the bank's position**
- 14 **that we would -- that a requirement of the loan request was**
- 15 **going to be needing the additional collateral of the trust**
- 16 **land.**
- 17 **Q.** Okay. That's probably my miscommunication then.
- 18 So my -- what I'm -- I'm going to switch gears then to a
- 19 little bit different idea. At what point did you become
- 20 aware that the trust land in fact could be used as collateral
- 21 for this loan?
- 22 **A. Well, the bank -- well, anything can be used as**
- 23 **collateral -- I mean, I don't know how to answer this**
- 24 **question. I don't know how to answer that question.**
- 25 **Q.** Well, let's start with, maybe I'll back up to

- 1 some more fundamental principles. So, for instance, you
- 2 can't use as collateral something you don't own, right?
- 3 **A. Right.**
- 4 **Q.** You can't use my land. I can't use your land.
- 5 So then when you're looking at ownership of a particular
- 6 piece of property that is proposed to be used as collateral,
- 7 you have to determine can this owner in fact use this
- 8 property as collateral?
- 9 **A. Right, right.**
- 10 **Q.** And I'm just curious when you first made the
- 11 decision or became aware of the idea that the trust could in
- 12 fact use its own land to collateralize Matt's debts?
- 13 **A. Matt's loan, okay. That would have been in late**
- 14 **summer/early fall of 2015.**
- 15 **Q.** Okay. And you first noted that there had been
- 16 some talk about Matt trying to sell the land to himself to
- 17 use it as collateral. Do you recall talking about that?
- 18 **A. You had brought that up. I recall that it was a**
- 19 **-- it was a passing comment in conversations. I don't**
- 20 **believe -- as I said earlier, I don't believe it gained much**
- 21 **traction other than that.**
- 22 **Q.** All right. So then you -- was it you or he that
- 23 was thinking if we do the consent to mortgage, that would
- 24 solve the problem?
- 25 **A. That came through the advice from our counsel.**

- 1 **Q.** And then did your counsel reach out to Danny
- 2 Smeins to facilitate getting the consent signed?
- 3 **A. That I don't remember how that played out.**
- 4 **Q.** Matt -- or excuse me, Lance, I'm going to show
- 5 you what Reed has graciously lent to me here. We'll mark
- 6 these as Exhibit 2 and 3.
- 7 (Exhibit No. 2 and 3 were marked.)
- 8 **Q.** (BY MR. WUGLER) All right. And Lance, the
- 9 first one -- well, they're both titled the same thing,
- 10 "Consent to Mortgage of Real Estate Owned by the Trust," and
- 11 Exhibit 2 looks like it's signed by Jamie Moeckly, right?
- 12 **A. Um-huh.**
- 13 **Q.** Yes or no?
- 14 **A. Yes, yes.**
- 15 **Q.** And then Exhibit 3 is signed by Gary Beck it
- 16 looks like and Betty Beck, is that right?
- 17 **A. Yes.**
- 18 **Q.** Okay. Did Danny Smeins review these documents
- 19 with the bank before he proposed these to the people for
- 20 signing?
- 21 **A. That I don't remember.**
- 22 **Q.** Did you ever review those prior to them being
- 23 signed?
- 24 **A. That I don't remember.**
- 25 **Q.** So as I understand it then, just kind of a

- 1 summary, the strategy in terms of getting the trust land
- 2 available for collateral was to get these consents, and was
- 3 there any other strategy involved there?
- 4 **A. No.**
- 5 **Q.** Okay. I'm going to turn you back to page 2 in
- 6 Exhibit 1. You can just leave those in front of you there.
- 7 Yep, the big binder.
- 8 **A. Okay.**
- 9 **Q.** The bottom half of Exhibit 2, or page two, I'm
- 10 sorry, in Exhibit 1. There looks like there's some
- 11 valuations on real estate property. So, for instance, you've
- 12 got Matt's Marshall County real estate 1.16 million, Brown
- 13 County real estate 1.7 million. Where did these numbers come
- 14 from?
- 15 **A. I would have to go back and look. I would guess**
- 16 **that these would come from roughly -- or I would guess that**
- 17 **these came from an appraisal that was completed.**
- 18 **Q.** Who did your appraisal for you?
- 19 **A. I don't remember off the top of my head.**
- 20 **Q.** And this would have been done after the loan
- 21 application process?
- 22 **A. Yep, during the loan application process, yes.**
- 23 **Q.** I think what we're going to have to look at here,
- 24 Lance, is several documents together just to make sense of
- 25 the picture.

1 excuse me, these consents, as you talked about, have some  
2 additional details in your understanding?

3 A. Well, again, if you're asking my understanding,  
4 which states this consent is limited to the current proposed  
5 mortgage and any future mortgages not to exceed \$800,000. So  
6 if you're asking what this consent is tied to or limits from  
7 a mortgage standpoint, I would say, again, this consent gives  
8 permission for the \$800,000 mortgage and whatever language is  
9 stated in that \$800,000 mortgage, and that's how I would --  
10 that's how I would understand it.

11 Q. All right. As you read this, is it also your  
12 understanding that there's nothing in here granting a consent  
13 for the trust to enter into the guaranty document?

14 A. I don't think I would agree with that. I would  
15 say by consenting to the \$800,000 mortgage, this consent form  
16 is giving the consent, exactly what it says, to mortgage the  
17 land by the trust for the benefit of Matthew Beck just as  
18 it's spelled out.

19 Q. Okay. So regardless, these consents got filled  
20 out and in your mind we're talking about \$800,000 of value  
21 max that is now security, or do you imagine that there's more  
22 available?

23 A. I would say -- well, I would say it's \$800,000  
24 principal amount, plus any other terms and conditions that  
25 are found in the mortgage.

1 Q. Okay. Because I was wondering how even with an  
2 \$800,000 security from the trust does that even get you to  
3 your -- I guess I'm probably going to forget the phrase you  
4 used, but your loan to value ratio that you're looking for.  
5 For instance, Matt's operation was nowhere near enough to  
6 justify a \$2 million loan, right?

7 A. On his own.

8 Q. On his own?

9 A. No.

10 Q. So you need additional value from somewhere, so  
11 you guys looked to the trust, correct?

12 A. Correct.

13 Q. But if all you're getting from the trust is  
14 \$800,000, when you add that to Matt's, the value that he's  
15 got, does that itself justify the \$2 million loan?

16 A. Those two things together did justify it at that  
17 time.

18 Q. Okay. And maybe it's in your notes there and I  
19 just need you to point it out to me, what was the working  
20 number in your mind as to the amount of value that was  
21 available to Matt as an equity for -- security for the loan?

22 A. You know, I -- going off of these notes, we won't  
23 quite have all the detail I'll need to give you that number.

24 Again, I'll have to go back and get the balance sheet from  
25 the spring of '15 to see what values we were working with and

1 where we were at.

2 Q. Okay. Just off the record real quick.  
3 (Off-the-record discussion.)

4 Q. (BY MR. WURGLER) All right, so I guess your  
5 answer then is you would need to look at that 2015  
6 projection?

7 A. Balance sheet. Balance sheet.

8 Q. Or the balance sheet. To give you a good idea to  
9 the answer?

10 A. Right, yeah, then I could give you --

11 Q. All right. Moving forward then, the bank gets  
12 the consents and the money goes to Matt, some of it. The  
13 1.855 million, does that just get paid to Bill Thovson  
14 directly?

15 A. We'd have to go back and look at the debt  
16 verifications and then the payoff quotes, which I believe  
17 those are in here. They look like an Excel spreadsheet, if  
18 you remember seeing that. That was Bill's format that he  
19 used.

20 Q. So, for instance, page 440.

21 MR. RASMUSSEN: Which page?

22 MR. WURGLER: 440.

23 A. 440, okay. I went to 42 right away. The other  
24 thing to reference that might get you what you're looking  
25 for, you know page one had a breakdown of -- again, I'd have

1 to go back and look, I don't recall if this was a tentative  
2 the day or two before closing what we thought all the final  
3 amounts would shake out at, or if this was as of the day of  
4 closing these were exactly how much money went to different  
5 parties, but it will give us a pretty good -- pretty good  
6 starting point, would be pretty close to that.

7 Q. (BY MR. WURGLER) Okay. And so you said this was  
8 right around the day of closing?

9 A. Yeah, either a couple days before or the day of  
10 or day or two after, as an overall summary of where the money  
11 went.

12 Q. All right. So the date of closing then, what  
13 ends up happening is the big loan for 1.8 million roughly  
14 ends up going to Legendary?

15 A. Right.

16 Q. The cattle loan for 370,000, we know Matt used  
17 within the next couple months to buy cattle?

18 A. Yes, that loan was done a month, month and a half  
19 later.

20 Q. And then there is some line of credit that is  
21 available to Matt as well?

22 A. Correct.

23 Q. All right. So you get the consents, the money  
24 goes to where it needs to go, and Matt is doing his operation  
25 through 2016. Did you do much checking on him in 2016?



\*\*\*\*\*  
\*  
IN THE MATTER OF THE \* 06TRU18-000002  
IRREVOCABLE TRUST OF \*  
GARY J. BECK AND BETTY BECK. \*  
\*  
\*\*\*\*\*

D E P O S I T I O N  
O F

MATTHEW BECK

October 4, 2018

9 o'clock, a.m.

Taken at:  
Offices of Bantz, Gosch & Cremer LLC  
305 6th Avenue Southeast  
Aberdeen, South Dakota

Reporter: Tammy Stolle, RPR

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Jamie Moeckly

\* \* \* \* \*

## I N D E X

WITNESS:

MATTHEW BECK

Examination - By Mr. Wurgler

PAGE NO.

3

EXHIBITS:

No. 6 - Discovery Pleadings

MARKED

35

1 WHEREUPON,  
 2 the following proceedings were had, to wit:  
 3 MATTHEW BECK, after being first duly sworn,  
 4 testified on his oath as follows:  
 5 EXAMINATION  
 6 BY MR. WURGLER:  
 7 Q. State your name for the record, please, sir.  
 8 A. **Matthew Beck.**  
 9 Q. Where did you grow up, Mr. Beck?  
 10 A. **Britton area.**  
 11 Q. What's the high school out there that you went  
 12 to?  
 13 A. **Britton.**  
 14 Q. When did you graduate?  
 15 A. **1998.**  
 16 Q. What did you do after that?  
 17 A. **Farmed and went to college.**  
 18 Q. Where did you go to college at?  
 19 A. **North Dakota State.**  
 20 Q. Did you have any career aspirations with a  
 21 college degree?  
 22 A. **No.**  
 23 Q. What were you going to North Dakota State for?  
 24 A. **Animal science.**  
 25 Q. You said you did a little bit of farming -- or

1 excuse me, I assume you did some farming growing up with your  
 2 folks, is that right?  
 3 A. **Yep.**  
 4 Q. And what kind of things did you help out with on  
 5 the farm?  
 6 A. **Everything.**  
 7 Q. How many acres were your folks farming up to the  
 8 point you graduated high school?  
 9 A. **Four or five hundred.**  
 10 Q. And there was some testimony yesterday about  
 11 where that land actually came from. Now is it correct that  
 12 some of that is your grandfather's land?  
 13 A. **Yes.**  
 14 Q. And did some of that come from even further back?  
 15 A. **Yes.**  
 16 Q. Okay. So if you just put a number on it, how  
 17 long has some of that land been in the family?  
 18 A. **Oh, probably a hundred years.**  
 19 Q. Okay. Once you graduated high school, what did  
 20 you intend to do for an occupation?  
 21 A. **Come back and farm.**  
 22 Q. What was the reason you went to college then?  
 23 A. **To further my education about farming.**  
 24 Q. How much college education did you get?  
 25 A. **A bachelor of science degree.**

1 Q. Did you graduate in 2002 then?  
 2 A. **2001.**  
 3 Q. And did you do all of your college through North  
 4 Dakota State?  
 5 A. **Yes.**  
 6 Q. While you were going to North Dakota State, were  
 7 you living up -- Is it Grand Forks, I can't remember where  
 8 all those --  
 9 A. **Fargo.**  
 10 Q. You were living in Fargo?  
 11 A. **Um-huh.**  
 12 Q. Okay. Were you able to help out with the farm  
 13 when you were going to college?  
 14 A. **Yes.**  
 15 Q. And how did you manage that?  
 16 A. **Drove home every weekend for three and a half**  
 17 **years.**  
 18 Q. Okay. You're married, correct?  
 19 A. **Yes.**  
 20 Q. And when did you get married?  
 21 A. **2002.**  
 22 Q. Okay. And I assume that was to Kelley, correct?  
 23 A. **Yeah.**  
 24 Q. Okay. You've got family now, kids of your own?  
 25 A. **Yep.**

1 Q. Okay. How many kids do you have?  
 2 A. **Three.**  
 3 Q. And is it correct that you've been farming out at  
 4 the family farm there since about -- well, and I'll put this  
 5 with a full-time qualification. How long have you been  
 6 farming out there full-time at the family farm?  
 7 A. **My whole life.**  
 8 Q. Full-time?  
 9 A. **Yes.**  
 10 Q. Well, and let's exclude those times when you were  
 11 actually attending school. When did you start farming when  
 12 you weren't going to school?  
 13 A. **High school or college?**  
 14 Q. Let's even exclude college. Would it have been  
 15 2001 then that you started farming without any school  
 16 alongside of that?  
 17 A. **Yes.**  
 18 Q. I'm going to use some definitions here in the  
 19 deposition. Just so that we're clear, when I talk about the  
 20 trust, I'm going to refer to the 1999 trust that you're a  
 21 trustee of because your folks had a couple of trusts prior to  
 22 that.  
 23 When I talk about the farm, it just means Gary  
 24 and Betty's land that was put in the trust that you're  
 25 currently trustee of.

1 here from the document, Jamie was not willing to sign off on  
 2 this consent to sale, is that right?  
 3 **A. Correct.**  
 4 **Q.** Did you discuss this sale with her?  
 5 **A. No.**  
 6 **Q.** Why didn't you discuss this with her?  
 7 **A. That wasn't my responsibility.**  
 8 **Q.** Were you trustee of the trust at this time?  
 9 **A. Yes.**  
 10 **Q.** Was Jamie named in the trust?  
 11 **A. Yes.**  
 12 **Q.** Was Jamie going to benefit from the terms of the  
 13 trust once your parents passed?  
 14 **A. Yes.**  
 15 **Q.** But you didn't see any responsibility to discuss  
 16 how this could affect her?  
 17 **A. I thought it was my parents' responsibility since**  
 18 **they were the grantors.**  
 19 **Q.** Do you know if they discussed it with her?  
 20 **A. I believe they did.**  
 21 **Q.** And what's your understanding of those  
 22 conversations?  
 23 **A. I don't know, she declined.**  
 24 **Q.** Once the consent to sale -- well, let me start  
 25 with this. Is it true that when Jamie would not sign this

1 consent to sale, you guys had to find another plan?  
 2 **A. I would just -- yes.**  
 3 **Q.** Okay. And once Jamie didn't sign the consent to  
 4 sale, what did you intend to do then about the trust land?  
 5 **A. Well, I don't think there was any different plan**  
 6 **in place. It was just how we went about it, I guess.**  
 7 **Q.** Okay. Can you tell me how you decided to go  
 8 about it?  
 9 **A. Just operating it as one farm.**  
 10 **Q.** I'm sorry, I didn't catch it. Operating as what?  
 11 **A. One farm.**  
 12 **Q.** One farm. The consent to mortgage which you see  
 13 on page 28 then. It looks to me that this was taking place  
 14 right about the same time as the -- a little bit after the  
 15 consent to sale idea, is that right?  
 16 **A. Yes.**  
 17 **Q.** And did you ask Danny to prepare this consent to  
 18 mortgage?  
 19 **A. Yeah, I would say my folks and I did it**  
 20 **collectively.**  
 21 **Q.** When did you first start talking with Plains  
 22 Commerce Bank?  
 23 **A. I would say the summer of '15.**  
 24 **Q.** How did you get their name as a possible lender?  
 25 **A. I guess I don't recall.**

1 **Q.** Who did you contact over at Plains Commerce to  
 2 see about possibly getting some financial?  
 3 **A. Lance Vilhauer.**  
 4 **Q.** Did you know him personally at the time?  
 5 **A. No.**  
 6 **Q.** How did you describe to Lance what you needed?  
 7 **A. Just a cattle and grain operation.**  
 8 **Q.** Did you have a dollar amount in mind?  
 9 **A. Based on cash flow and balance sheet, I guess.**  
 10 **They probably come up with that more than I could.**  
 11 **Q.** But you didn't have any particular amount from  
 12 Plains Commerce that you were hoping to get as a loan?  
 13 **A. Well, whatever it would have been to refinance**  
 14 **previous notes, I guess.**  
 15 **Q.** Are you referring to the Bill Thovson notes?  
 16 **A. Correct.**  
 17 **Q.** Were there any other notes that you were  
 18 refinancing through Plains Commerce?  
 19 **A. No.**  
 20 **Q.** And had Bill Thovson himself refinanced notes  
 21 before that?  
 22 **A. Correct.**  
 23 **Q.** Once you started discussing things with Lance  
 24 Vilhauer, did you inform him that there was trust land  
 25 involved with this possible refinance?

1 **A. Yes.**  
 2 **Q.** What was his response to that?  
 3 **A. He just wanted to see a copy of the trust.**  
 4 **Q.** Is he the only one you worked with over there?  
 5 **A. Yes.**  
 6 **Q.** Were there ever any attorneys that got involved  
 7 on behalf of Plains Commerce?  
 8 **A. Yes, I believe so.**  
 9 **Q.** Was that Tom Cogley?  
 10 **A. I don't recall who it was at that time.**  
 11 **Q.** Did you then send Lance Vilhauer trust document?  
 12 **A. Yes.**  
 13 **Q.** What did he say once he reviewed the trust  
 14 document?  
 15 **A. I don't recall. I believe he just sent it onto**  
 16 **his attorneys, or Plains Commerce attorneys.**  
 17 **Q.** What took place after that in terms of getting  
 18 this possible mortgage in place?  
 19 **A. I think they just wanted to have the consent to**  
 20 **mortgage.**  
 21 **Q.** Did they discuss that with Danny Smeins as far as  
 22 you know?  
 23 **A. I don't know.**  
 24 **Q.** Well, I'm sorry, I know I asked this, but I  
 25 forgot what you said. Did you ask Danny to prepare this

1 consent to mortgage?

2 **A. I don't know if I asked or my folks asked, or if**  
3 **it was a collective decision, or if it was Plains Commerce**  
4 **attorneys.**

5 **Q.** Did you consider Danny to be representing you at  
6 this time?

7 **A. Yes.**

8 **Q.** Did you pay -- get any invoices or pay any bills  
9 of Danny's?

10 **A. I don't recall.**

11 **Q.** Was Danny -- it's probably legal jargon, but was  
12 Danny representing you personally or as trustee with regard  
13 to this consent to mortgage?

14 **A. Trustee.**

15 **Q.** And with the consent to sale, was he representing  
16 you -- did he represent you in that situation as well?

17 **A. Yes.**

18 **Q.** Was he representing you personally or as trustee?

19 **A. As trustee, I would think.**

20 **Q.** Apart from the 2012 sale agreement that we looked  
21 at, the 2015 consent to sale, were there any other times  
22 where you and your folks put something together to sell the  
23 land to you?

24 **A. Not that I recall.**

25 **Q.** At what point did you learn then that Plains

1 Commerce -- well, let's back up. Apparently the consents to  
2 mortgage were satisfactory to Plains Commerce, is that right?

3 **A. To my knowledge, yes.**

4 **Q.** And did they give you some money then at that  
5 point?

6 **A. Yes.**

7 **Q.** Were you able to take care of your notes with  
8 Bill Thovson with that money?

9 **A. Yes.**

10 **Q.** What happened then that led you to be unable to  
11 meet your obligations under the mortgage?

12 **A. Just poor market conditions.**

13 **Q.** So this would have been 2015. The bank  
14 foreclosed in very early 2018, is that right?

15 **A. Correct.**

16 **Q.** Between the time you got the money from Plains  
17 Commerce and the foreclosure, what were you doing with the  
18 farming operation? Could you describe whether you had  
19 cattle, whether you had -- whether you were farming in terms  
20 of crop, things like that?

21 **A. Yes, cattle, corn and beans.**

22 **Q.** Were there drastic differences in market  
23 condition in the past five, six years in the price of corn  
24 and beans?

25 **A. Oh, yes.**

1 **Q.** And did you have any drought situations or hail  
2 situations that you were facing?

3 **A. Probably still recovering from flood situations.**

4 **Q.** When was that?

5 **A. From 2009 to 2012 at least.**

6 **Q.** Are you saying you had some land underwater  
7 still?

8 **A. Yes.**

9 **Q.** And you knew that at the time you got the  
10 mortgage with Plains Commerce?

11 **A. Yes.**

12 **Q.** What was the arrangement in terms of making  
13 payments to Plains Commerce, were they monthly payments or  
14 quarterly payments?

15 **A. Annuals.**

16 **Q.** Annuals. What was the amount?

17 **A. I don't recall.**

18 **Q.** Can you give me a ballpark?

19 **A. It was over 150,000.**

20 **Q.** And how long were you supposed to pay that off,  
21 how many years?

22 **A. 25, I believe.**

23 **Q.** Were you able to make any of the payments to  
24 them?

25 **A. The first year, I believe, yes.**

1 **Q.** Once the foreclosure papers got served on you,  
2 did you discuss that with your parents?

3 **A. Yes.**

4 **Q.** Were your parents aware of the refinance through  
5 Bill Thovson?

6 **A. Yes.**

7 **MR. WUGLER:** And for the record that's  
8 T-H-O-V-S-O-N.

9 **Q.** (BY MR. WUGLER) Were your parents aware of the  
10 debt situation from all through your trusteeship?

11 **A. Yes.**

12 **Q.** And how did you -- what was your practice of  
13 making them aware of that?

14 **A. Daily discussions. They were involved in the tax**  
15 **returns. They were involved in everything.**

16 **Q.** Did your parents ever express concern to you  
17 about the level of debt that was being carried by the farm?

18 **A. No.**

19 **Q.** Do you feel that your parents understood the  
20 severity of the situation?

21 **A. Yes.**

22 **Q.** Mr. Beck, Exhibit 4 here. Take a quick look at  
23 that.

24 **A. (Witness reviewing exhibit.)**

25 **Q.** Do you recall signing that document, Mr. Beck?

STATE OF SOUTH DAKOTA  
COUNTY OF BROWN

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

PLAINS COMMERCE BANK,	*	06CIV18-000055
Plaintiff,	*	
vs.	*	
MATTHEW A. BECK, a married person;	*	
KELLEY R. BECK, a married person;	*	
MATTHEW A. BECK, Trustee of the	*	PLAINS COMMERCE BANK'S
B&B FARMS TRUST, u/t/a November 1,	*	RESPONSE TO ACTING TRUSTEE
1999; BROWN COUNTY, a governmental	*	MOECKLY'S DISCOVERY
instrumentality of the State of South	*	REQUESTS 1-17
Dakota; MARSHALL COUNTY, a	*	
governmental instrumentality of the State	*	
of South Dakota; DEERE& COMPANY, a	*	
corporation,	*	
Defendants.	*	

\* \* \* \* \*

STATE OF SOUTH DAKOTA     )  
  )ss  
COUNTY OF BROWN         )

Plaintiff Plains Commerce Bank hereby responds to Acting Trustee Jamie Moeckly's Discovery Requests 1-17 as follows:

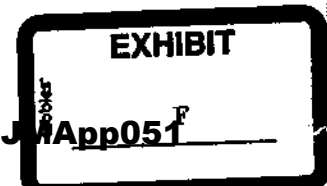
**Plaintiff objects to Intervenor Moeckly's characterization of herself as Acting Trustee. Dacotah Bank is the court appointed Trustee of B&B Farms Trust.**

1. **INTERROGATORY.** State the names of each person assisting with answering these discovery requests.

**RESPONSE:** John Schramm and Lance Vilhauer, assisted by counsel.

2. **INTERROGATORY.** State the name of each Plains Commerce Bank employee who was involved with the Promissory Notes or Mortgages.

**RESPONSE:** Lance Vilhauer and Judon Reinbold.



3. **INTERROGATORY.** Please describe in general terms how Plains Commerce Bank ordinarily keeps track of its loan files. (This request is intended to help counsel understand Plains Commerce Bank's file system so that accurate discovery requests can be made with regard to it.)

**RESPONSE:** Loan documents are contained in an electronic system.

4. **INTERROGATORY.** Are there any sources of information relevant to the Promissory Notes or Mortgages that are not kept in Plains Commerce Bank's ordinary filing system? If so, please describe it in a way that it can be requested in discovery. For example, does a banker keep a notebook in a desk drawer that may have relevant information written on it?

**RESPONSE:** See documents attached as PCB 1-21.

5. **REQUEST FOR PRODUCTION.** Produce a copy of Plains Commerce Bank's entire file(s) for the following:

- a. The Promissory Notes;
- b. The Mortgages;
- c. Matthew Beck, in any capacity;
- d. Kelley Beck; and
- e. The B&B Farms Trust.

**RESPONSE:**

- a. See documents attached as PCB 22-29;
- b. See documents attached as PCB 30-141;
- c. See documents attached as PCB 142-335;
- d. See documents attached as PCB 336-364;
- e. See documents attached as PCB 365-378.

6. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Matthew Beck whether in his personal capacity or capacity as trustee.

**RESPONSE:** See documents attached as PCB 379-401.

7. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Kelly Beck.

**RESPONSE:** None.

8. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Betty Beck.

**RESPONSE:** See documents attached as PCB 402-412.

9. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Brian Beck.

**RESPONSE:** None.

10. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Jamie Moeckly.

**RESPONSE:** None.

11. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Attorney Danny Smeins.

**RESPONSE:** See documents attached as PCB 413-421.

12. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Attorney Gordon Nielsen.

**RESPONSE:** None.

13. **REQUEST FOR PRODUCTION.** Produce copies of all electronic correspondence, paper correspondence, and recorded conversations between Plains Commerce Bank and Bill Thovson or Legendary Loan Link, Inc.

**RESPONSE:** See documents attached as PCB 422-453.

14. **INTERROGATORY.** When and how did Plains Commerce Bank first become aware of the B&B Farms Trust?



**RESPONSE:** In conversations with Matthew Beck during the loan application process.

15. **INTERROGATORY.** Who at Plains Commerce Bank reviewed the B&B Farms Trust document and when?

**RESPONSE:** The trust document was reviewed by Tom Cogley on behalf of the Bank in August 2015.

16. **INTERROGATORY.** Please state the current outstanding balances on the Promissory Notes.

**RESPONSE:** As of October 18, 2019, the current outstanding balance on the promissory note is \$1,067,368.66. The payoff amount is \$1,368,375.87.

17. **REQUEST FOR PRODUCTION.** Now that the court has granted Plains Commerce Bank partial summary judgment against Matthew Beck, personally, and Kelley Beck, provide all documentation related to Plains Commerce Bank's foreclosure activities against them.

**RESPONSE:** See documents attached as PCB 454-474.

[Remainder of this page intentionally left blank.]

Lance Vilhauer, being first duly sworn, on oath deposes and says:

That Lance Vilhauer is the Vice President/Business Banker of Plains Commerce Bank in the above-entitled action; that he has read the foregoing PLAINS COMMERCE BANK'S ANSWERS TO ACTING TRUSTEE MOECKLY'S DISCOVERY REQUESTS 1-17 by him subscribed and knows the contents thereof; that said Answers were prepared with the assistance and advice of counsel and employees of Plains Commerce Bank upon whose advice they have relied; that the Answers set forth herein, subject to inadvertent or undiscovered errors, are based on, and therefore necessarily limited by, the records and information still in existence, presently recollected and thus far discovered in the course of the preparation of these Answers; that consequently Plains Commerce Bank reserves the right to make any changes in the Answers if it appears that at any time that omissions or errors have been made therein or that more accurate information is available; that subject to the limitations set forth herein the said Answers are true to the best of their knowledge, information, and belief.

PLAINS COMMERCE BANK

By: *Lance Vilhauer*  
 Lance Vilhauer  
 Its: Vice President/Business Banker

Subscribed and sworn to before me this 21 day of October, 2019.



(Notarial Seal)

*Brady Haar*  
 Notary Public, South Dakota  
 My Commission Expires: 3-27-2025

CERTIFICATE OF SERVICE

The undersigned, attorneys for Plaintiff, hereby certifies that on the 21st day of October, 2019, a true and correct copy of the foregoing PLAINS COMMERCE BANK'S RESPONSE TO ACTING TRUSTEE MOECKLY'S DISCOVERY REQUESTS 1-17 was served by electronic transmission on the following:

Thomas J. Cogley  
Cogley Law Office, Prof. LLC  
202 South Main Street, Suite 230  
Aberdeen, SD 57401  
[tom@cogleylaw.com](mailto:tom@cogleylaw.com)

Mr. Kenneth L. Gosch  
Mr. Joshua G. Wurgler  
Bantz, Gosch & Cremer, L.L.C.  
PO Box 970  
Aberdeen, SD 57402-0970  
[kgosch@bantzlalaw.com](mailto:kgosch@bantzlalaw.com)  
[jwurgler@bantzlalaw.com](mailto:jwurgler@bantzlalaw.com)

and by first class mail on the following:

Matthew A. Beck  
Kelley R. Beck  
10949 408th Avenue  
Hecla, SD 57446

Dated this 21st day of October, 2019.

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

/s/ Reed Rasmussen

Reed Rasmussen  
415 S. Main Street, 400 Capitol Building  
PO Box 490  
Aberdeen, SD 57402-0490  
Telephone No. (605) 225-5420  
Facsimile No. (605) 226-1911  
[rrasmussen@sbslaw.net](mailto:rrasmussen@sbslaw.net)

and

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Sioux Falls, SD 57117-5027  
[roger.damgaard@woodsfuller.com](mailto:roger.damgaard@woodsfuller.com)  
[Jordan.Feist@woodsfuller.com](mailto:Jordan.Feist@woodsfuller.com)

Attorneys for Plaintiff



11/16/2015 11:16 Danny R. Smeins Law Office

(FAX) 605-448-5251

P.001/009

**LAW OFFICE OF DANNY R. SMEINS, P.C.**  
755 7<sup>TH</sup> STREET, STE. 106 - PO Box A  
BRITTON, SOUTH DAKOTA 57430

Webster Office  
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Phone (605) 448-5964  
Fax (605) 448-5251  
[drlaw@vanhuc.com](mailto:drlaw@vanhuc.com)

**FAX**

TO: Lance, Plains Commerce Bank  
FAX NO.: 605-225-9560  
FROM: Danny R. Smeins, Attorney at Law  
DATE: November 16, 2015  
RE: Consents - B & B Farms Trust  
PAGES: 9 (including this page)

---

Call 605-448-5964 if you do not receive all pages.

ORIGINAL: Mailed \_\_\_\_\_ Not Mailed  X

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**PCB 134**  
**JMApp057**

11/16/2015 11:18 Danny R. Smelns Law Office

(FAX)16054485251

P.008/009

Prepared by:  
 Law Office of Danny R. Smelns, P.C.  
 P.O. Box A  
 Britton, SD 57430  
 605-448-5964

---

**CONSENT TO MORTGAGE OF REAL ESTATE  
OWNED BY TRUST**

I, the undersigned, a secondary beneficiary of the B & B FARMS TRUST u/t/a dated November 1, 1999, hereby consent to the Trustee mortgaging or encumbering the following real estate to PLAINS COMMERCE BANK, Aberdeen, South Dakota:

Southwest Quarter (SW1/4), Section Fourteen (14), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

South Half (S1/2) and East Half of Northwest Quarter (E1/2NW1/4), Section Fifteen (15), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

Southeast Quarter of Northeast Quarter (SE1/4NE1/4), Southeast Quarter of Northwest Quarter (SE1/4NW1/4), Northwest Quarter of Southeast Quarter (NW1/4SE1/4), Section Sixteen (16), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to PLAINS COMMERCE BANK benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, MATTHEW BECK. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

**PCB 135  
JMA058**

11/16/2015 11:18 Danny R. Smelns Law Office

(FAX)16054485251

P.009/009

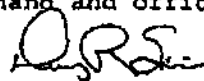
Dated this 12<sup>th</sup> day of Nov., 2015.

  
Brian Beck

STATE OF SOUTH DAKOTA )  
:ss.  
COUNTY OF MARSHALL )

On this the 12 day of Nov, 2015, before me, the undersigned officer, personally appeared **BRIAN BECK**, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof I hereunto set my hand and official seal.

  
Notary Public, South Dakota

My commission expires: Aug 14 2018

11/16/2015 11:17 Danny R. Smeins Law Office

(FAX)16054485251

P.004/009

Prepared by:  
 Law Office of Danny R. Smeins, P.C.  
 P.O. Box A  
 Britton, SD 57430  
 605-448-5964

---

**CONSENT TO MORTGAGE OF REAL ESTATE  
OWNED BY TRUST**

I, the undersigned, a secondary beneficiary of the **B & B FARMS TRUST** u/t/a dated November 1, 1999, hereby consent to the Trustee mortgaging or encumbering the following real estate to **FLAINS COMMERCE BANK**, Aberdeen, South Dakota:

Southwest Quarter (SW1/4), Section Fourteen (14), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

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I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to **FLAINS COMMERCE BANK** benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, **MATTHEW BECK**. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

**11/16/2015 11:17 Danny R. Smeins Law Office**

**(FAX)16054485251**

P.005/009

Dated this 9 day of Nov, 2015.

**Matthew Beck**

STATE OF SOUTH DAKOTA )  
COUNTY OF MARSHALL ) ss.

On this the 9 day of Nov, 2015, before me, the undersigned officer, personally appeared MATTHEW BECK, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof I hereunto set my hand and official seal.

Notary Public, South Dakota

My Commission expires: Aug 14, 2018

**PCB 138**  
**JMApp061**



11/16/2015 11:17 Danny R. Smeins Law Office

(760) 605-4485

P.006/008

Prepared by:  
 Law Office of Danny R. Smeins, P.C.  
 P.O. Box A  
 Britton, SD 57430  
 605-448-5964

---

**CONSENT TO MORTGAGE OF REAL ESTATE  
OWNED BY TRUST**

I, the undersigned, a secondary beneficiary of the B & B FARMS TRUST u/t/a dated November 1, 1999, hereby consent to the Trustee mortgaging or encumbering the following real estate to PLAINS COMMERCE BANK, Aberdeen, South Dakota:

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South Half (S1/2) and East Half of Northwest Quarter (E1/2NW1/4), Section Fifteen (15), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

Southeast Quarter of Northeast Quarter (SE1/4NE1/4), Southeast Quarter of Northwest Quarter (SE1/4NW1/4), Northwest Quarter of Southeast Quarter (NW1/4SE1/4), Section Sixteen (16), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to PLAINS COMMERCE BANK benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, MATTHEW BECK. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

11/18/2015 11:18 Danny R. Smelns Law Office

#AX016054485251

P.007/009

Dated this 12 day of November, 2015.

Jamie Moeckly  
Jamie Moeckly

STATE OF SOUTH DAKOTA )  
  : ss.  
COUNTY OF MARSHALL )

On this the 12 day of November, 2015, before me, the undersigned officer, personally appeared JAMIE MOECKLY, 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.

[Signature]  
Notary Public, South Dakota

Commission expires: Apr 17, 2018

11/16/2015 11:17 Danny R. Smeins Law Office

FAX 18054485251

P.002/009

Prepared by:  
 Law Office of Danny R. Smeins, P.C.  
 P.O. Box A  
 Britton, SD 57430  
 605-448-5954

---

**CONSENT TO MORTGAGE OF REAL ESTATE  
OWNED BY TRUST**

I, the undersigned, a primary beneficiary of the **B & B FARMS TRUST** u/t/a dated November 1, 1999, hereby consent to the Trustee mortgaging or encumbering the following real estate to **FLAINS COMMERCE BANK**, Aberdeen, South Dakota:

Southwest Quarter (SW1/4), Section Fourteen (14), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

South Half (S1/2) and East Half of Northwest Quarter (E1/2NW1/4), Section Fifteen (15), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

Southeast Quarter of Northeast Quarter (SE1/4NE1/4), Southeast Quarter of Northwest Quarter (SE1/4NW1/4), Northwest Quarter of Southeast Quarter (NW1/4SE1/4), Section Sixteen (16), Township One Hundred Twenty-seven North (127N), Range Sixty (60), West of the 5<sup>th</sup> P.M., Brown County, State of South Dakota.

I am aware and understand that the Trustee has authority or discretion to mortgage or encumber the trust property, however the proposed mortgage to **FLAINS COMMERCE BANK** benefits the Trustee and not all trust beneficiaries. This document confirms my consent to the mortgage of the real estate by Trustee and secondary beneficiary, **MATTHEW BECK**. This consent is limited to the current proposed mortgage and any future mortgages not to exceed \$800,000.00. This is not a consent to additional or new loans and encumbrances, except as stated herein and except for extensions of the note and mortgages executed contemporaneous to this consent and new mortgages up to the limits set forth herein.

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT  
 :SS  
COUNTY OF BROWN ) FIFTH JUDICIAL CIRCUIT  
\* \* \* \* \* )  
 )  
IN THE MATTER OF THE ) TRU 18-02  
IRREVOCABLE TRUST OF )  
GARY J. BECK AND BETTY BECK.)  
 )  
\* \* \* \* \*

**DEPOSITION OF BRIAN BECK**

DATE & TIME: October 3, 2018  
1:00 p.m.

LOCATION: LAW OFFICES OF BANTZ, GOSCH & CREMER  
305 6TH AVENUE SE  
Aberdeen, SD 57401

APPEARANCES: For Jamie Moekley:

Mr. Kenneth L. Gosch &  
Mr. Joshua Wurgler  
BANTZ, GOSCH & CREMER  
Attorneys at Law  
PO Box 970  
Aberdeen, SD 57402

For Matthew Beck:

Mr. Gordon P. Nielsen  
DELANEY, NIELSEN, & SANNES  
Attorneys at Law  
PO Box 9  
Sisseton, SD 57262



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I N D E X

WITNESSES

PAGE

Brian Beck

Examination By Mr. Wurgler

3-29

1                               BRIAN BECK,  
2       called as a witness, being first duly sworn, testified as  
3       follows:

4                               EXAMINATION

5 BY MR. WURGLER:

6 Q. Mr. Beck, as you sat here -- first of all, were you able to  
7       hear everything your mother said in her deposition?

8 A. Yes.

9 Q. Is there anything that jumps out at you right off the bat that  
10      you'd like to discuss or talk about or make a statement about?

11 A. One thing that caught my mind was you kept trying to push upon  
12      her that the bank would own that land. That's speculation on  
13      your part because there is nowhere near close to doing any  
14      foreclosure or sale. You don't know who's going to own that  
15      land. Sale is not lined up yet. They have nobody to buy the  
16      land. Might be the bank. May be a neighbor. Who knows.  
17      That's all speculation on your part.

18 Q. So does the trust have \$800,000 to pay the bank?

19 A. I have no idea. I assume not, otherwise...

20 Q. And if the only asset of the trust is the land, do you  
21      understand that the bank would have to sell the land to get  
22      the money?

23 A. I'm under the understanding that the bank -- nobody can touch  
24      that trust. It's an irrevocable trust, is it not?

25 Q. This isn't really the time and place to get into that, for me

- 1       that the legal action was going on.
- 2   Q. And by papers from my office, are you referring to Exhibit 2?
- 3   A. Yes.
- 4   Q. Okay. So just putting this together then, Exhibit 2 is dated
- 5       January 15, 2018. It would have been after that point that
- 6       you first saw the trust document?
- 7   A. Uh-huh. Yes.
- 8   Q. Good catch. Now we'll get into some of those documents you
- 9       were looking for just a couple minutes ago. If you turn to
- 10       47, and now what I'd asked you earlier is when did you become
- 11       aware that there was a trust? Is this what you are hoping
- 12       would give you a date reference?
- 13   A. No, there is another document here that we reviewed with Danny
- 14       and signed allowing Matt to mortgage his third of the trust.
- 15   Q. Mr. Beck, if you turn to page 22 -- you might as well keep
- 16       your finger there, too -- is that your signature on the page
- 17       23?
- 18   A. It is.
- 19   Q. And on page 22, Consent to Mortgage, is this the one you're
- 20       thinking of?
- 21   A. Yes, that is the one I'm thinking of.
- 22   Q. Okay. So this one is dated November 12 of 2015.
- 23   A. Correct.
- 24   Q. Flipping back to the other one, that's dated October 23 of
- 25       2015, a little bit earlier.

1 A. We agreed to disagree.

2 Q. Then you didn't sign and you left; correct?

3 A. Correct.

4 Q. So --

5 A. I believe I'm stating these facts from the best I can  
6 remember, so if something is not right... I'm not as young as  
7 I used to be and my memory is not as good as it used to was.

8 Q. Understood. But at some point then do you recall why you went  
9 back in to discuss it again?

10 A. Because I think everybody had been made aware of it and had  
11 their appointment with Danny and decided to sign it.  
12 Actually, I think -- I know Jamie originally refused to sign  
13 it and I believe Betty persuaded her to do so.

14 So once she did then I went and signed it because I  
15 didn't see any point of me signing the document if it was  
16 going to be a moot point.

17 Q. So by the time you signed it everybody else signed it, to your  
18 understanding?

19 A. To my understanding.

20 Q. And what was -- how did you understand -- I'm getting that all  
21 messed up. What did you understand the Consent to Mortgage on  
22 22 was accomplishing?

23 A. That allowed Matt to mortgage his third of the trust, value of  
24 the trust, to continue to operate the farm.

25 Q. Did Danny show you what the value of the trust was?



1 A. I believe he did but I don't remember the number. It was an  
2 extremely outrageous number.

3 Q. In terms of low or being too high?

4 A. Too high. That was about the time when land values inflated  
5 in Marshall County because of a particular land sale. And  
6 you've seen what land values have done today, they've dropped  
7 considerably.

8 Q. When you signed the document on 22, then, it notes the number  
9 \$800,000. Was it the understanding that was Matt's one-third  
10 of the trust?

11 A. Yes.

12 Q. Was that based on the too high number that you felt Danny  
13 presented to you?

14 A. Yes.

15 Q. If you felt that was too high, what -- why did you go ahead  
16 and sign it?

17 A. Because that's what land was going for and they were selling  
18 land about as fast as they could line up auctions. Guys were  
19 paying way more than that amount for land. And at that time  
20 the farm economy was good before the farm economy tanked and  
21 everybody started having financial problems. It was -- put it  
22 this way, it was not expected that land values were going to  
23 start dropping off.

24 Q. Did Danny explain why Matt needed this mortgage?

25 A. I believe -- I don't know that Danny explained it so much as I

- 1       understood it to be collateral.
- 2   Q. Did you understand the mortgage was for Matt personally and  
3       not for the trust?
- 4   A. I did.
- 5   Q. Did Danny discuss whether Matt was trying to finance some  
6       aspect of the farm?
- 7   A. He did not. Or if he did, I don't recall it.
- 8   Q. Were these lengthy discussions?
- 9   A. Half hour at the most.
- 10   Q. Now I know you disagree at this point, but if there was a  
11       danger that Matt's personal debts would have caused harm to  
12       the trust land, would you have signed this document at that  
13       time?
- 14   A. Probably. Absolutely.
- 15   Q. Can you explain why?
- 16   A. Because I knew I was never going be there to farm and so I  
17       kind of wanted to see him make a go of it.
- 18   Q. And my question was a little bit more narrowly-phrased than  
19       that. If you knew that there was a risk that the farm could  
20       be taken away, for instance, because of a bank foreclosure, if  
21       that risk was present, and I know you disagree with it now,  
22       but if it was present, would you have still been comfortable  
23       signing this document?
- 24   A. Absolutely. Getting out of bed in the morning is a risk.
- 25   Q. Okay. Do you want to see that land sold to the -- by the

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT

2 COUNTY OF BROWN FIFTH JUDICIAL CIRCUIT

3 \* \* \* \* \*

4 PLAINS COMMERCE BANK, \*  
\* 06CIV18-000055

5 Plaintiff, \*

6 vs. \*

7 MATTHEW A. BECK, a married person; \*  
8 KELLEY R. BECK, a married person; \*  
9 MATTHEW A. BECK, Trustee of the \*  
10 B&B FARMS TRUST, u/t/a November 1, \*  
11 1999; BROWN COUNTY, a governmental \*  
12 instrumentality of the State of \*  
13 South Dakota; MARSHALL COUNTY, a \*  
14 governmental instrumentality of \*  
15 the State of South Dakota; DEERE & \*  
16 COMPANY, a corporation, \*

17 Defendants. \*

18 \* \* \* \* \*

19

20 D E P O S I T I O N

21 O F

22 JAMIE MOECKLY

23 February 19, 2020

24 12 o'clock, p.m.

25

26

27 Taken at:  
28 Offices of Bantz, Gosch & Cremer, L.L.C.  
29 305 Sixth Avenue Southeast  
30 Aberdeen, South Dakota

31

32 Reporter: Tammy Stolle, RPR

EXHIBIT

JMApp072

## A P P E A R A N C E S

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of

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COUNSEL FOR INTERVENOR JAMIE MOECKLY

Also present: Lance Vilhauer

Tom Moeckly

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1 WHEREUPON,  
 2 the following proceedings were had, to wit:  
 3 JAMIE MOECKLY, after being first duly sworn,  
 4 testified on her oath as follows:  
 5 EXAMINATION  
 6 BY MR. RASMUSSEN:  
 7 Q. State your name, please.  
 8 A. **Jamie Moeckly.**  
 9 Q. Have you ever given a deposition before?  
 10 A. **Yes.**  
 11 Q. What was that for?  
 12 A. **That was pertaining to this same thing.**  
 13 Q. Okay.  
 14 A. **To the trust.**  
 15 Q. Okay. When was that?  
 16 A. **I don't recall what month that was in.**  
 17 Q. Within the last year?  
 18 A. **Well, in 2019.**  
 19 Q. Okay, yeah.  
 20 A. **Right.**  
 21 Q. Okay. Who took your deposition at that time?  
 22 A. **Gordon Nielsen.**  
 23 Q. Oh, okay. Okay. Well, so you've been through it  
 24 before. You kind of know how the process works then?  
 25 A. **Yep.**

1 Q. But just make sure we don't talk at the same  
 2 time, and if you need a break, please say so. If you don't  
 3 understand any of my questions, just let me know and I'll try  
 4 to restate them for you, okay?  
 5 A. **Okay.**  
 6 Q. All right. Where do you live?  
 7 A. **In Britton, South Dakota.**  
 8 Q. Right in town?  
 9 A. **Yes.**  
 10 Q. You're married, correct?  
 11 A. **Correct.**  
 12 Q. What's your maiden name?  
 13 A. **Beck.**  
 14 Q. What's your date of birth?  
 15 A. **January 8th of '71.**  
 16 Q. Okay. And grow up in Britton then?  
 17 A. **Nope, I grew up on the family farm by Hecla.**  
 18 Q. Oh, that's right, okay. Where did you go to --  
 19 did you go to high school?  
 20 A. **Right, I went to high school in Britton.**  
 21 Q. And did you graduate?  
 22 A. **Yes.**  
 23 Q. What year was that?  
 24 A. **1989.**  
 25 Q. Any education after that?

1 A. **I went to Moorhead State University for about a**  
 2 **year.**  
 3 Q. What were you studying there?  
 4 A. **Social work.**  
 5 Q. You were just there for a year?  
 6 A. **Right.**  
 7 Q. What did you do after that?  
 8 A. **I got married to Tom down here.**  
 9 Q. Did you go to Moorhead right after high school?  
 10 A. **Yes.**  
 11 Q. And why did you quit your education there?  
 12 A. **Mostly because I wanted to marry Tom, I guess.**  
 13 Q. Okay. All right. Good enough reason for me.  
 14 What have you -- have you been employed then since you  
 15 graduated high school?  
 16 A. **Yes.**  
 17 Q. And what sort of things have you done?  
 18 A. **I worked at Marshall County Health Care and**  
 19 **Marshall County Medical Clinic for about 20, 21 years and --**  
 20 Q. What did you do there?  
 21 A. **I was a receptionist.**  
 22 Q. Okay. All right, so that would take you up to  
 23 what, 2010, thereabouts?  
 24 A. **A little bit past that. I think I quit working**  
 25 **there about 2013.**

1 Q. Oh, okay.  
 2 A. **Actually.**  
 3 Q. All right. What did you do after that?  
 4 A. **I was at home for a little while after that and**  
 5 **then I started working for Community Transit.**  
 6 Q. Okay.  
 7 A. **Well, in between there I helped a friend take**  
 8 **care of her elderly mother in her home until she passed.**  
 9 Q. Okay. What is Community Transit?  
 10 A. **We just take anybody, I want to say the elderly,**  
 11 **but anybody can ride the transit. We take people to dialysis**  
 12 **to Aberdeen. We take people to nutrition, up to the Fun**  
 13 **After 50 to play cards, all them kind of things. Deliver**  
 14 **kids to school.**  
 15 Q. Do you still work there?  
 16 A. **Yes.**  
 17 Q. So how long have you been there?  
 18 A. **Probably about two years.**  
 19 Q. You have, like you said, your husband Tom. Any  
 20 children?  
 21 A. **One.**  
 22 Q. How old is your child?  
 23 A. **He's going to be 25 here real quick.**  
 24 Q. Where does he live?  
 25 A. **He lives in Minneapolis.**

1 Q. What's his name?  
 2 A. Alec.  
 3 Q. All right. You have two siblings?  
 4 A. Right.  
 5 Q. Matthew and Brian?  
 6 A. Right.  
 7 Q. What's the birth order?  
 8 A. Brian's oldest, and then me, and then Matthew.  
 9 Q. Okay. What was your involvement -- well, how  
 10 long did you live on the family farm then growing up?  
 11 A. I only lived there until I graduated high school  
 12 and then I went to school and I would come home on weekends  
 13 until I quit school and then I married Tom and lived with him  
 14 obviously.  
 15 Q. Yeah, okay. During the time you lived there,  
 16 were you involved with the farming operation doing chores,  
 17 that sort of thing?  
 18 A. I was not. Well, I got to wash all the tractor  
 19 windows. Is that chores?  
 20 Q. I guess it probably is, yeah. But you weren't  
 21 out feeding cattle or plowing the fields or anything like  
 22 that?  
 23 A. No. When I was younger, I would ride along, you  
 24 know, in the combine or in the grain truck, that type of  
 25 thing. I didn't actually do the work.

1 Q. Were you ever involved in the finances, the  
 2 business side of the farming operation?  
 3 A. I was not.  
 4 Q. Okay. Were you aware of your parents' decision  
 5 to enter into a trust in 1999?  
 6 A. I was not.  
 7 Q. Did you even know about it?  
 8 A. I did not.  
 9 Q. When did you first become aware of the existence  
 10 of that trust?  
 11 A. Not until 2015.  
 12 Q. Okay. And how did you become aware of it at that  
 13 point in time?  
 14 A. Well, my mom come to town in October of 2015 and  
 15 asked me to go to Danny's office and sign some papers because  
 16 they had decided they wanted to sell their land to Matthew.  
 17 Q. Okay.  
 18 A. And so then I made a phone call to Danny's office  
 19 to find out what was going on.  
 20 Q. Who did you talk to there?  
 21 A. I talked to Danny on the phone. I talked to the  
 22 receptionist first.  
 23 Q. Okay.  
 24 A. And then I visited with Danny.  
 25 Q. What did Danny tell you?

1 A. He didn't tell me a lot on the phone  
 2 conversation. He just said that the folks had decided -- he  
 3 told me that there was a trust and the folks had decided that  
 4 they wanted to dissolve that and sell the land to Matthew,  
 5 and so then at that time I scheduled an appointment with  
 6 Danny.  
 7 Q. All right. And you said that was in 2015, right?  
 8 A. Right.  
 9 Q. Okay. So then you met with Danny, is that right?  
 10 A. Yes, in his office in Webster, yeah.  
 11 Q. What did he tell you during that meeting?  
 12 A. He just -- he explained to us, I guess, that  
 13 Matthew had some -- had about \$500,000 worth of debt and that  
 14 he wanted to get a loan with the bank and we just -- we  
 15 talked about the consent to sale first and we decided that  
 16 probably wasn't a good option, and so then Danny brought up  
 17 this consent to mortgage.  
 18 Q. Okay.  
 19 A. And he, I don't know, just kind of went over --  
 20 went over the details a little bit of what that would  
 21 involve.  
 22 Q. Okay. So Danny was -- well, who was Danny  
 23 representing at that point in time?  
 24 A. I suppose he was -- I don't know.  
 25 Q. Okay. He wasn't representing you though?

1 A. He was representing my folks, and he was advising  
 2 us when we went there.  
 3 Q. Well, did you consider Danny to be your attorney  
 4 when you met with him?  
 5 A. I guess I probably did consider Danny to be my  
 6 attorney because he was advising me.  
 7 Q. Did you ever pay him anything for his services?  
 8 A. I did not.  
 9 Q. Did Danny ever tell you that he was acting in the  
 10 capacity as your attorney?  
 11 A. No.  
 12 Q. And I take it you never specifically asked him  
 13 that question?  
 14 A. No.  
 15 Q. You just -- because he was giving you some  
 16 advice, you assumed he was acting as your attorney, would  
 17 that be a fair statement?  
 18 A. Yes.  
 19 Q. Okay. I want to jump ahead a little bit. We're  
 20 going to come back to the consent here in a little bit, but  
 21 -- well, back at the time you met with Danny, were you aware  
 22 of what bank that Matthew was looking to borrow money from?  
 23 A. Not before we met with Danny.  
 24 Q. Okay. But when you met with Danny, you found  
 25 that out?

1 Q. Okay. And then in November of 2018, Dacotah Bank  
2 was named as the successor trustee. Do you recall that?

3 A. Yes.

4 Q. Okay. And did you understand then that you were  
5 no longer the trustee, that the Dacotah Bank was at that  
6 point in time?

7 A. Yes.

8 MR. WURGLER: I will object to that. I would  
9 disagree with that.

10 MR. RASMUSSEN: Could you explain the  
11 disagreement or --

12 MR. WURGLER: Yeah, I believe the order  
13 specifically said that Jamie would remain in her capacity as  
14 protecting the interest of the trust in the foreclosure. If  
15 I'm not mistaken, that's my understanding of the situation.

16 A. **I actually agree with that, sorry.**

17 Q. (BY MR. RASMUSSEN) Okay. Well, we can check  
18 that later.

19 So even after the -- just so I -- even after  
20 Dacotah Bank was appointed, did you still consider yourself  
21 as the acting trustee then?

22 A. **That's what I understood how it would be until  
23 all this was settled at some point.**

24 Q. Okay. Well, let's move -- looking at this  
25 document again, go to page 2, paragraph 2. That's referring

1 to the 1999 trust, which again you didn't know anything about  
2 that until 2015, right?

3 A. **Correct.**

4 Q. Okay.

5 (Exhibit No. 13 was marked.)

6 Q. (BY MR. RASMUSSEN) Exhibit 13 is a copy of that  
7 1999 trust agreement which you attached to your motion as  
8 Exhibit 6. That's why we left the exhibit sticker there  
9 also, that was from your motion. So when did you first -- I  
10 think, yeah, you said you first learned about the trust in  
11 2015. Do you remember when you first saw the trust agreement  
12 itself?

13 A. **I didn't see the actual trust agreement until Ken  
14 and Josh received it in their office.**

15 Q. Okay.

16 A. **I don't know the specific day or anything.**

17 Q. Sometime then after January of 2018?

18 A. **Correct.**

19 Q. Okay. In the trust document, there's a whereas  
20 clause, do you see that, right at kind of the top of the  
21 page?

22 A. **Oh, okay.**

23 Q. It says that the grantors desire to establish a  
24 trust known as B&B Farms Trust covering the assets described  
25 in Exhibit A, attached hereto. There's no Exhibit A attached

1 to this copy. Have you ever seen an Exhibit A listing the  
2 assets that were to go into the trust?

3 A. **I'm assuming I saw Exhibit A. Without seeing it  
4 to review it, I probably couldn't say yes or no specifically.**

5 Q. Okay. But do you think you have a copy of, you  
6 or your attorneys have a copy of Exhibit A?

7 A. **I'm assuming they have a copy of Exhibit A.**

8 MR. RASMUSSEN: If you do, Josh, I'd like a copy  
9 of it.

10 MR. WURGLER: Sure.

11 Q. (BY MR. RASMUSSEN) Do you know what assets were  
12 put into the trust?

13 A. **My folks's land.**

14 Q. Anything else?

15 A. **Not that I know of.**

16 Q. Look then at -- going back then to the motion, on  
17 the second page still, the bottom of the page, paragraph 5,  
18 it says, "Gary and Betty Beck are husband and wife and both  
19 are still living." Obviously Gary is no longer living. When  
20 did he die?

21 A. **He passed away in September.**

22 Q. Of 2019?

23 A. **(Witness nodded head.)**

24 Q. You have to answer out loud. Is that a yes?

25 A. **I'm sorry.**

1 Q. That's fine. Take what time -- whatever time you  
2 need.

3 A. **That was yes.**

4 Q. Okay. Thank you. Betty is still living?

5 A. **Yes.**

6 Q. Where is she at, where does she live?

7 A. **She still lives on the farm.**

8 Q. How is she doing health wise?

9 A. **I don't know.**

10 Q. And why is that?

11 A. **She doesn't talk to me.**

12 Q. And how long has that situation existed?

13 A. **Well, pretty much since October of 2015 was the  
14 last time that we -- I don't know.**

15 Q. What happened in --

16 A. **We had --**

17 Q. I'm sorry.

18 A. **We had some relation -- you know, visited a few  
19 times at the Manor and that type of thing when my dad was  
20 still living. Other than that, we haven't had much  
21 relationship.**

22 Q. What happened in October of 2015?

23 A. **That was when she came to town and told me I  
24 needed to sign some papers for -- about the farm.**

25 Q. What papers did she want you to sign at that



1 point?

2 A. She didn't specify when she was at my house. She  
3 just told me there was papers to sign at Danny's office, and  
4 then when I made a phone call to Danny's office, that's when  
5 I discovered that the trust was in existence.

6 Q. Okay. And did you -- when you found out about  
7 that, did you talk to your mother about it?

8 A. I tried to, but my mom really didn't want to  
9 listen to reason or -- she just got upset and cried all the  
10 time, and she told me when she came to my house and asked me  
11 to sign the papers, she said she needed me -- I'm sorry. I'm  
12 sorry, I didn't know I was going to --

13 Q. You didn't know I was going to be so mean, huh?

14 A. You are a mean guy.

15 She told me that she needed me in her life and so  
16 I had to sign those papers. So pretty much she was saying if  
17 I didn't -- if I didn't sign that she couldn't be a part of  
18 my life anymore.

19 Q. And again, the papers that she wanted you to  
20 sign, that would have been something different than the  
21 consent to mortgage that you eventually did sign, is that  
22 right?

23 A. Right, it was a consent to sale.

24 Q. Okay. You talked to me about that before, the  
25 consent to allow the trust to sell the property to Matthew?

1 A. Right.

2 Q. And you didn't want that to happen?

3 A. No.

4 Q. Why was that?

5 A. We didn't think that Matthew was in a good  
6 financial place to be able, for one, to buy the land, or to  
7 be able to be financially stable to hang onto it and --

8 Q. And when you say "we didn't think," who's the  
9 "we" we're talking about?

10 A. I guess Tom and my son and myself, and Danny too  
11 when we talked to him at his office, he didn't really think  
12 that was --

13 Q. Did Danny tell you he didn't think it was a good  
14 idea for Matthew to buy all the land?

15 A. I don't know, I don't -- I wouldn't specifically  
16 say that Danny said, "No, that's not a good idea."

17 Q. Okay.

18 A. I don't think he believed it to be a good idea.

19 Q. Okay. What makes you think that Danny didn't  
20 believe it would be a good idea?

21 A. I think he just -- I think he knew Matthew's  
22 history with this lender in Watertown and he talked about  
23 that and --

24 Q. Okay. So is it fair to say that your refusal to  
25 sign the documents allowing for the sale is what caused your

1 relationship with your mother to deteriorate?

2 A. Right.

3 Q. How had your relationship been with her prior to  
4 that time?

5 A. We had had some disagreement in, oh, the end of  
6 2012, 2013, but then when my son graduated from high school,  
7 we had kind of worked things out.

8 Q. What was the disagreement in 2012 or '13 about?

9 A. Oh, a couple of things. My mom had been into the  
10 -- I was still working at the clinic at that time and she had  
11 been into the doctor and she presented with a Medicaid card  
12 and so that was -- we had a disagreement about that because I  
13 had -- I called out to her house and asked why she was  
14 qualifying for Medicaid because I didn't think that she  
15 should be qualifying for state aid. And then I guess I had  
16 also asked if my son Alec could work out to the farm the  
17 summer of his junior year it would have been, and I was told  
18 no, but then my little brother hired a hired hand after that,  
19 so I guess that's -- I didn't understand.

20 Q. Was your father still living at home when he  
21 passed away?

22 A. No, he was in the nursing home.

23 Q. In Britton?

24 A. Yes.

25 Q. Okay. How long had he been there?

1 A. About two years or a little more.

2 Q. Okay. Is that Wheatcrest?

3 A. Wheatcrest Hills, yes.

4 Q. Yeah, okay. So was he also asking you to sign  
5 the document or documents in 2015?

6 A. He didn't come to town with my mom, but my dad  
7 did come to my house and I don't recall if it was in -- I  
8 don't know if it was in October. It may have been in  
9 November, the first part of November maybe. I don't know, he  
10 came in shortly after my mom was there and he was very upset  
11 with me that I wouldn't sign the papers.

12 Q. Did your relationship with him then deteriorate  
13 like it did with your mother?

14 A. Right, he -- he told me I was probably going to  
15 go to hell if I didn't do as he asked.

16 Q. How had your relationship been with your father  
17 prior to that time?

18 A. Not good.

19 Q. Why is that?

20 A. I don't know really. I guess because -- I guess  
21 part of it was because when I had asked if Alec could work  
22 out there before he went to college and I thought my dad  
23 would have maybe encouraged Matthew to let him be out there  
24 and I don't know why.

25 Q. After you left home, did you have much contact

1 with your parents?

2 A. Yes, we were at my folks just about every week or  
3 every weekend.

4 Q. And I assume that ended when this paper -- or  
5 this issue arose in 2015?

6 A. Yes.

7 Q. What about your two brothers, what sort of  
8 relationship did you have with them over the years?

9 A. We got along fine. We never really had any  
10 disagreements about anything until all this stuff come about.

11 Q. Okay. So disagreements then would have started  
12 in 2015 then?

13 A. Right.

14 Q. Okay. Before that, did you guys get together on  
15 a regular basis or have family reunions or anything like  
16 that?

17 A. We got together for holidays. Sometimes my mom  
18 would fix supper a lot of the time when we were out there and  
19 it was never a she called up this kid or that kid and invited  
20 them out, we probably would just be there and would have  
21 meals together and birthdays together and just all your  
22 typical family things.

23 Q. Where does your brother Brian live?

24 A. He lives in Britton.

25 Q. What does he do?

1 A. He works for Full Circle Ag. Is that what it's  
2 called now? Full Circle Ag? I don't know, they've changed  
3 their names a few times.

4 Q. Do you know if he was aware of this trust prior  
5 to 2015?

6 A. I do not know. They asked him in his deposition,  
7 but I don't remember what he said.

8 Q. Okay. What was his position about with regard to  
9 selling the land to Matthew?

10 A. I don't know if he was okay with -- I think he  
11 was okay with it.

12 Q. Do you have any relationship with him anymore?

13 A. No.

14 Q. And is that because of all this stuff that  
15 happened in -- with regard to the trust and the sale, etc.?

16 A. Yes.

17 Q. Okay. And I assume you don't have a relationship  
18 with Matthew either?

19 A. Nope.

20 Q. On page 3 then of the document, the motion,  
21 paragraph 7, states that you and your brothers were the  
22 secondary beneficiaries of the trust. You're aware of that  
23 obviously?

24 A. Right.

25 Q. And you're aware that your parents were the

1 primary beneficiaries?

2 A. Correct.

3 Q. Okay. Paragraph 8 then says upon the death of  
4 your parents, the trust assets are to be distributed equally  
5 to you and your brothers?

6 A. Correct.

7 Q. Is that correct, because as I read the trust,  
8 page 5 under Article VII, Matthew had an option to purchase?

9 A. Page 5 you said?

10 Q. Yeah, Article Roman Numeral VII.

11 A. (Witness reviewing exhibit.)

12 Q. Were you aware of that?

13 A. Yes.

14 Q. Okay. So he was being treated differently than  
15 you and Brian because he was given this option to purchase,  
16 correct?

17 A. Correct.

18 Q. Do you know why he was given an option to  
19 purchase?

20 A. I don't.

21 Q. Okay. What was the history of the operation of  
22 the farm? I mean, who was doing all the work out there after  
23 -- well, through the years?

24 A. Specifically as to what, what date, what time?

25 Q. Well, I assume as you were growing up as a child,

1 your father took care of things?

2 A. Correct.

3 Q. Okay. And how much younger is Matthew than you?

4 A. Matthew was born in '79, so he's a good nine  
5 years.

6 Q. Okay. So when you --

7 A. Younger.

8 Q. Did I cut you off?

9 A. Nothing. I said nine years younger.

10 Q. Okay. So I assume when you went off to college,  
11 he was still just a kid at home, and I would imagine as a  
12 farm kid, he and Brian would both help with farming chores,  
13 would that be a safe assumption?

14 A. Correct. Brian left the farm at some point. I  
15 don't know the specific date on that.

16 Q. At some point in time though, did it evolve where  
17 Matthew was doing -- basically running the farm, or maybe in  
18 conjunction with your father running the farm?

19 A. I would say not until he graduated from college  
20 and came home to farm.

21 Q. All right. Where did he go to college?

22 A. He went to NDSU.

23 Q. And he got a degree there?

24 A. Correct.

25 Q. In what?

- 1 A. I think in plant sciences. I'm not sure.
- 2 Q. Okay. What about Brian, did he go onto college?
- 3 A. He went to Wahpeton for a while.
- 4 Q. Okay. But after -- okay, then after college,
- 5 Matthew came back and was working on the farm then with your
- 6 father?
- 7 A. Correct.
- 8 Q. What about Brian, did he ever do that?
- 9 A. Brian was home and farmed with my dad for a
- 10 while. It didn't work out, so Brian moved to town and...
- 11 Q. Got other work?
- 12 A. Got other work, right.
- 13 Q. Why didn't it work out with Brian?
- 14 A. That's a long, long story.
- 15 Q. Okay. Well, I don't need a real long story.
- 16 Just -- was it just a matter of they couldn't get along or --
- 17 A. My -- yeah, correct. Brian and dad just -- they
- 18 butted heads and it just didn't work.
- 19 Q. Okay. When Brian was still there, was Matthew
- 20 farming with them, or did he come later?
- 21 A. I would say Matthew came later.
- 22 Q. All right.
- 23 A. I'm not sure on the time frame though.
- 24 Q. Okay. So then do you know how the -- as time
- 25 went on, how they divided up the chores and who did what and

- 1 who took care of the finances and all that kind of stuff?
- 2 A. I don't. I think Matthew and my dad shared. You
- 3 know, I think they both did equally as much work as one did
- 4 the other, and my mom also helped on occasion. At the point
- 5 when Matthew come home, it was getting to the point where she
- 6 really didn't want to go out and help herd cows and all that
- 7 stuff anymore.
- 8 Q. Sure. In a farming operation, there's the
- 9 physical labor part of it and then there's the business side
- 10 of it, you know, deciding what you're going to plant and you
- 11 know, when you're going to sell livestock, etc. Do you know
- 12 how that -- the business side was handled?
- 13 A. I don't know. I can't say that I know for sure
- 14 how that was handled. I guess I didn't involve myself in all
- 15 that.
- 16 Q. Okay.
- 17 A. But I would venture to say my dad made those
- 18 decisions.
- 19 Q. All right. Looking again then at the motion,
- 20 page -- still on page 3.
- 21 A. Okay.
- 22 Q. Paragraph 10 references paragraph 6.1 of the
- 23 trust, and that paragraph that is quoted in there, the last
- 24 sentence says, "The grantors desire to have the real estate
- 25 retained as an asset of the trust during the life of Gary."

- 1 Do you know why it was limited just to the life of Gary?
- 2 A. I do not.
- 3 Q. Okay. And similarly, the paragraph 6.2 which is
- 4 referenced in paragraph 11 of your motion, the trustee is not
- 5 authorized to sell, option or dispose of any interest during
- 6 the lifetime of Gary. Again, I'm assuming you don't know why
- 7 that was limited to Gary's lifetime?
- 8 A. I do not.
- 9 Q. Okay. Exhibit 3 from a prior deposition is a
- 10 consent form that was signed by your parents on November 16
- 11 of 2015 and that was a consent to mortgage the real estate,
- 12 correct?
- 13 A. Correct.
- 14 Q. And then you signed a similar form on
- 15 November 12, 2015 which is Exhibit 2, is that right?
- 16 A. Correct.
- 17 Q. Okay. And that's the -- I mean, you started
- 18 talking about that a little earlier when you -- that's the
- 19 form that you eventually signed that was prepared by Danny
- 20 Smeins?
- 21 A. Correct.
- 22 Q. Okay. What were you told about that form, what
- 23 was the purpose of it?
- 24 A. Danny discussed it with us and the purpose was
- 25 for Matthew to take a note with Plains Commerce and for him

- 1 to be able to use part of the trust as collateral.
- 2 Q. Okay. When you say Danny talked with us, was
- 3 that -- who's the "us" again?
- 4 A. I'm sorry, Tom and Alec.
- 5 Q. Okay, that's fine. I just need to know.
- 6 Why did you -- and this was after you refused to
- 7 sign the consent to -- some sort of consent to sell form,
- 8 correct?
- 9 A. Correct.
- 10 Q. Okay. You don't have a copy of that form, do
- 11 you?
- 12 A. I do not.
- 13 Q. Was that something that Danny also prepared
- 14 though?
- 15 A. Right.
- 16 Q. Okay. Why did you agree to sign this particular
- 17 form?
- 18 A. I keep saying we, but because Tom and Alec and I
- 19 discussed it as a family, but I decided, I guess, to sign the
- 20 form so that Matthew could take his note with Plains
- 21 Commerce, and I felt that this was the best way to protect
- 22 the trust and protect my parents' interest and to hopefully
- 23 patch things up with my parents.
- 24 Q. Okay. Why did you think it was -- would protect
- 25 the trust and protect your parents by signing this form?

1 A. It seemed my parents weren't receiving any income  
2 at the time and I thought that if Matthew was able to get  
3 back on his feet, then we'll get things straightened out. I  
4 guess I didn't know what kind of agreement my folks had with  
5 Matthew previous to all this.

6 Q. What did you think was going to happen if you  
7 refused to sign this form?

8 A. I don't know. I knew that my parents probably  
9 weren't going to talk to me anymore.

10 Q. Did your signing of this form help your  
11 relationship with your parents?

12 A. I thought it would, but it didn't.

13 Q. Okay. Do you know why not?

14 A. I don't.

15 Q. Did you talk to anyone else about signing this  
16 form or the contents of this form prior to the time you  
17 signed it, other than to your family members, your husband  
18 and your son?

19 A. No.

20 Q. You didn't talk to your parents or to Matthew or  
21 Brian about it?

22 A. I did call Brian on the phone and asked him about  
23 it, and it was a short two-minute conversation. He was  
24 already mad at me at the time and wasn't really speaking to  
25 me, so he just told me that he had already signed the consent

1 to mortgage and that was the end of the conversation, so...

2 Q. And he was again mad at you because you hadn't,  
3 what, signed the earlier form?

4 A. I'm sorry, say that again.

5 Q. He was mad at you because you hadn't signed the  
6 earlier form?

7 A. I assume -- I assume so.

8 Q. Okay. Do you know of any other reason why he  
9 would have been mad at you?

10 A. No.

11 Q. And so you're aware then that both Matthew and  
12 Brian also signed this same consent form?

13 A. Correct.

14 Q. Okay. You never discussed the consent form with  
15 anybody associated with Plains Commerce Bank, did you?

16 A. No.

17 Q. After the legal descriptions on the first page of  
18 the consent form, it says, "I'm aware and understand that the  
19 trustee has authority or discretion to mortgage or encumber  
20 the trust property." Was it your understanding that Matthew  
21 as the trustee could mortgage and encumber the trust property  
22 even if you didn't sign this form?

23 A. Was it my understanding that he could do that  
24 even if I didn't sign this?

25 Q. Right.

1 A. No.

2 Q. Okay. Do you know what that language, where it  
3 says, "I am aware and understand that the trustee had  
4 authority or discretion to mortgage or encumber the trust  
5 property," did you have an understanding as to what that  
6 meant?

7 A. I assumed that meant that if he got the agreement  
8 from everyone that he was able to use part of the trust as  
9 collateral to take out a loan.

10 Q. Okay. And is it your understanding that the  
11 trust agreement required him to obtain the consent of you and  
12 Brian before he could mortgage trust land?

13 A. Correct, and my parents also.

14 Q. Okay. So it's your understanding that the  
15 consent of all four of you was required then?

16 A. Correct.

17 Q. All right. Then a little while -- a little  
18 further down on this first page, it says, "This consent is  
19 limited to the current proposed mortgage and any future  
20 mortgages not to exceed \$800,000." Was that part of the  
21 document discussed with you by anyone?

22 A. With Danny you mean?

23 Q. Danny, or I guess anyone else prior to you  
24 signing this document.

25 A. I'm not sure I understand that question.

1 Q. Did -- well, let me just ask. Did Danny discuss  
2 with you that portion of the document where it says the  
3 consent was limited to the \$800,000?

4 A. Okay. Yes, correct.

5 Q. Okay. What did he tell you about that? I mean,  
6 what I -- I mean, obviously it's in here, but sometimes you  
7 have documents that -- when I bought a house, I signed all  
8 kinds of documents, but I didn't ask anybody about what  
9 certain phrases necessarily meant. Did you have specific  
10 discussions about that sentence?

11 A. I don't know if we had a specific conversation  
12 about -- I don't know, I suppose we did.

13 Q. Well, what was your understanding of that  
14 particular sentence that talks about the \$800,000?

15 A. To my understanding, that just meant that Matthew  
16 could take a loan up to \$800,000 and use \$800,000 value of  
17 the trust to do that with, not any more than that.

18 Q. Okay. With any loan, there's interest and  
19 various -- and various other charges, penalties, etc. Did  
20 you think about how that would play into it?

21 A. No.

22 Q. Did Danny talk to you about that part of the  
23 consent form? Did he give you any advice or explain it to  
24 you, other than what you've already relayed to me?

25 A. I would say not anything more than what I've

1 already said.

2 Q. Okay. We're back now to the motion. It's on  
3 page 3 of the motion there. Paragraph 12, which -- did you  
4 find the right document there? There you go.

5 Paragraph 12 begins at the bottom of page 3 and  
6 then continues onto page 4, and it's a reference to article  
7 Roman Numeral VIII of the trust. Did you have any -- well,  
8 there's portions of that paragraph then that are underlined.  
9 Did you have anything to do with underlining those portions  
10 of the Article VIII of the trust?

11 A. (Witness reviewing exhibit.) I'm not sure what  
12 you're asking me exactly.

13 Q. This was your motion and there's portions of that  
14 -- this is a portion of the trust. In the trust itself  
15 there's nothing underlined. It's just --

16 A. Right.

17 Q. And there are portions here underlined. Do you  
18 know why portions are underlined? Did you have anything to  
19 do with that?

20 A. Well, we discussed that in Ken and Josh's office,  
21 but they --

22 Q. Okay. I don't want you to tell me what they  
23 said.

24 A. Sorry.

25 Q. You personally --

1 A. No, I did not personally sit and --

2 Q. All right. That's fine.

3 A. Is that what you want to know?

4 Q. Yes, that's what I wanted to know.

5 A. Okay.

6 Q. Is it your position in this lawsuit that Matthew  
7 somehow violated this provision of the trust?

8 A. Yes.

9 Q. And how so?

10 A. He wasn't supposed to be able to use the trust  
11 for his own personal benefit.

12 Q. And how did he use it for his own personal  
13 benefit?

14 A. He wasn't supposed to be able to use the trust as  
15 collateral to take out a loan.

16 Q. Okay. But he was able -- he was allowed to use  
17 property owned by the trust as collateral, isn't he, under  
18 the consent that you signed?

19 A. Not according to the trust document he wasn't.

20 Q. Okay. So just so I understand, even though these  
21 consents were obtained, you still think it was a violation of  
22 the trust for Matthew to have mortgaged the trust land?

23 A. Yes.

24 Q. And is that -- the violation of the trust, is  
25 that a violation of this Article VIII that's quoted in the

1 motion?

2 A. Yes.

3 Q. Okay. Paragraphs 13 through 15 of the motion  
4 allege that -- well, talk about some mortgages that were  
5 signed in August and September of 2010 and those were  
6 attached as Exhibits 1 and 2 to your motion, correct?

7 A. I'm sorry?

8 Q. Those mortgages of August and September of 2010  
9 were attached to your motion as Exhibit 1 and 2, right?

10 A. Right.

11 Q. Okay. I'm going to mark those as exhibits.  
12 (Exhibits No. 14 and 15 were marked.)

13 Q. (BY MR. RASMUSSEN) I'm handing you what we've  
14 marked here as Exhibits 14 and 15 which are the documents  
15 that were attached to your motion as Exhibits 1 and 2,  
16 correct?

17 A. Okay.

18 Q. I think your -- the motion states that you had no  
19 prior knowledge of these mortgages, is that correct?

20 A. That's correct.

21 Q. When did you become aware of these mortgages?

22 A. Not until after we had retained Ken and Josh for  
23 attorneys.

24 Q. Okay. You were -- or are you aware that both of  
25 these mortgages were satisfied by the loans from Plains

1 Commerce Bank?

2 A. Correct.

3 Q. You know, have you subsequently learned anything  
4 about why these loans were obtained from Legendary Loan Link  
5 back in 2010?

6 A. Why Matthew obtained these loans?

7 Q. Right.

8 A. At that time?

9 Q. Yeah.

10 A. I believe that he -- I believe that him and  
11 Kelley had a loan with Cofina that they were being -- I don't  
12 know, needed to get taken care of.

13 Q. So there was a prior loan that they had to pay  
14 off and so they got the loans from Legendary Loan Link?

15 A. That was my understanding.

16 Q. Okay. What do you know about the history of your  
17 parents as far as did they have any loans against the  
18 property?

19 A. I didn't know any of my parents, any specifics of  
20 their financial history.

21 Q. Okay.

22 A. I guess until all this come to light.

23 Q. Well, have you learned something in that regard  
24 since this lawsuit?

25 A. My parents apparently had some sort of loan that

- 1 was due when Matthew come home to farm.  
 2 Q. Do you know who that was with?  
 3 A. I don't know for sure. I'd have to go back and  
 4 look through things. I think possibly Wells Fargo, but I'm  
 5 not sure.  
 6 Q. Okay. Do you know what that loan, how much that  
 7 was or what it was for?  
 8 A. I don't recall without being able to look at some  
 9 papers.  
 10 Q. Okay. But you do have some paperwork about that?  
 11 A. I believe Ken and Josh probably have.  
 12 Q. Okay. I guess if you do, I'd like to request  
 13 that.  
 14 A. I'm not sure.  
 15 Q. Okay. But that loan was in existence when  
 16 Matthew returned to the farm?  
 17 A. It was, or wasn't?  
 18 Q. Was it, is that your understanding? It was?  
 19 A. I understood it was.  
 20 Q. Okay. How did that loan get paid off, if you  
 21 know?  
 22 A. To our understanding, my folks sold some land to  
 23 Matthew and they used that money to pay off their debt.  
 24 Q. Okay. And then you mentioned, is it Cofina, is  
 25 that what you said?

- 1 A. I think so.  
 2 Q. Okay.  
 3 MR. WUGLER: It's Cofina, C-O-F-I-N-A.  
 4 A. Oh, sorry.  
 5 Q. (BY MR. RASMUSSEN) When was that -- who took  
 6 that loan out?  
 7 A. I don't know without --  
 8 Q. You don't know if it was your parents or Matthew  
 9 or a combination?  
 10 A. Oh, well, it was Matthew.  
 11 Q. Okay. And what was that loan for?  
 12 A. I don't know.  
 13 Q. Okay. But that loan then was paid off by the  
 14 money from Legendary Loan Link?  
 15 A. I think so.  
 16 Q. And then the Legendary Loan Link was paid off  
 17 from the money from Plains Commerce?  
 18 A. I believe so.  
 19 Q. Are you aware of any other loans that either your  
 20 parents or Matthew had in connection with the farming  
 21 operation?  
 22 A. I don't think so.  
 23 Q. Okay. Did Matthew pay any debts of your parents  
 24 that you're aware of?  
 25 A. No, not that I'm aware of.

- 1 Q. Okay. And I guess, I think you told me before,  
 2 you really don't know what the financial arrangements were,  
 3 is that a fair statement?  
 4 A. That's a fair statement.  
 5 Q. Okay. Look at paragraph 17 of the motion and it  
 6 says that you signed the consent to mortgage with the  
 7 understanding that by doing so, Matthew would pay the debt  
 8 owed to Plains Commerce Bank from his personal funds and have  
 9 the mortgage released or in the alternative, any debt of  
 10 Matthew would be paid from his share of the trust. Where did  
 11 you get that understanding?  
 12 A. I understood that from the consent to mortgage  
 13 that I signed.  
 14 Q. I don't -- I don't see where the consent to  
 15 mortgage says that.  
 16 A. Okay.  
 17 Q. Like I said, this says that Matthew would pay the  
 18 debt owed to Plains Commerce Bank from his personal funds and  
 19 have the mortgage released, or in the alternative, any debt  
 20 of his would be paid from his share of the trust. I don't --  
 21 I don't see that in this consent form. Do you?  
 22 A. (Witness reviewing exhibit.) I guess I assumed  
 23 when this document said that it was borrowing the money to  
 24 Matthew that it would be his responsibility to make sure --  
 25 Q. Okay. But when you say in this document that you

- 1 signed it with the understanding, that was just the  
 2 understanding that you came up with yourself?  
 3 A. That was the understanding that I got from Danny,  
 4 I guess.  
 5 Q. Okay. Well, that's what I'm asking you. If  
 6 that's where the understanding came from, and Danny told you  
 7 that Matthew was going to pay the debt from his personal  
 8 funds and have the mortgage released, or alternatively any  
 9 debt would be paid from his share of the trust, Danny  
 10 specifically told you that?  
 11 A. Danny said that just Matthew's third of the trust  
 12 would be -- his portion of the trust would be affected.  
 13 Q. Okay. Did Danny tell you that Matthew was going  
 14 to pay the debt from his personal funds and have the mortgage  
 15 released?  
 16 A. I don't know that Danny specifically said those  
 17 words.  
 18 Q. Okay. And you never talked to Matthew about this  
 19 understanding of yours?  
 20 A. No.  
 21 Q. Matthew did pay some of the debt from personal  
 22 funds, didn't he?  
 23 A. I don't know without reviewing.  
 24 Q. Okay. Well, he had equipment that was taken and  
 25 sold, that was his equipment, wasn't it?

- 1 A. You mean just recently now?
- 2 Q. Yeah.
- 3 A. Oh, okay. Yes, he did have some farm machinery
- 4 that was sold.
- 5 Q. Okay. At a hearing in August of 2018, Matthew
- 6 testified or he agreed that any debt paid by the trust would
- 7 come out of his share. Do you recall that testimony of his?
- 8 A. Yes.
- 9 Q. Is it still your understanding that money that
- 10 might go to Plains Commerce will come out of Matthew's share
- 11 of the trust?
- 12 A. No.
- 13 Q. Why not?
- 14 A. Because Matthew shouldn't have been able to use
- 15 the trust to finance anything in the first place from the
- 16 get-go.
- 17 (Exhibit No. 16 was marked.)
- 18 Q. (BY MR. RASMUSSEN) Exhibit 16 was attached to
- 19 your motion as Exhibit 4 and that's the mortgage that was
- 20 signed by Matthew as trustee of the B&B Farms Trust in favor
- 21 of Plains Commerce Bank. You've seen this document before,
- 22 is that right?
- 23 A. Correct.
- 24 Q. And this was limited to \$800,000, correct?
- 25 A. Correct.

- 1 Q. Okay. Looking at your motion again then,
- 2 paragraph 20 on page 5 says Plains Commerce Bank was aware of
- 3 the spendthrift provision of the trust at the time it loaned
- 4 the money to Matthew and Kelley in exchange for the mortgage.
- 5 How do you know what Plains Commerce Bank was aware of?
- 6 A. Well, they should have received a copy of the
- 7 trust and read through the trust and been able to see that
- 8 that was in there.
- 9 Q. Okay. So that would be the only basis for that
- 10 statement then, that they had a copy and they could read it?
- 11 A. Correct.
- 12 Q. You never talked to anybody at Plains Commerce
- 13 about that?
- 14 A. No.
- 15 Q. Have you ever talked to anybody at Plains
- 16 Commerce about this deal at all?
- 17 A. No.
- 18 Q. Paragraph 21 says in violation of the trust and
- 19 the consent to mortgage, the mortgage also provided that the
- 20 trust was required to pay interest and other fees, etc. How
- 21 was that in violation of the trust, or do you have an opinion
- 22 on that?
- 23 MR. WURGLER: I'll object on the grounds of legal
- 24 conclusion, but you can go ahead and answer if you can.
- 25 A. Okay, so now ask me the question again, I'm

- 1 sorry.
- 2 Q. (BY MR. RASMUSSEN) Paragraph 21 says that the --
- 3 the fact that the mortgage also provided that the trust was
- 4 required to pay interest and other fees and charges, that
- 5 that was in violation of the trust and the consent to
- 6 mortgage. Do you --
- 7 A. I don't believe it said anywhere in the consent
- 8 to mortgage that there would be any responsibility for those
- 9 extra or added on any fees of any sort.
- 10 Q. Okay.
- 11 A. And again, the trust shouldn't have been used.
- 12 Q. All right. Getting back to the fact even though
- 13 there was the consent, you don't believe the trust should
- 14 have been -- that the trust property should have been
- 15 mortgaged under any circumstances?
- 16 A. Correct.
- 17 Q. Okay. All right. But putting that issue aside,
- 18 even if it could be mortgaged, you think it was a violation
- 19 of the trust because it wasn't limited to 800,000, but
- 20 included interest and other fees, would that be a fair
- 21 statement?
- 22 A. That would be a fair statement.
- 23 Q. Okay. Have you ever taken out any loans
- 24 yourself, you and your husband?
- 25 A. Yes, for home, auto, that type of thing.

- 1 Q. Do you have a mortgage?
- 2 A. Yes.
- 3 Q. Okay. You understand that whatever that amount
- 4 of that mortgage is is that it's not limited to that dollar
- 5 amount, it includes interest, fees, etc.?
- 6 A. Right.
- 7 Q. And I may have asked you this question before,
- 8 and if I did, I apologize, but did Danny Smeins tell you that
- 9 when the consent said \$800,000 that that didn't include
- 10 interest, fees, etc.?
- 11 A. He didn't specify that it didn't include.
- 12 Q. So that wasn't a subject that you discussed with
- 13 him then?
- 14 A. Well, he just -- he just said it would be eight
- 15 hundred specifically, \$800,000.
- 16 Q. That the mortgage -- the proposed mortgage would
- 17 not exceed \$800,000?
- 18 A. Correct.
- 19 Q. Okay. And that was the extent of it?
- 20 A. Yes.
- 21 Q. What he said, okay. And there was nobody else
- 22 that told you that interest and fees would not be included,
- 23 right?
- 24 A. Right.
- 25 Q. Okay. Paragraph 23 of your motion refers to a

1 guaranty that was signed by Matthew on behalf of the trust,  
 2 right?  
 3 A. Correct.  
 4 (Exhibit No. 17 was marked.)  
 5 Q. (BY MR. RASMUSSEN) I've marked as Exhibit 17 a  
 6 copy of that guaranty. Are you aware of any effort on the  
 7 part of Plains Commerce Bank to attempt to enforce or collect  
 8 on this guaranty?  
 9 A. I know Matthew's had to sell some personal land  
 10 that he -- that he -- is that what you're asking me?  
 11 Q. No, I think Matthew signed a guaranty personally.  
 12 This guaranty though is signed by Matthew as trustee of the  
 13 trust. Are you aware of Plains Commerce having taken any  
 14 steps to enforce this guaranty against the trust?  
 15 A. Right, that's why we're here today.  
 16 Q. Okay. Well --  
 17 A. No?  
 18 Q. Well, that's fine. It may be a legal question.  
 19 Well, we'll just leave it at that.  
 20 Paragraph 10.3 of the trust document, it's on  
 21 page 6. Tough to keep everything straight.  
 22 It says, "No person dealing with any trustee  
 23 purporting to act hereunder need inquire into the authority  
 24 of such trustee to act, but any such person may rely upon the  
 25 statement of such trustee." Do you have any knowledge

1 whatsoever of what Matthew would have told the bank about his  
 2 authority to act under the terms of the trust?  
 3 A. I do not.  
 4 Q. Would you agree that your parents were desirous  
 5 of helping Matthew and they wanted to keep the farm in the  
 6 family and help him be a success?  
 7 A. Yes.  
 8 Q. Did you -- at what point in time did you form the  
 9 opinion that Matthew was engaged in self-dealing?  
 10 A. I guess -- I don't know. I guess not until we  
 11 started -- after we retained Ken and Josh, we went to the  
 12 courthouse and started going through documents and finding  
 13 loans and things that Matthew had acquired, and at that point  
 14 was when we kind of discovered that there apparently had been  
 15 a lot of self-dealing going on.  
 16 Q. Okay. And that would -- so an example of that  
 17 would have been the mortgages from Legendary Loan Link?  
 18 A. Correct, he'd apparently used the trust as  
 19 collateral at that time without anyone else's knowledge.  
 20 Q. Okay. Were your parents aware of that?  
 21 A. I can't say for my parents. I don't think they  
 22 were. I don't believe them to have known.  
 23 Q. Do you have any knowledge as to whether Brian was  
 24 aware of it?  
 25 A. I don't.

1 Q. When you discovered those mortgages and any other  
 2 evidence that you've felt established self-dealing, did you  
 3 try to talk to your parents about it?  
 4 A. No.  
 5 Q. When you had the disagreement back in 2015, did  
 6 you tell either your mother or father at that time that you  
 7 thought that Matthew was not operating the farm appropriately  
 8 or anything along those lines?  
 9 A. I don't know that I told them that I didn't think  
 10 he was doing things properly. After 2015, I really didn't  
 11 have much of any kind of conversations or anything with  
 12 either of my parents.  
 13 Q. Okay. What did you tell them as being the reason  
 14 that you wouldn't sign that document involving the sale of  
 15 land to Matthew?  
 16 A. I don't know that I told either of them anything  
 17 really because we just weren't having much of any  
 18 communication at all.  
 19 Q. Well, wasn't that -- your failure to sign that,  
 20 wasn't that what caused the breakdown in communication?  
 21 A. Right.  
 22 Q. Okay. So prior to you communicating that you  
 23 weren't going to sign that, did you talk to them about  
 24 concerns that you had regarding the farm?  
 25 A. I probably talked to my mom and said that I was

1 concerned that they didn't seem to have enough money for  
 2 things and that type of thing.  
 3 Q. Okay. Were you critical of -- in discussions  
 4 with your mother of the way that Matthew was operating the  
 5 farm?  
 6 A. I was never critical of Matthew.  
 7 Q. Okay.  
 8 A. The only thing I ever asked was for us all to get  
 9 together to talk about what was going -- about what was going  
 10 on.  
 11 Q. Did you ask Matthew to get together?  
 12 A. No, just my mom.  
 13 Q. Okay. When Mark Beck told you things weren't  
 14 going well, or told your husband things weren't going well,  
 15 did you talk to your parents about that?  
 16 A. I did call my mom and she did come to town and  
 17 come to my house and I just asked her if we could talk about  
 18 what was going on and get something figured out, and she  
 19 wouldn't talk. She wouldn't say anything. It was  
 20 unproductive. She left my house mad.  
 21 (Exhibit No. 18 was marked.)  
 22 Q. (BY MR. RASMUSSEN) Handing you Exhibit 18, which  
 23 is an agreement dated January 29, 2018 signed by Matthew and  
 24 your -- well, and your mother, she signed for herself and as  
 25 power of attorney for your father. Did you know anything



- 1 ever do anything to follow up to see if your brother was  
 2 making the payments on the mortgage?  
 3 A. No.  
 4 Q. Did you ever inquire of anybody about that?  
 5 A. No.  
 6 Q. Some of the land, or maybe all of the land now,  
 7 is being rented, correct?  
 8 A. Correct.  
 9 Q. Okay. I think Jason Bender is renting it?  
 10 A. Yes.  
 11 Q. And he obviously has to pay something for that?  
 12 A. Correct.  
 13 Q. Prior to 2019, the bank received that rental  
 14 income. Do you know what was done with the 2019 rental  
 15 income?  
 16 A. Previous to 2019, the bank --  
 17 Q. Prior to 2019 Plains Commerce was receiving that  
 18 rental income.  
 19 A. As far as I know, it's gone into an account at  
 20 Dacotah Bank. Dacotah Bank.  
 21 Q. Because they're the current trustee?  
 22 A. Right.  
 23 Q. Do you know how much Mr. Bender pays?  
 24 A. I don't off the top of my head, sorry.  
 25 Q. No, that's fine. How much is the trust land

- 1 worth, do you have any idea of that?  
 2 A. I don't.  
 3 Q. Okay. Does \$800,000 -- it's worth more -- would  
 4 you agree it's worth more than \$800,000?  
 5 A. Right.  
 6 Q. Quite a bit more than that?  
 7 A. I would assume, yes.  
 8 Q. Would you think \$800,000 represents approximately  
 9 one-third of the value of the trust land?  
 10 A. Yes.  
 11 Q. Which would be the share that Matthew would be  
 12 entitled to?  
 13 A. Yes.  
 14 Q. Did you ever ask Danny Smeins or anyone else how  
 15 the \$800,000 figure was determined?  
 16 A. Danny told us -- he arrived at that number when  
 17 we had a meeting, when we met with him, that he estimated the  
 18 total value of the land and just divided it by three.  
 19 Q. Okay. So his estimate was that the land was  
 20 worth about 2.4 million then?  
 21 A. Yes.  
 22 Q. Did you have any reason to believe that that  
 23 estimate is not at least somewhere in the ballpark?  
 24 A. No.  
 25 Q. Are you aware of any judgments that have been

- 1 filed against Matthew?  
 2 A. Currently?  
 3 Q. Yeah.  
 4 A. With Plains Commerce.  
 5 Q. Well, no, not Plains Commerce, but prior to that,  
 6 any other judgments, any other creditors file judgments  
 7 against or obtained judgments against Matthew, do you know if  
 8 there are any?  
 9 A. Like prior to 2019, or just prior forever, since  
 10 he started farming?  
 11 Q. Yeah, maybe since starting farming, are you aware  
 12 of any judgments being filed against him?  
 13 A. I think there are -- well, that Cofina had a  
 14 judgment against him, I guess. That's why he went with  
 15 Legendary Loan Link.  
 16 Q. Were you aware of any others?  
 17 A. I couldn't say without looking back through  
 18 papers that we found up at the courthouse and stuff. I guess  
 19 I don't commit all that stuff to my memory.  
 20 Q. What do you know about, if anything, Legendary  
 21 Loan Link?  
 22 A. Not a lot. I guess not really anything, other  
 23 than they're considered probably not really somebody you want  
 24 to be doing business with.  
 25 Q. Okay. Matthew and his wife have a special needs

- 1 child, is that right?  
 2 A. Yes.  
 3 Q. Just if you know, just in general, what sort of  
 4 issues does that child have?  
 5 A. He had -- sorry.  
 6 Q. That's all right. Do you want to take a quick  
 7 break?  
 8 A. No, I'm good.  
 9 Q. Okay.  
 10 A. He has a disease called tuberous sclerosis and he  
 11 has seizures, and he gets -- he gets tumors on his organs.  
 12 They're not cancerous tumors, just -- anyway, he's nonverbal.  
 13 Q. How old is he?  
 14 A. Oh, Austin must be -- what is he by now, Tom, 11?  
 15 TOM MOECKLY: I'm not sure.  
 16 Q. (BY MR. RASMUSSEN) Did issues with Austin create  
 17 financial problems for Matthew and his wife?  
 18 A. I don't think so because Austin, I believe, is on  
 19 -- gets disability assistance.  
 20 Q. All right.  
 21 A. So, and Kelley's insured with her job, so I don't  
 22 -- and they've always gotten help for special things like  
 23 special strollers and beds and that type of thing with other  
 24 various -- I don't know, I can't think of what I want to say,  
 25 but just other kinds of programs and stuff, I guess.

- 1 future mortgages. Did you see a current proposed mortgage at  
2 that time?
- 3 A. **No.**
- 4 Q. Did you ask to see one?
- 5 A. **No.**
- 6 Q. Okay. And when did you first see the mortgage?
- 7 A. **After I saw it in Ken and Josh's office.**
- 8 Q. Okay. So prior to that time, you didn't ask  
9 anybody for it and you didn't have an opportunity to see the  
10 mortgage then, is that right?
- 11 A. **No.**
- 12 Q. Okay. When you -- you've testified here today  
13 that despite the consent form, you didn't -- you don't  
14 believe Matthew had the authority to mortgage any of the  
15 trust property, correct?
- 16 A. **Right.**
- 17 Q. Okay. Did you have that feeling when you signed  
18 this consent form?
- 19 A. **No.**
- 20 Q. That was -- that's something that came about  
21 after you retained your attorneys?
- 22 A. **Correct.**
- 23 Q. Okay. We've talked about the fact that Danny  
24 Smeins estimated the value of the trust land to be about  
25 \$2.4 million and that 800,000 then would represent Matthew's

- 1 one-third share, correct?
- 2 A. **Correct.**
- 3 Q. Okay. So if in the end here Plains Commerce was  
4 to, through their foreclosure action, sell Matthew's share,  
5 \$800,000 worth of land, trust land, would you have a problem  
6 with that?
- 7 A. **Yes.**
- 8 Q. Why?
- 9 A. **Because I don't think they should have been able  
10 to access the trust land.**
- 11 Q. But if it's -- your share would be 800,000 --  
12 again, assuming 2.4 million is the value, your share would be  
13 800,000, Brian's share would be 800,000, Matthew's share  
14 would 800,000. How would you be damaged by them, by the bank  
15 taking Matthew's share?
- 16 A. **Because it's my grandpa's land and I want to see  
17 it stay in the family. I don't want it to go up to the  
18 highest bidder for a stranger to own it.**
- 19 Q. Okay. So if this mortgage had never -- the loan  
20 and mortgage had never taken place and the trust had just  
21 remained in effect, and you know, your mother eventually  
22 passes away, what was your thoughts as to what was going to  
23 happen to the trust land?
- 24 MR. WUGLER: Could I ask you to clarify your  
25 time frame?

- 1 Q. (BY MR. RASMUSSEN) Well, at any time, again  
2 assuming Matthew never took out a loan from Plains Commerce  
3 Bank, there's no -- the trust property isn't mortgaged and  
4 your mother passes away at whatever point in time that would  
5 be, and again, assuming that you and your brothers are all  
6 alive, what do you think was going to happen with the trust  
7 land?
- 8 A. **I assumed it would follow the trust document.**
- 9 Q. Which is what, what does the trust document  
10 provide for after the death of both of your parents?
- 11 A. **For things to be broken up evenly.**
- 12 Q. Okay.
- 13 A. **Between the three siblings, I guess.**
- 14 Q. Okay. Again, assuming it's 2.4 million bucks  
15 worth of land, you would get \$800,000 worth, Matthew would  
16 get \$800,000 worth, and Brian would get \$800,000 worth,  
17 correct?
- 18 A. **Well, I would hope the land wouldn't be sold so  
19 that nobody would get a specific dollar amount, but...**
- 20 Q. But you understand that either Matthew or Brian  
21 would have -- or you, would have the authority to sell your  
22 portion of it, correct?
- 23 A. **Correct, but I don't think they would do that.**
- 24 Q. Okay. And I guess under the trust, Matthew would  
25 have had the option to purchase the land?

- 1 A. **If he could secure financing.**
- 2 Q. So under that scenario that I -- if Matthew was  
3 -- would you have had any intention of going in and farming  
4 any of the trust land?
- 5 A. **No.**
- 6 Q. Your husband doesn't farm, does he?
- 7 A. **No.**
- 8 Q. So if -- unless Matthew continued farming all of  
9 it, was able to financially do that, some of that trust land  
10 was probably going to get sold, or at least Matthew's share  
11 would have to get sold, wouldn't it, if he was broke?
- 12 MR. WUGLER: I'll object on grounds of  
13 speculation. You can answer.
- 14 A. **What you're asking me is if he was --**
- 15 Q. (BY MR. RASMUSSEN) That was a bad question. Let  
16 me --
- 17 A. **I guess I don't really know how to --**
- 18 Q. And I guess my main question is why are you  
19 intervening in this lawsuit when the only thing in question  
20 is Matthew's share of the trust land which he could have done  
21 whatever he wanted, he could have done whatever he wanted  
22 with his share once your mother passed away?
- 23 A. **But that's in the future and that hasn't happened  
24 yet and I want to protect the trust land and keep it in the  
25 family as long as possible. If I'm capable of doing that,**

1 then that's what I want to happen.

2 Q. Okay.

3 MR. RASMUSSEN: All right. I think that's all I  
4 have. Thank you very much.

5 THE WITNESS: Thanks.

6 MR. WURGLER: Just a couple brief follow-ups.

7 EXAMINATION

8 BY MR. WURGLER:

9 Q. Looking at Exhibit 2 then which is the consent to  
10 mortgage, this document mentions a mortgage in it. Did you  
11 see any mortgage when this document was presented to you for  
12 signing?

13 A. No.

14 Q. Did you have an opportunity to review any  
15 mortgage terms prior to signing this?

16 A. No.

17 Q. Did you know that Matthew was going to sign a  
18 separate document which was called a guaranty and I think is  
19 in Exhibit --

20 MR. RASMUSSEN: 17.

21 Q. (BY MR. WURGLER) 17. Did you know --

22 A. No.

23 Q. Okay. And had you seen this guaranty at the time  
24 you were asked to sign the consent to mortgage?

25 A. No.

1 Q. Had you seen a copy of the trust at the time that  
2 you were asked to sign this consent to mortgage?

3 A. No.

4 Q. Did you know any of the terms of the trust at  
5 that time?

6 A. No.

7 Q. Did you try to get a copy of the trust?

8 A. Yes.

9 Q. And please explain what happened there.

10 A. I e-mailed Danny's office and asked for a copy of  
11 the trust and I also asked on the phone, I don't know, maybe  
12 once or twice that inevitably Danny was always out of the  
13 office or in Webster or somewhere, and his secretary always  
14 said that they would have to check with Danny and get back to  
15 me, and it just never come to light that it got -- that I  
16 ever got a copy.

17 Q. You never did get a copy?

18 A. No.

19 Q. Mr. Rasmussen asked you about meeting with Danny,  
20 and I just wanted to clear up the meetings. Would you  
21 confirm -- how many meetings did you have with Danny?

22 A. Just the one at his office in Webster.

23 Q. And what document did you discuss at that  
24 meeting?

25 A. The consent to sale and then we talked about what

1 the consent to mortgage would be all about.

2 Q. And so you discussed both of those documents at  
3 that meeting?

4 A. Yes.

5 MR. WURGLER: All right. Nothing further.

6 CONT. EXAMINATION

7 BY MR. RASMUSSEN:

8 Q. I just want to ask one more question based on the  
9 last thing Josh just asked you about the meeting with Danny.  
10 So when you met with him, he initially was asking you to sign  
11 the consent to sale document?

12 A. He wasn't really asking me to sign the document.  
13 We just talked about it.

14 Q. Okay.

15 A. Because that was the initial --

16 Q. Okay.

17 A. -- thing that my folks wanted.

18 Q. All right. And you told him that you weren't  
19 going to sign that?

20 A. Right.

21 Q. All right. Did he already have the consent to  
22 mortgage document then ready for your signature at that time?

23 A. I don't remember if he had the actual document  
24 with him in his office in Webster that day or not.

25 Q. Okay. So the -- you don't know if the consent

1 was -- well, I guess on the copy that was signed by you, it  
2 looks like there's a fax transmission information on it, so  
3 was that -- was it -- well, that doesn't necessarily mean  
4 that's how you got it, but it's dated November 16 of 2015.  
5 Well, that would be after you signed it, so --

6 A. Right.

7 Q. You don't know how you got -- this document was  
8 relayed to you then, whether it was mailed or hand delivered  
9 or whatever?

10 A. I got it in Danny's office, I believe.

11 Q. Okay. So did you go back to his office a second  
12 time?

13 A. Well, to sign it.

14 Q. Okay. You did go back to sign it?

15 A. Right.

16 Q. And did you meet with Danny that day?

17 A. Danny was there when I signed, but...

18 Q. Okay. So did you talk with him about the  
19 document the day you signed it?

20 A. No, not -- no, it was pretty much just to get a  
21 signature.

22 Q. Okay. So when you actually had a more detailed  
23 discussion with him, the document hadn't been prepared yet?

24 A. Not in his -- I had gotten the document, but I  
25 don't remember. I can't say one way or the other, I'm sorry.

STATE OF SOUTH DAKOTA )

IN CIRCUIT COURT

ss

COUNTY OF BROWN )

FIFTH JUDICIAL CIRCUIT

\* \* \* \* \* CIV. 18 -

PLAINS COMMERCE BANK, INC.,  
a banking corporation;

Plaintiff,

vs.

COMPLAINT

MATTHEW A. BECK, a married person;  
KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the  
B&B FARMS TRUST, u/t/a November 1,  
1999; BROWN COUNTY, a governmental  
instrumentality of the State of  
South Dakota; MARSHALL COUNTY, a  
governmental instrumentality of the  
State of South Dakota; DEERE &  
COMPANY, a corporation;

Defendants.

COMES NOW, the plaintiff, Plains Commerce Bank, Inc., a banking corporation, by and through its undersigned attorney, and for its cause of action against the defendants, states and alleges as follows:

1. That Plaintiff is a banking corporation organized and existing under the laws of the State of South Dakota, with its principal place of business located in Aberdeen, Brown County, South Dakota.

2. That the defendants, Matthew A. Beck and Kelley R. Beck, husband and wife, are residents of Brown County, South Dakota; upon information and belief, the defendant, Matthew A. Beck, Trustee of the B&B Farms Trust, u/t/a November 1, 1999, is a trust located in Brown County, South Dakota; that the defendant, Brown County, is a governmental instrumentality of the State of South Dakota; that the defendant, Marshall County, is a governmental instrumentality of the State of South Dakota; that the defendant, Deere & Company, is a corporation organized and existing under the laws of the State of Delaware authorized to conduct business within the State of South Dakota.

EXHIBIT

I

MApp089

**CAUSE OF ACTION**

3. That on or about November 25, 2015, Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, in consideration of a loan, made, executed and delivered to Plains Commerce Bank, Inc., a corporation, at its place of business in Aberdeen, Brown County, South Dakota, their promissory note in writing in the amount of \$1,855,000.00, payable in annual installments, with interest as therein provided. A copy of note 101026072 is attached hereto, marked Exhibit "A", and made a part hereof.

4. That on or about December 14, 2015, Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, in consideration of a loan, made, executed and delivered to Plains Commerce Bank, Inc., a corporation, at its place of business in Aberdeen, Brown County, South Dakota, their promissory note in writing in the amount of \$370,000.00, payable in annual installments, with interest as therein provided. A copy of note 101026088 is attached hereto, marked Exhibit "B", and made a part hereof.

5. That to secure the payment of the notes, Exhibits "A" and "B", and as a part of the same transactions, Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, made and delivered to Plains Commerce Bank, Inc., a corporation, a certain mortgage upon the following described real estate in Brown County, South Dakota, to-wit:

The Northeast Quarter, the Southwest Quarter, and the Southeast Quarter, all in Section 35, Township 128 North, Range 60 West of the 5th P.M., Brown County, South Dakota; and

The West Half of the Northwest Quarter of Section 15, Township 127 North, Range 60 West of the 5th P.M., except that portion deeded for highway purposes as created in Book 229 of Deeds, Page 437, Brown County, South Dakota;

together with all the rights and appurtenances described in the mortgage; that the mortgage was duly acknowledged and filed for record in the office of the Register of Deeds of Brown County, South Dakota, on November 30, 2015, and was recorded in Book 670, Page 680, of the real estate mortgage records of said county. A copy of the mortgage is attached hereto, marked Exhibit "C", and made a part hereof.

6. That to secure the payment of the notes, Exhibits "A" and "B", and as a part of the same transactions, Defendant Matthew A. Beck, Trustee of the B&B Farms Trust, made and delivered to Plains Commerce Bank, Inc., a corporation, a certain mortgage upon the

following described real estate in Brown County, South Dakota, to-wit:

The North Half of the Southwest Quarter, the Southwest Quarter of the Southwest Quarter, the North Half of the Southeast Quarter of the Southwest Quarter of Section 14, Township 127 North, Range 60 West of the 5th P.M., except that portion deeded for highway purposes as created in Book 229 of Deeds, Page 437, including Beck Outlot 1 in the Southwest Quarter of Section 14, Township 127 North, Range 60 West of the 5th P.M., according to the plat thereof of record, Brown County, South Dakota; and

The Southeast Quarter, the Southwest Quarter, and the East Half of the Northwest Quarter of Section 15, Township 127 North, Range 60 West of the 5th P.M., except that portion deeded for highway purposes as created in Book 229 of Deed, Page 437, Brown County, South Dakota; and

The Southeast Quarter of the Northeast Quarter of Section 16, Township 127 North, Range 60 West of the 5th P.M., Brown County, South Dakota; and

The Southeast Quarter of the Northwest Quarter of Section 16, Township 127 North, Range 60 West of the 5th P.M., Brown County, South Dakota; and

The Northwest Quarter of the Southeast Quarter of Section 16, Township 127 North, Range 60 West of the 5th P.M., Brown County, South Dakota;

together with all the rights and appurtenances described in the mortgage; that the mortgage was duly acknowledged and filed for record in the office of the Register of Deeds of Brown County, South Dakota, on November 30, 2015, and was recorded in Book 670, Page 679, of the real estate mortgage records of said county. A copy of the mortgage is attached hereto, marked Exhibit "D", and made a part hereof.

7. That to secure the payment of the notes, Exhibits "A" and "B", and as a part of the same transactions, Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, made and delivered to Plains Commerce Bank, Inc., a corporation, a certain mortgage upon the following described real estate in Marshall County, South Dakota, to-wit:

Tract One:

SW1/4NW1/4, NW1/4SW1/4, Section 15;

W1/2SE1/4, SW1/4NE1/4, E1/2NE1/4, NE1/4SE1/4, Section 16;

NE1/4NE1/4, NW1/4NE1/4, Section 21;

Tract Two:

NW1/2SW1/4, SW1/4NW1/4, Section 22;

All in Township 127 North, Range 54 West of the 5th P.M.,  
Marshall County, South Dakota;

together with all the rights and appurtenances described in the mortgage; that the mortgage was duly acknowledged and filed for record in the office of the Register of Deeds of Marshall County, South Dakota, on November 30, 2015, and was recorded in Book 192, Pages 285-300, of the real estate mortgage records of said county. A copy of the mortgage is attached hereto, marked Exhibit "E", and made a part hereof.

8. That to secure payment of the notes, Exhibits "A" and "B", and all debts and obligations owed by Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, to Plaintiff, and as part of the same transactions, Defendants Matthew A. Beck and Kelley R. Beck made and delivered unto Plaintiff a certain security agreement dated November 25, 2015, and granting unto Plaintiff a security interest in the following described property, to wit:

All debts, accounts and other rights to payment, inventory, equipment, instruments and chattel paper, general intangibles, documents, farm products and supplies, government payments and programs, investment property and deposit accounts;

together with all similar property owned or hereafter acquired, and any and all increases, additions, accessions and substitutions thereto or therefore, including any proceeds thereof. That such security agreement is attached hereto as Exhibit "F", and by this reference made a part hereof.

9. That to secure payment of the notes, Exhibits "A" and "B", and all debts and obligations owed by Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, to Plaintiff, and as part of the same transactions, Defendants Matthew A. Beck and Kelley R. Beck made and delivered unto Plaintiff a certain security agreement dated December 14, 2015, and granting unto Plaintiff a security interest in the following described property, to wit:

All debts, accounts and other rights to payment, inventory, equipment, instruments and chattel paper, general intangibles, documents, farm products and supplies, government payments and programs, investment property and deposit accounts;  
1971 International 1600, VIN 416060H103418;  
2007 Merritt GN Trailer, Serial 1MT5N24277H018383;  
1993 Hillsboro 7x24 Trailer, Serial 1TH2A2GKXP1012202; and  
1985 Dorsey 8x45 Trailer, Serial 1DTP16W22FA170667;

together with all similar property owned or hereafter acquired, and any and all increases, additions, accessions and substitutions thereto or therefore, including any proceeds thereof. That such security agreement is attached hereto as Exhibit "G", and by this reference made a part hereof.

10. That to secure the payment of the notes, Exhibits "A" and "B", and all debts and obligations owed by Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, to Plaintiff, and as a part of the same transactions, Defendant Matthew A. Beck, Trustee of the B&B Farms Trust, made and delivered to Plains Commerce Bank, Inc., a corporation, a certain guaranty dated November 25, 2015, guaranteeing the payment and performance of each and every debt. That such guaranty is attached hereto as Exhibit "H", and by this reference made a part hereof.

### PERFECTION

11. That Plaintiff's security interest in such personal property specified in Exhibits "F" and "G" were perfected by the filing of financing statements with the Secretary of State, State of South Dakota, against Matthew A. Beck and Kelley R. Beck, bearing even date as to the corresponding promissory notes. That such verifications are attached hereto as Exhibit "I", and by this reference made a part hereof.

### DEFAULT

12. That the notes provide that if default is made in the payment of any installment when due according to the terms thereof, the holder thereof may, at its election, declare the principal sum of each obligation owing, together with accrued interest thereon, all due and payable at once; and the mortgages provides that if default is made in the payment of the note or any payments required under the mortgage, or if default is made in the repayment of any advances made for and on behalf of the mortgagor, that the holder may, at its election, declare the entire indebtedness due and payable, and the mortgage may be foreclosed immediately.

13. That the conditions of the notes have been broken in that Plaintiff has demanded payment in full of each of the promissory notes, Exhibits "A" and "B", but Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, and Matthew A. Beck, Trustee of the B&B Farms Trust, u/t/a November 1, 1999, failed to pay upon demand, in contravention of the terms of the loan agreement between the parties.



14. That Defendant, Brown County, South Dakota, may claim some lien, right, title, or interest in or to the real estate by reason of delinquent and unpaid real estate taxes owed to Defendant, Brown County, and for which this Defendant possesses a statutory and ongoing lien. This Defendant is made a party pursuant to SDCL §21-49-15.

15. That Defendant, Marshall County, South Dakota, may claim some lien, right, title, or interest in or to the real estate by reason of delinquent and unpaid real estate taxes owed to Defendant, Marshall County, and for which this Defendant possesses a statutory and ongoing lien. This Defendant is made a party pursuant to SDCL §21-49-15.

16. That Defendant, Deere & Company, may claim some lien, right, title or interest in or to the personal property herein by reason of certain financing statement identified as follows:

Financing statements filed with the South Dakota Secretary of State's office on June 14, 2004;

but whatever right, title or interest said Defendant may have, by reason of such financing statement, or otherwise, is junior and inferior to the right, title or interest of the above Plaintiff.

17. That Plaintiff has performed all of the conditions of such contracts pertaining to it.

18. That by reason of such default, Plaintiff did exercise its option to declare the whole of the principal sum of the notes due and payable and the entire amount of the principal and interest as all due and collectible and security instruments foreclosable at once in accordance with the terms of the notes and security instruments and demanded payment in full. That the balance due Plaintiff is \$2,062,025.75, plus interest thereon from and after January 19, 2018.

19. That Plaintiff has expended the sum of \$1,464.38 for title reports and Plaintiff is entitled to be reimbursed therefor with interest pursuant to the terms of the mortgages. That Plaintiff may be required to make further advances for insurance premiums, real estate taxes and other costs during the pendency of this action to protect the real estate security, and such advances, if any, should be included as a part of the indebtedness secured by said mortgages.

20. That the notes, mortgages, and security agreements provide for attorney's fees in case of suit thereon, and that the State of South Dakota allows certain fees and disbursements in matters such as this.

21. Plaintiff's security interest in the personal property described herein is superior and paramount to the interest of all Defendants.

22. That Plaintiff is the owner and holder of the notes and security instruments hereinabove described; that the debts have not been paid, except as shown in this complaint; and there is justly due and owing Plaintiff the sum of \$2,062,025.75, plus interest thereon from and after January 19, 2018.

23. That no proceedings have been previously commenced for the recovery of the debt secured by the notes and mortgage or for the enforcement of the mortgage.

24. That the whole of said mortgaged premises constitutes one distinct tract, parcel and farm, has been and is now used as such, and the same is so situated that the sale thereof in one parcel will be to the advantage of all parties having an interest therein.

25. That it is likely that Plaintiff, holder of such mortgages, will not be willing to bid the full amount of the judgment debt, and Plaintiff will establish at time of trial to the satisfaction of the Court, the fair and reasonable value of the mortgaged premises, and the Court should determine the value, and if the Court finds such fair and reasonable value to be less than the sum due on the mortgages with advancements, costs and expenses of sale, then the Plaintiff asks the Court by its judgment to authorize such Plaintiff to bid not less than the value determined, and if a deficiency remains after the foreclosure sale, Plaintiff shall be entitled to a general execution for such deficiency only upon application to the Court; otherwise such foreclosure shall operate as a complete satisfaction of the debt secured by the mortgages and judgment issued herein.

26. That none of the defendants are in the military service of the United States or with the forces of any nation with which the United States may be allied in the prosecution of war, nor have they been ordered to report for induction under the Selective Training and Reserve Act of 1940, as amended, nor are they members of the Enlisted Reserve Corps who have been ordered to report for military service, nor are they otherwise entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended.

**WHEREFORE**, Plaintiff prays judgment as follows:

1. For the immediate recovery of the possession of such personal property comprising its security herein; and the sale of the same as provided by law; and

2. For the appointment of a receiver to collect the rents, profits, and leases on the subject property, and, after payment of reasonable costs and expenses for the receiver and for maintenance of the real estate involved herein, including a reasonable fee for said receiver, payment of the net proceeds to Plaintiff, for application upon the indebtedness owed herein; and

3. For judgment against Defendants Matthew A. Beck and Kelley R. Beck, husband and wife, and Matthew A. Beck, Trustee of the B&B Farms Trust, u/t/a November 1, 1999, jointly and severally, in the amount of \$2,062,025.75, plus interest thereon from and after January 19, 2018, and any advances that might be made during the pendency of this action, and the costs of this case, including Plaintiff's attorney's fees as provided by law, and any and all additional costs, expenses or advancements pursuant to the notes and security instruments that may be incurred; and

4. For judgment and decree establishing its mortgages as first and superior lien upon the described real estate and foreclosing the same for the remaining amount of the aforesaid judgment, interest, title charges, costs and any advances that might be made for payment of unpaid real estate taxes relating to these premises during the pendency of this action, and that such is a first and superior lien dated November 25, 2015; that the claims and rights of Defendants be declared and adjudged to be junior, inferior and subordinate to Plaintiff's mortgage lien; that Plaintiff's mortgages be foreclosed and that the equity of redemption of any and all Defendants herein be barred and foreclosed, subject only to such rights of redemption as may be provided by statute; that a special execution issue from this Court directing the sale of the mortgaged premises or so much thereof as may be necessary to satisfy the judgment, interest, title charges, any real estate taxes that may be advanced and costs; and that the Court further adjudge and decree that should any of the real estate be sold and not redeemed within the manner and time provided by law or within one (1) year from recording of the certificate of sale, that the Sheriffs of Brown and Marshall Counties will thereupon be authorized by this Court to issue his deed to the purchaser under this proceeding; and

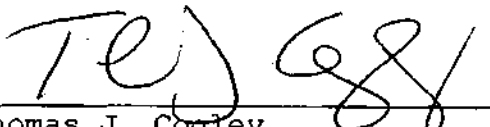
5. That the Court enter its Order, pursuant to SDCL §21-47-7 (1987), enjoining Defendants, or any of them, from doing any act to the injury of the real property including deeding all or portions thereof to other persons during the existence of a lien or

foreclosure of a mortgage thereon, and until the expiration of the time allowed for redemption; and

6. Plaintiff also prays for such other and further relief as may be just and equitable in the premises.

Dated this 18 day of January, 2018.

RONAYNE & COGLEY, P.C.

  
\_\_\_\_\_  
Thomas J. Cogley  
Attorney for Plaintiff  
Plains Commerce Bank, Inc.  
24 Fifth Avenue SW  
Post Office Box 759  
Aberdeen, South Dakota 57402  
(605) 225-0100  
tom@ronaynecogley.com

101026072

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
101026072	MATTHEW A BECK		11/25/15	4/LAV
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$1,855,000.00	Not Applicable	7.000%	11/25/20	Agricultural
Creditor Use Only				

### PROMISSORY NOTE

(Agricultural - Single Advance)

**DATE AND PARTIES.** The date of this Promissory Note (Note) is November 25, 2015. The parties and their addresses are:

**LENDER:**

PLAINS COMMERCE BANK  
524 S Dakota Street  
Aberdeen, SD 57401  
Telephone: (605) 225-7648

**BORROWER:**

MATTHEW A BECK  
10849 408TH AVE  
HECLA, SD 57446

KELLEY R BECK  
10949 406TH AVE  
HECLA, SD 57446

**1. DEFINITIONS.** As used in this Note, the terms have the following meanings:

- A. Pronouns. The pronouns "I," "me," and "my" refer to each Borrower signing this Note, individually and together with their heirs, successors and assigns, and each other person or legal entity (including guarantors, endorser, and sureties) who agrees to pay this Note. "You" and "Your" refer to the Lender, any participants or syndicators, successors and assigns, or any person or company that acquires an interest in the Loan.
- B. Note. Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. Loan. Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. Loan Documents. Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. Property. Property is any property, real, personal or intangible, that secures my performance of the obligations of this Loan.
- F. Percent. Rates and rate change limitations are expressed as annualized percentages.
- G. Dollar Amounts. All dollar amounts will be payable in lawful money of the United States of America.

**2. PROMISE TO PAY.** For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$1,855,000.00 (Principal) plus interest from November 25, 2015 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

**3. INTEREST.** Interest will accrue on the unpaid Principal balance of this Note at the rate of 7.000 percent (Interest Rate).

- A. Post-Maturity Interest. After maturity or acceleration, interest will accrue 9.00%.
- B. Maximum Interest Amount. Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.
- C. Statutory Authority. The amount assessed or collected on this Note is authorized by the South Dakota usury laws under S.D. Codified Laws Ann. 55 54-3-13 and 54-3-14.
- D. Accrual. Interest accrues using an Actual/360 days counting method.

**4. ADDITIONAL CHARGES.** As additional consideration, I agree to pay, or have paid, these additional fees and charges.

A. Nonrefundable Fees and Charges. The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

- Flood Determination. A(n) Flood Determination fee of \$35.00 payable from separate funds on or before today's date.
- Loan Origination. A(n) Loan Origination fee of \$4,500.00 payable from separate funds on or before today's date.
- Recording - Releases. A(n) Recording - Releases fee of \$80.00 payable from separate funds on or before today's date.
- Recording - Mortgage. A(n) Recording - Mortgage fee of \$80.00 payable from separate funds on or before today's date.

**5. REMEDIAL CHARGES.** In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. Late Charge. If a payment is more than 10 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. However, this charge will not be greater than \$250.00. I will pay this late charge promptly but only once for each late payment.

MATTHEW A BECK  
South Dakota Promissory Note  
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6. **PAYMENT.** I agree to pay this Note on demand, but if no demand is made, I agree to pay this Note in 3 payments. This Note is amortized over 25 payments. I will make 4 payments of \$180,656.80 beginning on November 25, 2016, and on the same day each year thereafter. A single "balloon payment" of the entire unpaid balance of Principal and Interest will be due November 25, 2020.

Payments will be rounded to the nearest \$.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 28th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due, then to principal that is due, then to escrow that is due, then to late charges that are due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

7. **PREPAYMENT.** I may prepay this Loan under the following terms and conditions. Refinance penalty shall apply if the loan balance is prepaid in whole (100%) or in part (any refinance of principal over the normal amortization).

In the event of a refinance, in whole or in part, a refinance penalty rate shall be assessed as follows:

- 1) If the refinance occurs on or before the first anniversary date of the loan, the refinance penalty will equal five percent (5%) of the principal amount prepaid.
- 2) If the refinance occurs after the first anniversary date, but on or before the second anniversary date, the refinance penalty will equal four percent (4%) of the principal amount prepaid.
- 3) If the refinance occurs after the second anniversary date, but on or before the third anniversary date, the refinance penalty will equal three percent (3%) of the principal amount prepaid.
- 4) If the refinance occurs after the third anniversary date, but on or before the fourth anniversary date, the refinance penalty will equal two percent (2%) of the principal amount prepaid.
- 5) If the refinance occurs after the fourth anniversary date, but on or before the fifth anniversary date, the refinance penalty will equal one percent (1%) of the principal amount prepaid.

Refinance penalty shall not apply if the refinance occurs after the fifth anniversary date.

Any partial prepayment will not excuse any later scheduled payments until I pay in full.

8. **LOAN PURPOSE.** The purpose of this Loan is REFINANCE FARM REAL ESTATE AND CHATTEL LOANS.

9. **SECURITY.** The Loan is secured by separate security Instruments prepared together with this Note as follows:

Document Name	Parties to Document	Date of Security Document
Security Agreement - MATTHEW A BECK , KELLEY R BECK	MATTHEW A BECK , KELLEY R BECK	11-25-2015
Mortgage - , , SD	MATTHEW A BECK , KELLEY R BECK	11-25-2015
Mortgage - , , SD	MATTHEW A BECK , KELLEY R BECK	11-25-2015
Mortgage - , , SD	MATTHEW A BECK as Trustee of the B&B FARMS TRUST	11-25-2015

and by the following, previously executed, security Instruments or agreements: UCC FILING DATED 07-27-2015; SECURED ENTITY GUARANTY FROM B&B FARMS TRUST; AS EXTENDED AS APPLICABLE.

10. **LIMITATIONS ON CROSS-COLLATERALIZATION.** The cross-collateralization clause on any existing or future loan is void and ineffective as to the Loan, including any extension or refinancing.

The Loan is not secured by a previously executed security instrument if a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Real Estate Settlement Procedures Act, (Regulation X), that are required for loans secured by the Property or if, as a result, the other debt would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Truth in Lending Act, (Regulation Z), that are required for loans secured by the Property.

11. **DEFAULT.** I understand that you may demand payment anytime at your discretion. For example, you may demand payment in full if any of the following events (known separately and collectively as an Event of Default) occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. **Death or Incompetency.** I die or am declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.

E. **Other Documents.** A default occurs under the terms of any other Loan Document.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

MATTHEW A BECK  
South Dakota Promissory Note  
SD/4JREINBOLOOOO0000009625046N

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**L. Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

**M. Erosion.** Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce or make possible the production of an agricultural commodity, as further explained in 7 CFR Part 1940, Subpart G, Exhibit M.

**N. Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

**12. DUE ON SALE OR ENCUMBRANCE.** You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law, as applicable. However, if I am in default under this Agreement, I may not sell any Products that are farm products or inventory derived from farm products even in the ordinary course of business.

**13. WAIVERS AND CONSENT.** To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

**A. Additional Waivers By Borrower.** In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

(7) I agree that you may inform any party who guarantees this Loan of any Loan accommodations, renewals, extensions, modifications, substitutions or future advances.

**B. No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

**14. REMEDIES.** After I default, you may at your option do any one or more of the following.

**A. Acceleration.** You may make all or any part of the amount owing by the terms of this Note immediately due.

**B. Sources.** You may use any and all remedies you have under state or federal law or in any Loan Document.

**C. Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on my default.

**D. Payments Made On My Behalf.** Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

**E. Attachment.** You may attach or garnish my wages or earnings.

**F. Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

**G. Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

**15. COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, court costs and other legal expenses, including any reasonable attorney's fees if allowed by law. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

**16. COMMISSIONS.** I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

**17. WARRANTIES AND REPRESENTATIONS.** I have the right and authority to enter into this Note. The execution and delivery of this Note will not violate any agreement governing me or to which I am a party.

**18. INSURANCE.** I agree to obtain the insurance described in this Loan Agreement.

**A. Property Insurance.** I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing the Loan.

**B. Insurance Warranties.** I agree to purchase any insurance coverages that are required, in the amounts you require, as described in this or any other documents I sign for the Loan. I will provide you with continuing proof of coverage. I will buy or provide insurance from a firm licensed to do business in the State where the Property is located. If I buy or provide the insurance from someone other than you, the firm will be reasonably acceptable to you. I will have

MATTHEW A BECK  
South Dakota Promissory Note  
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the insurance company name you as loss payee on any insurance policy. You will apply the insurance proceeds toward what I owe you on the outstanding balance. I agree that if the insurance proceeds do not cover the amounts I still owe you, I will pay the difference. I will keep the insurance until all debts secured by this agreement are paid. If I want to buy the insurance from you, I have signed a separate statement agreeing to this purchase.

19. **APPLICABLE LAW.** This Note is governed by the laws of South Dakota, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

20. **JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

21. **AMENDMENT, INTEGRATION AND SEVERABILITY.** This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable. No present or future agreement securing any other debt I owe you will secure the payment of this Loan if, with respect to this loan, you fail to fulfill any necessary requirements or fail to conform to any limitations of the Truth in Lending Act (Regulation Z) or the Real Estate Settlement Procedures Act (Regulation X) that are required for loans secured by the Property or if, as a result, this Loan would become subject to Section 67D of the John Warner National Defense Authorization Act for Fiscal Year 2007.

22. **INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.


23. **NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you any correct and complete financial statements or other information you request. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

24. **CREDIT INFORMATION.** I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

25. **ERRORS AND OMISSIONS.** I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs (including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

26. **SIGNATURES.** By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

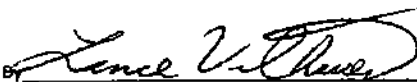
**BORROWER:**

  
MATTHEW A BECK Date 11-25-15 (Seal)

  
KELLEY R BECK Date 11-25-15 (Seal)

**LENDER:**

Plains Commerce Bank

  
Lance Vilhauer, Business Banker Date 11-25-15 (Seal)



101026088

LOAN NUMBER	LOAN NAME	ACCT. NUMBER	NOTE DATE	INITIALS
101026088	MATTHEW A BECK		12/14/15	4/LAV
NOTE AMOUNT	INDEX (w/Margin)	RATE	MATURITY DATE	LOAN PURPOSE
\$370,000.00	Not Applicable	7.000%	12/14/20	Agricultural
Creditor Use Only				

### PROMISSORY NOTE

(Agricultural - Single Advance)

**DATE AND PARTIES.** The date of this Promissory Note (Note) is December 14, 2015. The parties and their addresses are:

**LENDER:**

PLAINS COMMERCE BANK  
624 S Dakota Street  
Aberdeen, SD 57401  
Telephone: (605) 225-7548

**BORROWER:**

MATTHEW A BECK  
10849 408TH AVE  
HECLA, SD 57446

KELLEY R BECK  
10949 408TH AVE  
HECLA, SD 57446

**1. DEFINITIONS.** As used in this Note, the terms have the following meanings:

- A. **Pronouns.** The pronouns "I," "me," and "any" refer to each Borrower signing this Note, individually and together with their heirs, successors and assigns, and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this Note. "You" and "Your" refer to the Lender, any participants or syndicators, successors and assigns, or any person or company that acquires an interest in the Loan.
- B. **Note.** Note refers to this document, and any extensions, renewals, modifications and substitutions of this Note.
- C. **Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.
- D. **Loan Documents.** Loan Documents refer to all the documents executed as a part of or in connection with the Loan.
- E. **Property.** Property is any property, real, personal or intangible, that secures any performance of the obligations of this Loan.
- F. **Percent.** Rates and rate change limitations are expressed as annualized percentages.
- G. **Dollar Amounts.** All dollar amounts will be payable in lawful money of the United States of America.

**2. PROMISE TO PAY.** For value received, I promise to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$370,000.00 (Principal) plus interest from December 14, 2015 on the unpaid Principal balance until this Note matures or this obligation is accelerated.

**3. INTEREST.** Interest will accrue on the unpaid Principal balance of this Note at the rate of 7.000 percent (Interest Rate).

- A. **Post-Maturity Interest.** After maturity or acceleration, interest will accrue 9.00%.
- B. **Maximum Interest Amount.** Any amount assessed or collected as interest under the terms of this Note will be limited to the maximum lawful amount of interest allowed by state or federal law, whichever is greater. Amounts collected in excess of the maximum lawful amount will be applied first to the unpaid Principal balance. Any remainder will be refunded to me.
- C. **Statutory Authority.** The amount assessed or collected on this Note is authorized by the South Dakota usury laws under S.D. Codified Laws Ann. 55 64-3-13 and 64-3-14.
- D. **Accrual.** Interest accrues using an Actual/360 days counting method.

**4. ADDITIONAL CHARGES.** As additional consideration, I agree to pay, or have paid, these additional fees and charges.

A. **Nonrefundable Fees and Charges.** The following fees are earned when collected and will not be refunded if I prepay this Note before the scheduled maturity date.

Loan. A(n) Loan fee of \$100.00 payable from separate funds on or before today's date.

Motor Vehicle Fee. A(n) Motor Vehicle Fee fee of \$25.00 payable from separate funds on or before today's date.

**5. REMEDIAL CHARGES.** In addition to interest or other finance charges, I agree that I will pay these additional fees based on my method and pattern of payment. Additional remedial charges may be described elsewhere in this Note.

A. **Late Charge.** If a payment is more than 10 days late, I will be charged 5.000 percent of the Unpaid Portion of Payment or \$25.00, whichever is greater. However, this charge will not be greater than \$250.00. I will pay this late charge promptly but only once for each late payment.

**6. PAYMENT.** I agree to pay this Note on demand, but if no demand is made, I agree to pay this Note in 6 payments. A payment of \$90,493.87 will be due December 14, 2016, and on the same day each year thereafter. A final payment of the entire unpaid balance of Principal and interest will be due December 14, 2020.

MATTHEW A BECK  
South Dakota Promissory Note  
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Payments will be rounded to the nearest \$0.01. With the final payment I also agree to pay any additional fees or charges owing and the amount of any advances you have made to others on my behalf. Payments scheduled to be paid on the 29th, 30th or 31st day of a month that contains no such day will, instead, be made on the last day of such month.

Each payment I make on this Note will be applied first to interest that is due, then to principal that is due, then to escrow that is due, then to late charges that are due, and finally to any charges that I owe other than principal and interest. If you and I agree to a different application of payments, we will describe our agreement on this Note. You may change how payments are applied in your sole discretion without notice to me. The actual amount of my final payment will depend on my payment record.

7. **PREPAYMENT.** I may prepay this Loan in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until I pay in full.

8. **LOAN PURPOSE.** The purpose of this Loan is PURCHASE BRED CATTLE AND BULLS.

9. **SECURITY.** The Loan is secured by separate security instruments prepared together with this Note as follows:

Document Name	Parties to Document	Date of Security Document
Security Agreement - MATTHEW A BECK, KELLEY R BECK	MATTHEW A BECK, KELLEY R BECK	12-14-2015

and by the following, previously executed, security instruments or agreements: SECURITY AGREEMENT DATED 11-25-2015; CREMS IN FILE DATED 11-25-2015; UCC FILING DATED 07-27-2015 EFS DATED 12-02-2015; SECURED ENTITY GUARANTY FROM B&B FARMS TRUST; AS EXTENDED AS APPLICABLE.

10. **LIMITATIONS ON CROSS-COLLATERALIZATION.** The cross-collateralization clause on any existing or future loan is void and ineffective as to the Loan, including any extension or refinancing.

The Loan is not secured by a previously executed security instrument if a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Real Estate Settlement Procedures Act, (Regulation X), that are required for loans secured by the Property or if, as a result, the other debt would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Truth in Lending Act, (Regulation Z), that are required for loans secured by the Property.

11. **DEFAULT.** I understand that you may demand payment anytime at your discretion. For example, you may demand payment in full if any of the following events (known separately and collectively as an Event of Default) occur:

A. **Payments.** I fail to make a payment in full when due.

B. **Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or any co-signer, endorser, surety or guarantor of this Note or any other obligations I have with you.

C. **Death or Incapacity.** I die or am declared legally incompetent.

D. **Failure to Perform.** I fail to perform any condition or to keep any promise or covenant of this Note.

E. **Other Documents.** A default occurs under the terms of any other Loan Document.

F. **Other Agreements.** I am in default on any other debt or agreement I have with you.

G. **Misrepresentation.** I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. **Judgment.** I fail to satisfy or appeal any judgment against me.

I. **Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. **Name Change.** I change my name or assume an additional name without notifying you before making such a change.

K. **Property Transfer.** I transfer all or a substantial part of my money or property.

L. **Property Value.** You determine in good faith that the value of the Property has declined or is impaired.

M. **Erosion.** Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce or make possible the production of an agricultural commodity, as further explained in 7 CFR Part 1940, Subpart G, Exhibit M.

N. **Insecurity.** You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Note or that the prospect for payment or performance of the Loan is impaired for any reason.

12. **DUE ON SALE OR ENCUMBRANCE.** You may, at your option, declare the entire balance of this Note to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law, as applicable.

13. **WAIVERS AND CONSENT.** To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. **Additional Waivers By Borrower.** In addition, I, and any party to this Note and Loan, to the extent permitted by law, consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to this Note.

(1) You may renew or extend payments on this Note, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property securing this Note.

(4) You, or any institution participating in this Note, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of this Note to any person in any amounts and I waive notice of such sales, repurchases or participations.

MATTHEW A BECK  
South Dakota Promissory Note  
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(6) I agree that any of us signing this Note as a Borrower is authorized to modify the terms of this Note or any instrument securing, guarantying or relating to this Note.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in this Note, or any other Loan Document, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

**14. REMEDIES.** After I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Note immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any Loan Document.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on my default.

D. Payments Made On My Behalf. Amounts advanced on my behalf will be immediately due and may be added to the balance owing under the terms of this Note, and accrue interest at the highest post-maturity interest rate.

E. Attachment. You may attach or garnish my wages or earnings.

F. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Note against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Note" means the total amount to which you are entitled to demand payment under the terms of this Note at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay this Note, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

G. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

**15. COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note or any other Loan Document. Expenses include, but are not limited to, court costs and other legal expenses, including any reasonable attorney's fees if allowed by law. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of this Note. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

**16. COMMISSIONS.** I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services that I buy through you or your affiliate.

**17. WARRANTIES AND REPRESENTATIONS.** I have the right and authority to enter into this Note. The execution and delivery of this Note will not violate any agreement governing me or to which I am a party.

**18. INSURANCE.** I agree to obtain the insurance described in this Loan Agreement.

A. Property Insurance. I will insure or retain insurance coverage on the Property and abide by the insurance requirements of any security instrument securing the Loan.

B. Insurance Warranties. I agree to purchase any insurance coverages that are required, in the amounts you require, as described in this or any other documents I sign for the Loan. I will provide you with continuing proof of coverage. I will buy or provide insurance from a firm licensed to do business in the State where the Property is located. If I buy or provide the insurance from someone other than you, the firm will be reasonably acceptable to you. I will have the insurance company name you as loss payee on any insurance policy. You will apply the insurance proceeds toward what I owe you on the outstanding balance. I agree that if the insurance proceeds do not cover the amounts I still owe you, I will pay the difference. I will keep the insurance until all debts secured by this agreement are paid. If I want to buy the insurance from you, I have signed a separate statement agreeing to this purchase.

**19. APPLICABLE LAW.** This Note is governed by the laws of South Dakota, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law. In the event of a dispute, the exclusive forum, venue and place of jurisdiction will be in South Dakota, unless otherwise required by law.

**20. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** My obligation to pay the Loan is independent of the obligation of any other person who has also agreed to pay it. You may sue me alone, or anyone else who is obligated on the Loan, or any number of us together, to collect the Loan. Extending the Loan or new obligations under the Loan, will not affect my duty under the Loan and I will still be obligated to pay the Loan. This Note shall inure to the benefit of and be enforceable by you and your successors and assigns and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

**21. AMENDMENT, INTEGRATION AND SEVERABILITY.** This Note may not be amended or modified by oral agreement. No amendment or modification of this Note is effective unless made in writing and executed by you and me. This Note and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Note is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable. No present or future agreement securing any other debt I owe you will secure the payment of this Loan if, with respect to this loan, you fail to fulfill any necessary requirements or fail to conform to any limitations of the Truth in Lending Act (Regulation Z) or the Real Estate Settlement Procedures Act (Regulation X) that are required for loans secured by the Property or if, as a result, this Loan would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

**22. INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Note.

**23. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Borrower will be deemed to be notice to all Borrowers. I will inform you in writing of any change in my name, address or other application information. I will provide you

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South Dakota Promissory Note  
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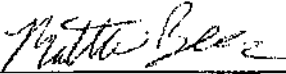
any correct and complete financial statements or other information you request. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Loan and to confirm your lien status on any Property. Time is of the essence.

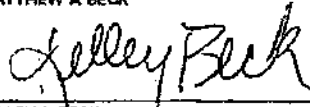
24. CREDIT INFORMATION. I agree to supply you with whatever information you reasonably request. You will make requests for this information without undue frequency, and will give me reasonable time in which to supply the information.

25. ERRORS AND OMISSIONS. I agree, if requested by you, to fully cooperate in the correction, if necessary, in the reasonable discretion of you of any and all loan closing documents so that all documents accurately describe the loan between you and me. I agree to assume all costs including by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to reasonably comply with your requests within thirty (30) days.

26. SIGNATURES. By signing under seal, I agree to the terms contained in this Note. I also acknowledge receipt of a copy of this Note.

**BORROWER:**

  
MATTHEW A BECK Date 12-14-15 (Seal)

  
KELLEY R BECK Date 12-14-15 (Seal)

**LENDER:**

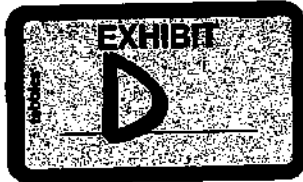
Plains Commerce Bank

  
Lence Vilhauer, Business Banker Date 12-14-15 (Seal)

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INSTRUMENT NO. 2015006655  
BOOK: 670 MORTGAGE  
PAGE: 679

Pages: 16



2015/11/30 03:02:00 PM

CAROL SHERMAN, REGISTER OF DEEDS  
BROWN COUNTY, SOUTH DAKOTA

Recording Fee: \$ 30.00  
Return To: PLAINS COMMERCE BANK

This document was prepared by Loan  
Department, Plains Commerce Bank,  
524 S Dakota Street, Aberdeen, SD  
57402-1059, 605-225-7548

State of South Dakota

Space Above This Line For Recording Data

### **MORTGAGE - COLLATERAL REAL ESTATE MORTGAGE**

**DATE AND PARTIES.** The date of this Mortgage (Security Instrument) is November 25, 2015. The parties and their addresses are:

**MORTGAGOR:**

**MATTHEW A BECK**

As Trustee

Of the B&B FARMS TRUST

Dated November 1, 1999, A South Dakota Trust

41044 109TH ST

HECLA, SD 57446

**LENDER:**

**PLAINS COMMERCE BANK**

Organized and existing under the laws of South Dakota

524 S Dakota Street

Aberdeen, SD 57401

**1. DEFINITIONS.** For the purposes of this document, the following term has the following meaning.

**A. Loan.** "The Loan" refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction.

**MATTHEW A BECK**

South Dakota Mortgage

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**2. CONVEYANCE.** For good and valuable consideration, the receipt and sufficiency of which is acknowledged, and to secure the Secured Debts and Mortgagor's performance under this Security Instrument, Mortgagor does hereby grant, bargain, convey and mortgage to Lender, the following described property:

SEE ATTACHED SCEDULE A

The property is located in Brown County at , , South Dakota .

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, wells, ditches and water stock, crops, timber, all diversion payments or third party payments made to crop producers and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described (all referred to as Property). This Security Instrument will remain in effect until the Secured Debts and all underlying agreements have been terminated in writing by Lender.

**3. MAXIMUM OBLIGATION LIMIT.** The total principal amount secured by this Security Instrument at any one time and from time to time will not exceed \$800,000.00. Any limitation of amount does not include interest and other fees and charges validly made pursuant to this Security Instrument. Also, this limitation does not apply to advances made under the terms of this Security Instrument to protect Lender's security and to perform any of the covenants contained in this Security Instrument.

**4. SECURED DEBTS.** The term "Secured Debts" includes and this Security Instrument will secure each of the following:

**A. Specific Debts.** The following debts and all extensions, renewals, refinancings, modifications and replacements. A promissory note or other agreement, No. 101026072, dated November 25, 2015, from MATTHEW A BECK and KELLEY R BECK (Borrower) to Lender, with a loan amount of \$1,855,000.00 and maturing on November 25, 2020.

**B. All Debts.** All present and future debts from MATTHEW A BECK and KELLEY R BECK to Lender, even if this Security Instrument is not specifically referenced, or if the future debt is unrelated to or of a different type than this debt. If more than one person signs this Security Instrument, each agrees that it will secure debts incurred either individually or with others who may not sign this Security Instrument. Nothing in this Security Instrument constitutes a commitment to make additional or future loans or advances. Any such commitment must be in writing. This Security Instrument will not secure any debt for which a non-possessory, non-purchase money security interest is created in "household goods" in connection with a

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MATTHEW A BECK

South Dakota Mortgage

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"consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. This Security Instrument will not secure any debt for which a security interest is created in "margin stock" and Lender does not obtain a "statement of purpose," as defined and required by federal law governing securities. This Security Instrument will not secure any other debt if Lender, with respect to that other debt, fails to fulfill any necessary requirements or fails to conform to any limitations of the Truth in Lending Act (Regulation Z) or the Real Estate Settlement Procedures Act (Regulation X) that are required for loans secured by the Property.

C. Sums Advanced. All sums advanced and expenses incurred by Lender under the terms of this Security Instrument.

**5. LIMITATIONS ON CROSS-COLLATERALIZATION.** The cross-collateralization clause on any existing or future loan is void and ineffective as to the Loan, including any extension or refinancing.

The Loan is not secured by a previously executed security instrument if a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. The Loan is not secured by a previously executed security instrument if Lender fails to fulfill any necessary requirements or fails to conform to any limitations of the Real Estate Settlement Procedures Act, (Regulation X), that are required for loans secured by the Property or if, as a result, the other debt would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

The Loan is not secured by a previously executed security instrument if Lender fails to fulfill any necessary requirements or fails to conform to any limitations of the Truth in Lending Act, (Regulation Z), that are required for loans secured by the Property.

**6. PAYMENTS.** Mortgagor agrees that all payments under the Secured Debts will be paid when due and in accordance with the terms of the Secured Debts and this Security Instrument.

**7. NON-OBLIGATED MORTGAGOR.** Any Mortgagor, who is not also identified as a Borrower in the Secured Debts section of this Security Instrument and who signs this Security Instrument, is referred to herein as a Non-Obligated Mortgagor for purposes of subsection 7(d)(4) of 12 C.F.R. 1002 (Regulation B) which implements the Equal Credit Opportunity Act (ECOA). By signing this Security Instrument, the Non-Obligated Mortgagor does mortgage and assign their rights and interests in the Property to secure payment of the Secured Debts, to create a valid lien, to pass clear title, to waive inchoate rights and to assign earnings or rights to payment under any lease or rent of the Property. However, the Non-Obligated Mortgagor is not personally liable for the Secured Debts by virtue of signing this Security Instrument. Nothing in this

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section shall be construed to modify or otherwise affect the Non-Obligated Mortgagor's obligations, if any, that were separately made with Lender in a separate agreement and duly signed by the Non-Obligated Mortgagor in the context of that separate agreement.

**8. WARRANTY OF TITLE.** Mortgagor warrants that Mortgagor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to grant, bargain, convey, sell and mortgage the Property. Mortgagor also warrants that the Property is unencumbered, except for encumbrances of record.

**9. PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Mortgagor agrees:

- A. To make all payments when due and to perform or comply with all covenants.
- B. To promptly deliver to Lender any notices that Mortgagor receives from the holder.
- C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.

**10. CLAIMS AGAINST TITLE.** Mortgagor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Mortgagor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Mortgagor's payment. Mortgagor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Mortgagor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Mortgagor may have against parties who supply labor or materials to maintain or improve the Property.

**11. DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law, as applicable.

**12. TRANSFER OF AN INTEREST IN THE MORTGAGOR.** If Mortgagor is an entity other than a natural person (such as a corporation, partnership, limited liability company or other organization), Lender may demand immediate payment if:

- A. A beneficial interest in Mortgagor is sold or transferred.
- B. There is a change in either the identity or number of members of a partnership or similar entity.

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C. There is a change in ownership of more than 25 percent of the voting stock of a corporation, partnership, limited liability company or similar entity.

However, Lender may not demand payment in the above situations if it is prohibited by law as of the date of this Security Instrument.

**13. WARRANTIES AND REPRESENTATIONS.** Mortgagor makes to Lender the following warranties and representations which will continue as long as this Security Instrument is in effect:

**A. Power.** Mortgagor is duly organized, and validly existing and in good standing in all jurisdictions in which Mortgagor operates. Mortgagor has the power and authority to enter into this transaction and to carry on Mortgagor's business or activity as it is now being conducted and, as applicable, is qualified to do so in each jurisdiction in which Mortgagor operates.

**B. Authority.** The execution, delivery and performance of this Security Instrument and the obligation evidenced by this Security Instrument are within Mortgagor's powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which Mortgagor is a party or to which Mortgagor is or any of Mortgagor's property is subject.

**14. PROPERTY CONDITION, ALTERATIONS, INSPECTION, VALUATION AND APPRAISAL.** Mortgagor will keep the Property in good condition and make all repairs that are reasonably necessary. Mortgagor will not commit or allow any waste, impairment, or deterioration of the Property. Mortgagor will keep the Property free of noxious weeds and grasses. Mortgagor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Mortgagor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Mortgagor will notify Lender of all demands, proceedings, claims, and actions against Mortgagor, and of any loss or damage to the Property.

No portion of the Property will be removed, demolished or materially altered without Lender's prior written consent except that Mortgagor has the right to remove items of personal property comprising a part of the Property that become worn or obsolete, provided that such personal property is replaced with other personal property at least equal in value to the replaced personal property, free from any title retention device, security agreement or other encumbrance. Such replacement of personal property will be deemed subject to the security interest created by this Security Instrument. Mortgagor will not partition or subdivide the Property without Lender's prior written consent.

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Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time and frequency for the purpose of inspecting, valuating, or appraising the Property. Lender will give Mortgagor notice at the time of or before an on-site inspection, valuation, or appraisal for on-going due diligence or otherwise specifying a reasonable purpose. Any inspection, valuation or appraisal of the Property will be entirely for Lender's benefit and Mortgagor will in no way rely on Lender's inspection, valuation or appraisal for its own purpose, except as otherwise provided by law.

**15. AUTHORITY TO PERFORM.** If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Mortgagor appoints Lender as attorney in fact to sign Mortgagor's name or pay any amount necessary for performance. Lender's right to perform for Mortgagor will not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.

**16. ASSIGNMENT OF LEASES AND RENTS.** Mortgagor assigns, grants, bargains, conveys and mortgages to Lender as additional security all the right, title and interest in the following (Property).

A. Existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including but not limited to any extensions, renewals, modifications or replacements (Leases).

B. Rents, issues and profits, including but not limited to security deposits, minimum rents, percentage rents, additional rents, common area maintenance charges, parking charges, real estate taxes, other applicable taxes, insurance premium contributions, liquidated damages following default, cancellation premiums, "loss of rents" insurance, guest receipts, revenues, royalties, proceeds, bonuses, accounts, contract rights, general intangibles, and all rights and claims which Mortgagor may have that in any way pertain to or are on account of the use or occupancy of the whole or any part of the Property (Rents).

In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Mortgagor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed. Mortgagor may collect, receive, enjoy and use the Rents so long as Mortgagor is not in default. Mortgagor will not collect in advance any Rents due in future lease periods, unless Mortgagor first

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obtains Lender's written consent. Upon default, Mortgagor will receive any Rents in trust for Lender and Mortgagor will not commingle the Rents with any other funds. When Lender so directs, Mortgagor will endorse and deliver any payments of Rents from the Property to Lender. Amounts collected will be applied at Lender's discretion to the Secured Debts, the costs of managing, protecting, valuating, appraising and preserving the Property, and other necessary expenses. Mortgagor agrees that this Security Instrument is immediately effective between Mortgagor and Lender. As long as this Assignment is in effect, Mortgagor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants. Mortgagor, at its sole cost and expense, will keep, observe and perform, and require all other parties to the Leases to comply with the Leases and any applicable law. If Mortgagor or any party to the Lease defaults or fails to observe any applicable law, Mortgagor will promptly notify Lender. If Mortgagor neglects or refuses to enforce compliance with the terms of the Leases, then Lender may, at Lender's option, enforce compliance. Mortgagor will not sublet, modify, extend, cancel, or otherwise alter the Leases, or accept the surrender of the Property covered by the Leases (unless the Leases so require) without Lender's consent. Mortgagor will not assign, compromise, subordinate or encumber the Leases and Rents without Lender's prior written consent. Lender does not assume or become liable for the Property's maintenance, depreciation, or other losses or damages when Lender acts to manage, protect or preserve the Property, except for losses and damages due to Lender's gross negligence or intentional torts. Otherwise, Mortgagor will indemnify Lender and hold Lender harmless for all liability, loss or damage that Lender may incur when Lender opts to exercise any of its remedies against any party obligated under the Leases.

**17. DEFAULT.** Mortgagor will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

**A. Payments.** Mortgagor or Borrower fail to make a payment in full when due.

**B. Insolvency or Bankruptcy.** The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Mortgagor, Borrower, or any co-signer, endorser, surety or guarantor of this Security Instrument or any other obligations Borrower has with Lender.

**C. Business Termination.** Mortgagor merges, dissolves, reorganizes, ends its business or existence, or a partner or majority owner dies or is declared legally incompetent.

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**D. Failure to Perform.** Mortgagor fails to perform any condition or to keep any promise or covenant of this Security Instrument.

**E. Other Documents.** A default occurs under the terms of any other document relating to the Secured Debts.

**F. Other Agreements.** Mortgagor is in default on any other debt or agreement Mortgagor has with Lender.

**G. Misrepresentation.** Mortgagor makes any verbal or written statement or provides any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

**H. Judgment.** Mortgagor fails to satisfy or appeal any judgment against Mortgagor.

**I. Forfeiture.** The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

**J. Name Change.** Mortgagor changes Mortgagor's name or assumes an additional name without notifying Lender before making such a change.

**K. Property Transfer.** Mortgagor transfers all or a substantial part of Mortgagor's money or property. This condition of default, as it relates to the transfer of the Property, is subject to the restrictions contained in the DUE ON SALE section.

**L. Property Value.** Lender determines in good faith that the value of the Property has declined or is impaired.

**M. Material Change.** Without first notifying Lender, there is a material change in Mortgagor's business, including ownership, management, and financial conditions.

**N. Erosion.** Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce or make possible the production of an agricultural commodity, as further explained in 7 CFR Part 1940. Subpart G, Exhibit M.

**O. Insecurity.** Lender determines in good faith that a material adverse change has occurred in Borrower's financial condition from the conditions set forth in Borrower's most recent financial statement before the date of this Security Instrument or that the prospect for payment or performance of the Secured Debts is impaired for any reason.

**18. REMEDIES.** On or after the occurrence of an Event of Default, Lender may use any and all remedies Lender has under state or federal law or in any document relating to the Secured Debts. Any amounts advanced on Mortgagor's behalf will be immediately due and may be added to the balance owing under the Secured Debts. Lender may make a claim for any and all insurance benefits or refunds that may be available on Mortgagor's default.

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Subject to any right to cure, required time schedules or any other notice rights Mortgagor may have under federal and state law, Lender may make all or any part of the amount owing by the terms of the Secured Debts immediately due and foreclose this Security Instrument in a manner provided by law upon the occurrence of an Event of Default or anytime thereafter.

All remedies are distinct, cumulative and not exclusive, and Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debts after the balance is due or is accelerated or after foreclosure proceedings are filed will not constitute a waiver of Lender's right to require full and complete cure of any existing default. By not exercising any remedy, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

**19. REDEMPTION.** The period of redemption after sale on foreclosure will be one year. Any agreement to extend the redemption period must be in writing.

**20. COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after the occurrence of an Event of Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement, valuation, appraisal or protection of Lender's rights and remedies under this Security Instrument or any other document relating to the Secured Debts. Mortgagor agrees to pay expenses for Lender to inspect, value, appraise and preserve the Property and for any recordation costs of releasing the Property from this Security Instrument. Expenses include, but are not limited to, reasonable attorneys' fees when you are a "regulated lender" under S.D.C.L. Section 54-3-14, as amended, court costs and other legal expenses and actual disbursements necessarily incurred. These expenses are due and payable immediately. If not paid immediately, these expenses will bear interest from the date of payment until paid in full at the highest interest rate in effect as provided for in the terms of the Secured Debts. In addition, to the extent permitted by the United States Bankruptcy Code, Mortgagor agrees to pay the reasonable attorneys' fees incurred by Lender to protect Lender's rights and interests in connection with any bankruptcy proceedings initiated by or against Mortgagor.

**21. ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment or a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to

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the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substance," "hazardous waste," "hazardous substance," or "regulated substance" under any Environmental Law.

Mortgagor represents, warrants and agrees that:

A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance has been, is, or will be located, transported, manufactured, treated, refined, or handled by any person on, under or about the Property, except in the ordinary course of business and in strict compliance with all applicable Environmental Law.

B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has not and will not cause, contribute to, or permit the release of any Hazardous Substance on the Property.

C. Mortgagor will immediately notify Lender if (1) a release or threatened release of Hazardous Substance occurs on, under or about the Property or migrates or threatens to migrate from nearby property; or (2) there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor will take all necessary remedial action in accordance with Environmental Law.

D. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor has no knowledge of or reason to believe there is any pending or threatened investigation, claim, or proceeding of any kind relating to (1) any Hazardous Substance located on, under or about the Property; or (2) any violation by Mortgagor or any tenant of any Environmental Law. Mortgagor will immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any such pending or threatened investigation, claim, or proceeding. In such an event, Lender has the right, but not the obligation, to participate in any such proceeding including the right to receive copies of any documents relating to such proceedings.

E. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are and will remain in full compliance with any applicable Environmental Law.

F. Except as previously disclosed and acknowledged in writing to Lender, there are no underground storage tanks, private dumps or open wells located on or under the Property and no such tank, dump or well will be added unless Lender first consents in writing.

G. Mortgagor will regularly inspect the Property, monitor the activities and operations on the Property, and confirm that all permits, licenses or approvals required by any applicable Environmental Law are obtained and complied with.

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H. Mortgagor will permit, or cause any tenant to permit, Lender or Lender's agent to enter and inspect the Property and review all records at any reasonable time to determine (1) the existence, location and nature of any Hazardous Substance on, under or about the Property; (2) the existence, location, nature, and magnitude of any Hazardous Substance that has been released on, under or about the Property; or (3) whether or not Mortgagor and any tenant are in compliance with applicable Environmental Law.

I. Upon Lender's request and at any time, Mortgagor agrees, at Mortgagor's expense, to engage a qualified environmental engineer to prepare an environmental audit of the Property and to submit the results of such audit to Lender. The choice of the environmental engineer who will perform such audit is subject to Lender's approval.

J. Lender has the right, but not the obligation, to perform any of Mortgagor's obligations under this section at Mortgagor's expense.

K. As a consequence of any breach of any representation, warranty or promise made in this section, (1) Mortgagor will indemnify and hold Lender and Lender's successors or assigns harmless from and against all losses, claims, demands, liabilities, damages, cleanup, response and remediation costs, penalties and expenses, including without limitation all costs of litigation, which Lender and Lender's successors or assigns may sustain; and (2) at Lender's discretion, Lender may release this Security Instrument and in return Mortgagor will provide Lender with collateral of at least equal value to the Property without prejudice to any of Lender's rights under this Security Instrument.

L. Notwithstanding any of the language contained in this Security Instrument to the contrary, the terms of this section will survive any foreclosure or satisfaction of this Security Instrument regardless of any passage of title to Lender or any disposition by Lender of any or all of the Property. Any claims and defenses to the contrary are hereby waived.

**22. CONDEMNATION.** Mortgagor will give Lender prompt notice of any pending or threatened action by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Mortgagor authorizes Lender to intervene in Mortgagor's name in any of the above described actions or claims. Mortgagor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds will be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

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**23. INSURANCE.** Mortgagor agrees to keep the Property insured against the risks reasonably associated with the Property. Mortgagor will maintain this insurance in the amounts Lender requires. This insurance will last until the Property is released from this Security Instrument. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debts. Mortgagor may choose the insurance company, subject to Lender's approval, which will not be unreasonably withheld.

All insurance policies and renewals shall include a standard "mortgage clause" (or "lender loss payable clause") endorsement that names Lender as "mortgagee" and "loss payee". If required by Lender, all insurance policies and renewals will also include an "additional insured" endorsement that names Lender as an "additional insured". If required by Lender, Mortgagor agrees to maintain comprehensive general liability insurance and rental loss or business interruption insurance in amounts and under policies acceptable to Lender. The comprehensive general liability insurance must name Lender as an additional insured. The rental loss or business interruption insurance must be in an amount equal to at least coverage of one year's debt service, and required escrow account deposits (if agreed to separately in writing).

Mortgagor will give Lender and the insurance company immediate notice of any loss. All insurance proceeds will be applied to restoration or repair of the Property or to the Secured Debts, at Lender's option. If Lender acquires the Property in damaged condition, Mortgagor's rights to any insurance policies and proceeds will pass to Lender to the extent of the Secured Debts.

Mortgagor will immediately notify Lender of cancellation or termination of insurance. If Mortgagor fails to keep the Property insured, Lender may obtain insurance to protect Lender's interest in the Property and Mortgagor will pay for the insurance on Lender's demand. Lender may demand that Mortgagor pay for the insurance all at once, or Lender may add the insurance premiums to the balance of the Secured Debts and charge interest on it at the rate that applies to the Secured Debts. This insurance may include lesser or greater coverages than originally required of Mortgagor, may be written by a company other than one Mortgagor would choose, and may be written at a higher rate than Mortgagor could obtain if Mortgagor purchased the insurance. Mortgagor acknowledges and agrees that Lender or one of Lender's affiliates may receive commissions on the purchase of this insurance.

**24. ESCROW FOR TAXES AND INSURANCE.** Mortgagor will not be required to pay to Lender funds for taxes and insurance in escrow.

**25. WAIVERS.** Except to the extent prohibited by law, Mortgagor waives all appraisement and homestead exemption rights relating to the Property.

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**26. COLLATERAL REAL ESTATE MORTGAGE.** THE PARTIES AGREE THAT THIS MORTGAGE CONSTITUTES A COLLATERAL REAL ESTATE MORTGAGE PURSUANT TO THE SDCL 44-8-26.

**27. CROPS; TIMBER; MINERALS; RENTS, ISSUES, AND PROFITS.** Mortgagor gives to Lender a security interest in all crops, timber, and minerals located on the Property as well as all rents, issues and profits of them including, but not limited to, all Conservation Reserve Program (CRP) and Payment in Kind (PIK) payments and similar governmental programs (all of which shall also be included in the term Property).

**28. APPLICABLE LAW.** This Security Instrument is governed by the laws of South Dakota, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

**29. JOINT AND INDIVIDUAL LIABILITY AND SUCCESSORS.** Each Mortgagor's obligations under this Security Instrument are independent of the obligations of any other Mortgagor. Lender may sue each Mortgagor individually or together with any other Mortgagor. Lender may release any part of the Property and Mortgagor will still be obligated under this Security Instrument for the remaining Property. Mortgagor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Mortgagor's consent. Such a change will not release Mortgagor from the terms of this Security Instrument. The duties and benefits of this Security Instrument will bind and benefit the successors and assigns of Lender and Mortgagor.

**30. AMENDMENT, INTEGRATION AND SEVERABILITY.** This Security Instrument may not be amended or modified by oral agreement. No amendment or modification of this Security Instrument is effective unless made in writing and executed by Mortgagor and Lender. This Security Instrument and any other documents relating to the Secured Debts are the complete and final expression of the agreement. If any provision of this Security Instrument is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

**31. INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Security Instrument.

**32. NOTICE, ADDITIONAL DOCUMENTS AND RECORDING FEES.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by registered or certified mail, return receipt requested, to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Mortgagor will be deemed to be notice to all Mortgagors. Mortgagor will inform

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Lender in writing of any change in Mortgagor's name, address or other application information. Mortgagor will provide Lender any other, correct and complete information Lender requests to effectively mortgage or convey the Property. Mortgagor agrees to pay all expenses, charges and taxes in connection with the preparation and recording of this Security Instrument. Mortgagor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Mortgagor's obligations under this Security Instrument and to confirm Lender's lien status on any Property, and Mortgagor agrees to pay all expenses, charges and taxes in connection with the preparation and recording thereof. Time is of the essence.

**SIGNATURES.** By signing, Mortgagor agrees to the terms and covenants contained in this Security Instrument. Mortgagor also acknowledges receipt of a copy of this Security Instrument.

**MORTGAGOR:**

**B&B FARMS TRUST**

By B&B Farms Trust, Matthew Beck TTE Date 11-25-15  
MATTHEW A BECK as Trustee under the B&B FARMS TRUST, Trust, dated  
November 1, 1999

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**ACKNOWLEDGMENT.**

STATE OF SOUTH DAKOTA, COUNTY OF BROWN ss.

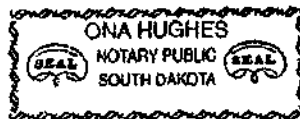
On this the 25th day of November 2015, before me, ONA HUGHES, the undersigned officer, personally appeared MATTHEW A BECK, who acknowledged himself/herself/themselves to be the Trustee of B&B FARMS TRUST, a Trust, and that he/she/they, as such Trustee, being authorized so to do, executed the foregoing instrument in the capacity therein stated and for the purposes therein contained.

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

My commission expires:

September 23, 2017

  
(Notary Public)  
ONA HUGHES



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**SCHEDULE A**

THE NORTH HALF OF THE SOUTHWEST QUARTER, THE SOUTHWEST QUARTER OF THE SOUTHWEST QUARTER, THE NORTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 14, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., EXCEPT THAT PORTION DEEDED FOR HIGHWAY PURPOSES AS CREATED IN BOOK 229 OF DEEDS, PAGE 437, INCLUDING BECK OUTLOT 1 IN THE SOUTHWEST QUARTER OF SECTION 14, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., ACCORDING TO THE PLAT THEREOF OF RECORD, BROWN COUNTY, SOUTH DAKOTA

THE SOUTHEAST QUARTER, THE SOUTHWEST QUARTER AND THE EAST HALF OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., EXCEPT THAT PORTION DEEDED FOR HIGHWAY PURPOSES AS CREATED IN BOOK 229 OF DEEDS, PAGE 437, BROWN COUNTY, SOUTH DAKOTA

THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER OF SECTION 16, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., BROWN COUNTY, SOUTH DAKOTA

THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 16, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., BROWN COUNTY, SOUTH DAKOTA

THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 16, TOWNSHIP 127 NORTH, RANGE 60 WEST OF THE 5<sup>TH</sup> P.M., BROWN COUNTY, SOUTH DAKOTA

101026072

# **GUARANTY** (Continuing Debt - Limited)

**DATE AND PARTIES.** The date of this Guaranty is November 26, 2015. The parties and their addresses are:

**LENDER:**

PLAINS COMMERCE BANK  
624 S Dakota Street  
Aberdeen, SD 57401  
Telephone: (605) 226-7543

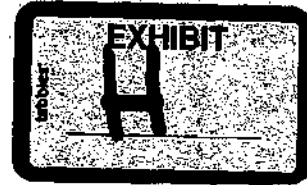
**BORROWER:**

MATTHEW A BECK  
10949 408TH AVE  
HECLA, SD 57446

KELLEY R BECK  
10949 408TH AVE  
HECLA, SD 57446

**GUARANTOR:**

B&B FARMS TRUST  
Dated November 1, 1909, a South Dakota Trust  
41044 108TH ST  
HECLA, SD 57446



**1. DEFINITIONS.** As used in this Guaranty, the terms have the following meanings:

- A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refers to the Lender.
- B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.
- D. Loan. "The Loan" refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction.
- E. Loan Documents. "Loan Documents" refer to all the documents executed as a part of or in connection with the Loan.

**2. SPECIFIC AND FUTURE DEBT GUARANTY.** For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion of themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 101026072, dated November 26, 2015, from MATTHEW A BECK and KELLEY R BECK (Borrower) to you, in the amount of \$1,865,000.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

My liability will not exceed \$800,000.00 of the principal amount outstanding at default, plus accrued interest, attorneys' fees and collection costs, when allowed by law, and all other costs, fees and expenses agreed to be paid under all agreements evidencing the Debt and securing the payment of the Debt. You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

**3. EXTENSIONS.** I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

**4. UNCONDITIONAL LIABILITY.** I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

**5. BANKRUPTCY.** If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or

B&B FARMS TRUST  
South Dakota Guaranty  
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imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

**8. REVOCATION.** I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect my obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

**7. SECURITY.** This Guaranty is secured by Property described in these security instruments or agreements: MORTGAGE DATED 11-25-2015.

**6. LIMITATIONS ON CROSS-COLLATERALIZATION.** The cross-collateralization clause on any existing or future loan is void and ineffective as to the Loan, including any extension or refinancing.

The Loan is not secured by a previously executed security instrument if a non-possessory, non-purchase money security interest is created in "household goods" in connection with a "consumer loan," as those terms are defined by federal law governing unfair and deceptive credit practices. The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Real Estate Settlement Procedures Act, (Regulation X), that are required for loans secured by the Property or if, as a result, the other debt would become subject to Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

The Loan is not secured by a previously executed security instrument if you fail to fulfill any necessary requirements or fail to conform to any limitations of the Truth in Lending Act, (Regulation Z), that are required for loans secured by the Property.

**9. PROPERTY.** I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

**10. DEFAULT.** I will be in default if any of the following events (known separately and collectively as an Event of Default) occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Business Termination. I merge, dissolve, reorganize, and my business or existence, or a partner or majority owner dies or is declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Material Change. Without first notifying you, there is a material change in my business, including ownership, management, and financial conditions.

N. Erosion. Any loan proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetlands to produce or make possible the production of an agricultural commodity, as further explained in 7 CFR Part 1940, Subpart G, Exhibit M.

O. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

**11. WAIVERS AND CONSENT.** To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way effect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

**12. REMEDIES.** After the Borrower or I default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

F. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

**13. COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after the occurrence of an Event of Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

**14. WARRANTIES AND REPRESENTATIONS.** I make to you the following warranties and representations which will continue as long as this Guaranty is in effect:

A. Power. I am duly organized, and validly existing and in good standing in all jurisdictions in which I operate. I have the power and authority to enter into this transaction and to carry on my business or activity as it is now being conducted and, as applicable, am qualified to do so in each jurisdiction in which I operate.

B. Authority. The execution, delivery and performance of this Guaranty and the obligation evidenced by this Guaranty are within my powers, have been duly authorized, have received all necessary governmental approval, will not violate any provision of law, or order of court or governmental agency, and will not violate any agreement to which I am a party or to which I am or any of my Property is subject.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

**15. RELIANCE.** I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby, and that this Guaranty is given for a business purpose. I agree to rely exclusively on the right to revoke this Guaranty prospectively as to future transactions in the manner as previously described in this Guaranty if at any time, in my opinion or the opinion of the directors or officers of my business, the benefits then being received by me in connection with this Guaranty are not sufficient to warrant the continuance of this Guaranty. You may rely conclusively on a continuing warranty that I continue to be benefited by this Guaranty and you will have no duty to inquire into or confirm the receipt of any such benefits, and this Guaranty will be effective and enforceable by you without regard to the receipt, nature or value of any such benefits.

**16. APPLICABLE LAW.** This Guaranty is governed by the laws of South Dakota, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

**17. AMENDMENT, INTEGRATION AND SEVERABILITY.** This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty and the other Loan Documents are the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

**18. ASSIGNMENT.** If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

**19. INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

B&B FARMS TRUST

South Dakota Guaranty

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20. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any correct and complete financial statements or other information you request. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

21. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

22. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

**GUARANTOR:**

B&B FARMS TRUST

By Matthew Beck TTE of B+B Farms Trust Date 11-25-15 (Seal)  
MATTHEW A BECK as Trustee under the B&B FARMS TRUST, Trust, dated November 1, 1989

**LENDER:**

Plains Commerce Bank

By Lance Vilhauer Date 11-25-15 (Seal)  
Lance Vilhauer, Business Banker



1 STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 ) SS  
 2 COUNTY OF BROWN ) FIFTH JUDICIAL CIRCUIT

3 \* \* \* \* \*

4 PLAINS COMMERCE BANK, ) CIV. 18-55  
 ) Plaintiff, )  
 5 ) MOTIONS HEARING  
 )

6 -vs- )

7 MATTHEW A. BECK, a married person; )  
 8 KELLEY R. BECK, a married person; )  
 9 MATTHEW A. BECK, Trustee of the B&B )  
 10 FARMS TRUST, u/t/a November 1, 1999; )  
 11 BROWN COUNTY, a governmental )  
 12 instrumentality of the State of )  
 13 South Dakota; MARSHALL COUNTY, a )  
 14 governmental instrumentality of the )  
 15 State of South Dakota; )  
 16 DEERE & COMPANY, a corporation, )

17 Defendants, )

18 -and- )

19 JAMIE MOECKLY, )

20 Intervenor. )

21 \* \* \* \* \*

22 DATE & TIME: July 31, 2020  
 23 1:53 p.m.

24 BEFORE: THE HONORABLE SCOTT P. MYREN  
 25 CIRCUIT COURT JUDGE  
 Brown County Courthouse  
 Aberdeen, South Dakota 57401

LOCATION: Brown County Circuit Courtroom  
 Brown County Courthouse  
 Aberdeen, South Dakota 57401

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1 APPEARANCES:

FOR PLAINTIFF:

2

REED RASMUSSEN, ESQ.

3

Siegel, Barnett & Schutz, LLP

415 S. Main St., 400 Capitol Bldg

4

PO Box 490

Aberdeen, SD 57402-0490

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FOR DEFENDANT B&B FARMS TRUST:

6

THOMAS P. TONNER, ESQ.

7

Richards, Tonner, Oliver & Fischbach

404 S. Lincoln Street

8

PO Box 1456

Aberdeen, SD 57402-1456

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10

FOR INTERVENOR:

11

JOSHUA G. WUGLER, ESQ.

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Bantz, Gosch & Cremer

PO Box 970

Aberdeen, SD 57401

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<p style="text-align: right;">3</p> <p>1 THE COURT: So we're on the record. This is civil file</p> <p>2 18-55, <i>Plains Commerce Bank v. Matthew Beck, Kelley Beck,</i></p> <p>3 <i>Matthew Beck as trustee, B&amp;B Farms, Brown County,</i></p> <p>4 <i>Marshall County, and Deere &amp; Company.</i> I don't have that many</p> <p>5 people in the courtroom, so I'm going to let you identify who</p> <p>6 you are and who you're representing.</p> <p>7 You may start, Mr. Rasmussen.</p> <p>8 MR. RASMUSSEN: Reed Rasmussen representing the plaintiff</p> <p>9 Plains Commerce Bank.</p> <p>10 MR. WURGLER: Your Honor, Josh Wurgler representing</p> <p>11 Jamie Moeckly who is intervenor on behalf of the trust.</p> <p>12 THE COURT: Is there anyone -- Mr. Tonner.</p> <p>13 MR. TONNER: I represent the trustee, Dacotah Bank.</p> <p>14 THE COURT: Anyone else that was expecting to, or here to</p> <p>15 represent a party? Okay. Those are the three that are here.</p> <p>16 So we've got cross motions for summary judgment. That's</p> <p>17 my understanding of what we're here for today. I have read</p> <p>18 through everything that everyone submitted. I've tried to be</p> <p>19 diligent about getting through it all, but I'm more than happy</p> <p>20 to listen to arguments that you might have. You don't --</p> <p>21 don't feel obliged to repeat every argument you made in your</p> <p>22 briefs. I have read through them all, but to the extent that</p> <p>23 you want to try to point out some of your thoughts on the case</p> <p>24 to me. I see in the briefs that theories develop over time,</p> <p>25 also, so -- and we got one last night, so there may be</p>	<p style="text-align: right;">5</p> <p>1 extent our responses to the other side's statement of</p> <p>2 undisputed material facts, there really are not any undisputed</p> <p>3 material facts. I mean, the facts are that Matthew Beck got</p> <p>4 this mortgage, that intervenor and the other beneficiaries all</p> <p>5 signed that consent to mortgage form. And, you know, Plains</p> <p>6 Commerce --</p> <p>7 THE COURT: Do you think that there is a factual dispute</p> <p>8 over whether the money that Matthew was securing by the</p> <p>9 mortgage was debt of the estate?</p> <p>10 MR. RASMUSSEN: Well, his mother testified that there was</p> <p>11 some money from the trust that was part of the mortgage. The</p> <p>12 only, the only thing that the other side has raised in</p> <p>13 opposition to that is the promissory notes themselves, which</p> <p>14 are clearly to Matthew and his wife.</p> <p>15 THE COURT: So do you think there is a factual dispute?</p> <p>16 MR. RASMUSSEN: I don't think there is a -- no, I don't</p> <p>17 think there is a material factual dispute that should preclude</p> <p>18 summary judgment for either, frankly, for either side.</p> <p>19 THE COURT: Okay. Go ahead.</p> <p>20 MR. RASMUSSEN: You know, the first issue has to do with</p> <p>21 paragraphs 4.1 and 6.2 of the trust agreement. That issue has</p> <p>22 been fully briefed. We think that those portions of the trust</p> <p>23 do allow for the mortgage to have occurred. We don't believe</p> <p>24 the spendthrift trust prohibits that. And, again, that's been</p> <p>25 fully briefed. I'm not going to go through all of that here</p>
<p style="text-align: right;">4</p> <p>1 continuing development that you may want to expound upon. So</p> <p>2 whatever you have to say.</p> <p>3 I'm just going to start with Mr. Rasmussen. You may</p> <p>4 address both motions since they're cross. I'll give you each</p> <p>5 all the chances that you need to address the Court before I</p> <p>6 proceed.</p> <p>7 And, Mr. Tonner, you weren't intending to address the</p> <p>8 Court?</p> <p>9 MR. TONNER: That's correct, Your Honor.</p> <p>10 THE COURT: Okay. Go ahead, Mr. Rasmussen.</p> <p>11 MR. RASMUSSEN: Thank you, Your Honor. Josh and I were</p> <p>12 talking before we started, and we think we have two hours set</p> <p>13 aside. I can assure you we will not be here two hours from</p> <p>14 now.</p> <p>15 THE COURT: Well, my court reporter will tell you that you</p> <p>16 have one hour set aside --</p> <p>17 MR. RASMUSSEN: Oh, okay. Well, that's fine.</p> <p>18 THE COURT: -- and that she is anticipating leaving before</p> <p>19 that hour is done.</p> <p>20 MR. RASMUSSEN: And I'm good with that, too. So...</p> <p>21 As the Court indicated, there has been substantial</p> <p>22 briefing. And I know you always read everything, so I don't</p> <p>23 intend to go over everything. I just want to hit some of the</p> <p>24 high points or low points, I guess.</p> <p>25 First of all, although we've both clarified to a certain</p>	<p style="text-align: right;">6</p> <p>1 today.</p> <p>2 It appears from the briefing that the intervenor's main</p> <p>3 arguments against applications of those two portions of the</p> <p>4 trust is that the mortgage did not benefit the trust and that</p> <p>5 it represented improper self-dealing on Matthew's part.</p> <p>6 But the mortgage clearly did benefit the trust. The</p> <p>7 Plains Commerce mortgage, which is limited to \$800,000,</p> <p>8 resulted in the satisfaction of two prior mortgages that</p> <p>9 encumbered the trust property in favor of Legendary Loan Link</p> <p>10 totalling \$1,789,000. So clearly there was benefit to the</p> <p>11 trust through this whole process.</p> <p>12 Probably more importantly, it was the goal of Gary and</p> <p>13 Betty Beck to preserve the family farm and to provide</p> <p>14 themselves with income in their old age. Matthew was the</p> <p>15 child who returned home to help them achieve that goal.</p> <p>16 Matthew undertook his own debt when he came in, bought some</p> <p>17 property from the trust, and satisfied some debt for the trust</p> <p>18 or for his parents in connection with that transaction.</p> <p>19 The testimony of the intervenor as to why she signed the</p> <p>20 consent form is, in my mind, particularly telling. She</p> <p>21 stated, "It seemed my parents weren't receiving any income at</p> <p>22 the time, and I thought that if Matthew was able to get back</p> <p>23 on his feet, then we'll get things straightened out."</p> <p>24 I mean, that was the whole -- the whole deal here is that</p> <p>25 they were trying to save the land, save the farm, save the</p>

<p style="text-align: right;">7</p> <p>1 family farm, save the trust, and that, that's why she signed</p> <p>2 on to do that very thing that her parents wanted done and what</p> <p>3 her brothers wanted. The intervenor was perfectly content to</p> <p>4 allow Plains Commerce to loan substantial money to Matthew</p> <p>5 secured, some of which was secured by trust land, when she</p> <p>6 thought it was going to benefit the trust, but when Matthew</p> <p>7 defaulted, she contends Plains Commerce should have to take an</p> <p>8 \$800,000 loss.</p> <p>9 Beyond paragraphs 4.1 and 6.2 of the trust, there are</p> <p>10 several other reasons the mortgage should be upheld. Even if</p> <p>11 it was determined that these paragraphs did not permit the</p> <p>12 mortgage, the consents signed by all the beneficiaries altered</p> <p>13 the trust pursuant to article 3 so as to allow the mortgage.</p> <p>14 Going beyond the terms of the trust, we have SDCL 55-2-3.</p> <p>15 That statute provides several exceptions to the general rule</p> <p>16 that a trustee cannot take an action adverse to the intents --</p> <p>17 interests of a beneficiary. That statute has four exceptions</p> <p>18 -- or excuse me. It has four exceptions, but in this case,</p> <p>19 the applicable one is subparagraph 1, and that subparagraph</p> <p>20 has four requirements.</p> <p>21 Number one, the beneficiary has the capacity to contract.</p> <p>22 I don't think there is any issue that all the beneficiaries in</p> <p>23 this case had the capacity to contract, the ones who signed</p> <p>24 the consent form.</p> <p>25 Number two, the beneficiary has full knowledge of</p>	<p style="text-align: right;">9</p> <p>1 that there was or would be a mortgage.</p> <p>2 There is absolutely no reason she could not have refused</p> <p>3 to sign the consent before she reviewed the trust and the</p> <p>4 mortgage. She had, she took the -- she refused to sign the</p> <p>5 consent to sell document on an earlier occasion. And so she</p> <p>6 had every right or opportunity at that time to say, "Hey, I'm</p> <p>7 not going to sign anything until I get a chance to look at</p> <p>8 this trust agreement and the mortgage." But she didn't do</p> <p>9 that.</p> <p>10 The only thing she did, according to her testimony, is</p> <p>11 that she left -- she sent an e-mail to Danny Smeins and left</p> <p>12 two voicemails at his office, or maybe messages with his</p> <p>13 secretary. I can't remember exactly what she said. But she</p> <p>14 never talked to Mr. Smeins directly. There is absolutely no</p> <p>15 evidence in the record that Mr. Smeins was instructed not to</p> <p>16 give her a copy of the trust or that he refused to do so.</p> <p>17 I've dealt with Mr. Smeins in the past. He doesn't always</p> <p>18 return the first call or the first e-mail. She didn't follow</p> <p>19 up despite the fact that her son and husband told her, "You</p> <p>20 probably shouldn't sign this until you look at the trust," but</p> <p>21 she didn't do that.</p> <p>22 The situation is just like the cases where a person tries</p> <p>23 to get out of a contract because they didn't read it. The</p> <p>24 only way that defense prevails is if the party can establish</p> <p>25 they were defrauded. There is no claim of fraud here. There</p>
<p style="text-align: right;">8</p> <p>1 trustee's motives. Again, there is really, there is no issue</p> <p>2 there. The consent form itself said that this is for Matthew</p> <p>3 to secure his loan and that it acknowledged that this is, will</p> <p>4 benefit him and not necessarily the other beneficiaries.</p> <p>5 Number three, the beneficiary has full knowledge of all</p> <p>6 other facts concerning the transaction which might affect his</p> <p>7 or her decision. That one is in dispute. I'm going to come</p> <p>8 back to that in just a second.</p> <p>9 The fourth factor is absence of influence on the part of</p> <p>10 the trustee. There is absolutely no evidence in this case</p> <p>11 that the trustee influenced the intervenor with regard to</p> <p>12 this, the consent to mortgage document. If I recall, I</p> <p>13 believe her testimony was she never talked to him about it.</p> <p>14 So there is absolutely nothing to indicate that that would</p> <p>15 preclude the application of subparagraph one.</p> <p>16 So then all we're left with is the third factor or third</p> <p>17 element set forth in subparagraph one. The intervenor argues</p> <p>18 that that statute doesn't apply because she did not have full</p> <p>19 knowledge because she didn't receive a copy of the trust</p> <p>20 agreement or the mortgage before signing the consent form.</p> <p>21 But she knew there was a trust. She learned of it when</p> <p>22 Danny Smeins talked to her about signing the consent to sell</p> <p>23 document, which she declined to sign. And then she knew that</p> <p>24 there was a mortgage because the consent to mortgage document,</p> <p>25 obviously that's what it said, and then it said right in there</p>	<p style="text-align: right;">10</p> <p>1 is no claim that anybody tricked her into signing this</p> <p>2 consent. I mean, she says the reason she signed it was to</p> <p>3 save the farm and because she thought it would improve the</p> <p>4 relationship with her parents. Well, certainly Plains</p> <p>5 Commerce shouldn't be responsible for that. She's fully</p> <p>6 testified or acknowledged in her first deposition that she</p> <p>7 voluntarily signed that consent form.</p> <p>8 The intervenor now wants to contend that SDCL 55-2-3(1)</p> <p>9 shouldn't apply because she voluntarily did not pursue</p> <p>10 obtaining the additional evidence that she now says she</p> <p>11 needed. Plains Commerce shouldn't be prejudiced because she</p> <p>12 stuck her head in the sand and didn't do that.</p> <p>13 Moving on then -- well, that SDCL 55-2-3 just simply</p> <p>14 provides additional support in favor of Plains Commerce's</p> <p>15 motion in summary judgment.</p> <p>16 We also have arguments in the briefs regarding the</p> <p>17 certificate of trust in connection with SDCL 55-4-53 and</p> <p>18 55-4-54, as well as paragraph 5.8 of the trust, which allows,</p> <p>19 which says that somebody relying on an instrument signed by</p> <p>20 the trustee doesn't have to do any further investigation. I'm</p> <p>21 not going to -- those have been briefed. I'll just rely on</p> <p>22 the brief as far as those issues are concerned.</p> <p>23 But, in summary, all the beneficiaries wanted Matthew to</p> <p>24 be successful, which would benefit the trust as well as</p> <p>25 benefitting Gary and Betty. Plains Commerce proceeded in good</p>

<p style="text-align: right;">11</p> <p>1 faith and obtained the consent of the beneficiaries, even</p> <p>2 though under the 6.2, the only consent that was required would</p> <p>3 have been the consent of Betty and Gary. But they got the</p> <p>4 consent of all the beneficiaries to allow a portion of the</p> <p>5 trust land to be used as collateral. It wasn't until things</p> <p>6 did not go well, as well as hoped with the farming operation</p> <p>7 that the intervenor alone decided to attack the mortgage. If</p> <p>8 anyone is being defrauded in this case, it's the bank on which</p> <p>9 for summary judgment should be granted and the intervenor's</p> <p>10 motion denied.</p> <p>11 THE COURT: So I'm going to step back a little bit and ask</p> <p>12 you a hypothetical that may seem really simple and straight</p> <p>13 forward, and hopefully that's the answer, too.</p> <p>14 So if there was a trust created and included real estate,</p> <p>15 and a specific provision of the trust says "no one can build</p> <p>16 anything on this land," can the beneficiaries agree to build</p> <p>17 something on the land? Can they consent to something that is</p> <p>18 specifically prohibited by the trust agreement?</p> <p>19 MR. RASMUSSEN: I think under 55-2-3, you know, that</p> <p>20 provides that the trustee can take actions adverse to the</p> <p>21 beneficiary, basically to the beneficiaries if they all agree</p> <p>22 to it. And I, I think -- yeah, I think that could be done.</p> <p>23 If all the beneficiaries consented to that thing being built</p> <p>24 on the trust land even though the trust said it couldn't be</p> <p>25 done, I think that statute would allow it.</p>	<p style="text-align: right;">13</p> <p>1 provisions are simply, under the very definition, not a power</p> <p>2 of appointment, and they don't meet any of the qualifications</p> <p>3 that are required by article 8. And that's all been briefed,</p> <p>4 Your Honor, so I won't rehash that.</p> <p>5 Mr. Rasmussen, in both his brief and today, has mentioned</p> <p>6 that he feels the mortgage did benefit the trust. And,</p> <p>7 Your Honor, what really happened here is that one violation of</p> <p>8 the trust agreement was replaced by a second violation of the</p> <p>9 trust agreement. If Matt had, prior to the dealing with the</p> <p>10 bank in this case, signed over the trust land to secure</p> <p>11 another personal mortgage with somebody else, nobody in this</p> <p>12 case apparently knew about that at the time. And so --</p> <p>13 THE COURT: You're talking about the Legendary Loan?</p> <p>14 MR. WURGLER: The Legendary Loan, yep. And so we'd</p> <p>15 probably be in the same position if that had all come to light</p> <p>16 and come crashing down in foreclosure back then, but what</p> <p>17 happened was the bank here chose to basically bail Legendary</p> <p>18 Loan out and step into its shoes and commit its own violation</p> <p>19 of this trust.</p> <p>20 Now, in answer to your hypothetical, Your Honor, a trust</p> <p>21 document is almost sacrosanct. When you take your property</p> <p>22 that you have absolute control and ownership over and you put</p> <p>23 it in trust, giving up control and ownership over that to the</p> <p>24 trustee, you want to be very sure what you're doing. You want</p> <p>25 to be very sure that you have circumscribed the limits on that</p>
<p style="text-align: right;">12</p> <p>1 THE COURT: Okay. Thank you. Anything else?</p> <p>2 MR. RASMUSSEN: No, Your Honor. Thank you.</p> <p>3 MR. WURGLER: Thank you, Your Honor. I'll keep it brief</p> <p>4 as well.</p> <p>5 I'd like to just address a point Mr. Rasmussen raised in</p> <p>6 his reply with regard to the power of appointment. And he</p> <p>7 pointed out that the definition of power of appointment that</p> <p>8 we should be looking at is found in SDCL 29A-1-201(36) as that</p> <p>9 was the statute in place at the time the trust was created</p> <p>10 that had a definition of power of appointment. And that being</p> <p>11 important because, obviously, section 8 of the trust says that</p> <p>12 if there is a power of appointment, that can be exercised to</p> <p>13 some extent contrary to what is said in article 8 about</p> <p>14 forbidding spendthrift transfers.</p> <p>15 And I'd like to read that statute for Your Honor just to</p> <p>16 demonstrate that even if that is a statute we apply, it still</p> <p>17 does not help the bank in this case. It says, "Power of</p> <p>18 appointment means a power to vest absolute ownership in the</p> <p>19 property subject to the power, whether or not the powerholder</p> <p>20 then had capacity to exercise the power." And it goes on and</p> <p>21 discusses a further clarification with general power of</p> <p>22 appointment, et cetera.</p> <p>23 But the point being, the power of appointment vests</p> <p>24 absolute ownership in someone else. If you exercise it,</p> <p>25 you're vesting absolute ownership. And the article 6.2</p>	<p style="text-align: right;">14</p> <p>1 trustee's power, you want to be sure that you've explained</p> <p>2 what that trustee's power is. Because if, in a case like</p> <p>3 this, you're dealing with your own farmland or farmland that's</p> <p>4 been in the family for a long time, you want to be sure that's</p> <p>5 not going to get foreclosed on by a bank, sold off to somebody</p> <p>6 who has no connection or concern over this land.</p> <p>7 And the grantors in this case, Gary and Betty,</p> <p>8 specifically noted the article 8 protection so that that</p> <p>9 circumstance, so that the circumstances we're in today would</p> <p>10 not come about. And because that provision was violated by</p> <p>11 both the bank and by Matt, we're here today with the trust</p> <p>12 land at risk of being sold to somebody who doesn't care about</p> <p>13 it. And that's the whole --</p> <p>14 THE COURT: So let me stop you for a minute. So you'll</p> <p>15 notice my hypothetical didn't include, did not include a</p> <p>16 spendthrift trust provision. So just dealing with just the</p> <p>17 hypothetical that I asked Mr. Rasmussen about, trust created,</p> <p>18 land, real estate put in there, trust provisions specifically</p> <p>19 say you may not build any buildings on this land. All of the</p> <p>20 beneficiaries, primary and secondary, agree and consent to</p> <p>21 build a building on the land. Can they do it?</p> <p>22 MR. WURGLER: Legally, no. But as you know, Your Honor, I</p> <p>23 mean, people enter into agreements that don't find their way</p> <p>24 into court all the time. Can they do it? Sure, they could</p> <p>25 try to do it. But if somebody wanted to object, they'd have</p>

<p style="text-align: right;">15</p> <p>1 recourse in a court of law, which is exactly why we have the</p> <p>2 protections we have with trusts and with modifying trusts,</p> <p>3 altering or amending them because the trust grants rights to</p> <p>4 people, both current and future, and the people who have an</p> <p>5 interest in those rights must have an opportunity to be heard.</p> <p>6 They have to have full information as to the nature of the</p> <p>7 transaction, what their right are, how this is going to</p> <p>8 prejudice them.</p> <p>9 And I'd further note, Your Honor, in 2015 we had in effect</p> <p>10 in our statutes SDCL 55-3-5. The current version, which was</p> <p>11 modified in 2017, is a little bit different. But I'll read</p> <p>12 you the portion that was in effect in 2015. It says, "A</p> <p>13 trustee must fulfill the purposes of the trust as declared at</p> <p>14 its creation or as subsequently amended, and must follow all</p> <p>15 the directions of the trustor given at that time, except as,</p> <p>16 except as modified by the consent of all parties interested</p> <p>17 and upon approval by the court."</p> <p>18 We have a court protection put into place here if you want</p> <p>19 to modify, alter, or amend the trust. There is nothing</p> <p>20 difficult about pursuing that option. There is nothing</p> <p>21 difficult about trying to say, okay, Matt has got a certain</p> <p>22 amount of debt, we think that some of this is related to the</p> <p>23 trust, let's get all the beneficiaries together and say "Here</p> <p>24 is debt that belongs to the trust. Can we all consent --</p> <p>25 after fully informing everybody of the nature of the</p>	<p style="text-align: right;">17</p> <p>1 characterization of the consent as Jamie signing a contract</p> <p>2 and trying to get out of it claiming she didn't read it, that</p> <p>3 type of thing. We extensively noted in our statement of fact</p> <p>4 all the circumstances surrounding that, that consent form and</p> <p>5 how it got signed.</p> <p>6 That form, there was a lot of fog surrounding that form.</p> <p>7 It was not clearly disclosed to Jamie what was all involved</p> <p>8 with this mortgage, and it further wasn't disclosed to Jamie</p> <p>9 what the nature of the trust agreement was. The statute</p> <p>10 itself that the bank is relying on does not put the burden on</p> <p>11 Jamie to go and figure out what all of her rights and</p> <p>12 responsibilities are under the trust agreement. The gist of</p> <p>13 that statute, as I read it, is that the trustee who has an</p> <p>14 interest in the transaction, contrary to the benefit of the</p> <p>15 trust, has an obligation to fully disclose the information.</p> <p>16 Jamie did not see the trust, she didn't know what her rights</p> <p>17 were, and I think that forecloses on that argument,</p> <p>18 Your Honor.</p> <p>19 That's all I have. Thank you.</p> <p>20 THE COURT: Mr. Rasmussen, anything else?</p> <p>21 MR. RASMUSSEN: Yeah. Just on that last -- well, a couple</p> <p>22 things.</p> <p>23 The Legendary Loan Link, still I'm not hearing them saying</p> <p>24 that there wasn't a benefit to the trust because it, Plains</p> <p>25 Commerce stepped in and took out that loan, which there has</p>
<p style="text-align: right;">16</p> <p>1 transaction, can we all consent and get court approval that</p> <p>2 this irrevocable trust can be amended, altered, or modified in</p> <p>3 some manner?"</p> <p>4 So the protections, Your Honor, are these. If you're</p> <p>5 going to be modifying a trust, which it's anybody's right to</p> <p>6 attempt, you need to give notice, you need to be making sure</p> <p>7 everybody is fully informed, and you need to be, according to</p> <p>8 this statute, getting the court's blessing on that.</p> <p>9 I'd like to briefly address the 2007 certificate of trust</p> <p>10 that the bank is relying on. I went through, and I noticed --</p> <p>11 and I hope Mr. Rasmussen can correct me if I'm wrong, but I</p> <p>12 noticed that there is nothing even in the bank's statement of</p> <p>13 undisputed material fact relating to the 2007 certificate of</p> <p>14 trust. I don't think it's in there. I don't think that is a</p> <p>15 material fact that the bank can rely on here. One -- the</p> <p>16 second reason being, we don't know when the bank got the</p> <p>17 certificate of trust, who reviewed it, if they reviewed it.</p> <p>18 What we do know is that the bank did have the trust</p> <p>19 agreement in this case. It knew about article 8, sent it to</p> <p>20 its own counsel, and decided to proceed ahead using, in my</p> <p>21 mind, some risky, some risky interpretation of this trust.</p> <p>22 And, Your Honor, I don't -- Mr. Rasmussen raised 55-2-3,</p> <p>23 the exception about getting permission to do something. We've</p> <p>24 already briefed that, so I won't address that.</p> <p>25 And I will, finally, Your Honor, disagree with the</p>	<p style="text-align: right;">18</p> <p>1 been no determination in any court, nobody has ever challenged</p> <p>2 that, that loan. And I'm not saying that they even knew about</p> <p>3 it. I'm not claiming they did. But --</p> <p>4 THE COURT: Explain for me your understanding of who</p> <p>5 created that loan and for what purpose.</p> <p>6 MR. RASMUSSEN: My understanding is Matthew went to</p> <p>7 Legendary Loan Link. And it's a private lender and --</p> <p>8 THE COURT: As the trustee or as an individual?</p> <p>9 MR. RASMUSSEN: Both.</p> <p>10 THE COURT: Okay.</p> <p>11 MR. RASMUSSEN: The documents are signed by him just</p> <p>12 individually and as trustee for the trust. And, you know, the</p> <p>13 debt was \$1.7 million or something thereabouts. And, you</p> <p>14 know, Plains Commerce got that. I mean, they were careful</p> <p>15 enough in saying, you know -- they did, I mean, they obviously</p> <p>16 looked at it and said, you know, I think they had questions</p> <p>17 that that was the right way to proceed, so they went and got</p> <p>18 the consents and, you know, reduced the trust obligation to</p> <p>19 \$800,000.</p> <p>20 But, again, I can't accept the argument that somebody who</p> <p>21 knows there is a trust and is told you better look at that</p> <p>22 trust, knows there is a mortgage, and they don't, they don't</p> <p>23 ask for it from the trustee, they don't do anything to pursue</p> <p>24 it other than leaving a phone message or sending an e-mail and</p> <p>25 not following up on it, can then come back after \$800,000 is</p>

<p style="text-align: right;">19</p> <p>1    loaned, which is truly benefitting that trust, come back three</p> <p>2    years later when, unfortunately, somebody defaults and say,</p> <p>3    "Hey, you know, king's ax, I should have never signed it</p> <p>4    because now things are going down the tubes, so the bank</p> <p>5    should take the loss." I don't think that's what the law</p> <p>6    provides.</p> <p>7        THE COURT: Anything else?</p> <p>8        MR. RASMUSSEN: No, Your Honor. Thank you.</p> <p>9        THE COURT: Anything else?</p> <p>10       MR. WURGLER: Just one last thing, Your Honor.</p> <p>11       In the event -- I just want to get this out there. In the</p> <p>12    event the Court decides against the intervenor, I think there</p> <p>13    are some further issues that would need to be worked out here,</p> <p>14    such as: What amount is still outstanding on this loan? How</p> <p>15    do we address the bank having taken pretty much all of the</p> <p>16    income from the trust for a number of years now? Over</p> <p>17    \$100,000, maybe up to \$200,000. I don't have the exact</p> <p>18    number. But how does that play into all this? And so I just</p> <p>19    wanted to throw that out there, Your Honor, as just some</p> <p>20    further issues that we would need to work through. Thank you.</p> <p>21        THE COURT: So I'll take it under advisement. I'll get</p> <p>22    you a decision as quickly as I can. I'm not prepared to do it</p> <p>23    today. I thought I might be able to, but I've got to reread</p> <p>24    some of the things that you've submitted, especially more</p> <p>25    recently. So I'll get it to you as soon as I can.</p>	<p style="text-align: right;">21</p> <p>1    STATE OF SOUTH DAKOTA )</p> <p style="text-align: right;">)SS                      CERTIFICATE</p> <p>2    COUNTY OF BROWN        )</p> <p>3</p> <p>4        THIS IS TO CERTIFY that I, Kristi A. Brandt, RPR, Official</p> <p>5    Court Reporter for the Circuit Court, Fifth Judicial Circuit,</p> <p>6    Brown County, South Dakota, took the proceedings of the</p> <p>7    foregoing case, and the foregoing pages, 1-20 inclusive, are a</p> <p>8    true and correct transcript of my stenotype notes.</p> <p>9        Dated at Aberdeen, South Dakota, this 3rd day of February,</p> <p>10    2021.</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17        <u>/s/ Kristi A. Brandt</u></p> <p>             Kristi A. Brandt, RPR</p> <p>18        Official Court Reporter</p> <p>             My Commission Expires:</p> <p>19        February 21, 2025</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">20</p> <p>1        We're off the record.</p> <p>2        (Whereupon, the proceedings were adjourned at 2:21 p.m.)</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal Nos. 29512 and 29560

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PLAINS COMMERCE BANK,  
Plaintiff and Appellant,

vs.

MATTHEW A. BECK, a married person; KELLEY R. BECK, a married person;  
MATTHEW A. BECK, Trustee of the B&B FARMS TRUST, u/t/a November 1, 1999;  
BROWN COUNTY, a governmental instrumentality of the State of South Dakota;  
MARSHALL COUNTY, a governmental instrumentality of the State of South Dakota;  
DEERE & COMPANY, a corporation,  
Defendants,

and

JAMIE MOECKLY,  
Intervenor and Appellee.

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

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The Honorable Scott P. Myren for Appeal No. 29512  
The Honorable Richard A. Sommers for Appeal No. 29560  
Circuit Court Judges

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**REPLY BRIEF OF APPELLANT PLAINS COMMERCE BANK**

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Notice of Appeal for Case No. 29512 filed on the 12th day of January, 2021  
Notice of Appeal for Case No. 29560 filed on the 25th day of February, 2021

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## **REPLY BRIEF OF APPELLANT PLAINS COMMERCE BANK**

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### **PRELIMINARY STATEMENT**

Citations to the record in this Brief will be the same as used in Appellant's initial Brief. References to Appellee/Intervenor's Brief will be designated as IB followed by the page number. Appellee Plains Commerce Bank will be referred to herein as Plains Commerce. Intervenor Jamie Moeckly will be referred to as either Intervenor or Jamie.

### **STATEMENT OF FACTS**

In large part, there is no dispute between the parties concerning the material facts in this case. Intervenor's Brief, however, relies on facts set forth in Intervenor Moeckly's Statement of Undisputed Material Facts Supporting Motion for Summary Judgment. (App 38-44).<sup>1</sup> Intervenor's Brief fails to note that a number of the statements set forth in Intervenor's facts section of her Brief were either denied or clarified in Plaintiff's Response to Intervenor's Statement of Undisputed Material Facts. (App 45-51). This Brief will point out those "facts" contained in Intervenor's Brief which were denied or clarified by Plains Commerce.

- "There is no evidence that the Trust has ever been modified." (IB 5).

Plains Commerce denied this statement. (App 49, ¶ 54). This issue is discussed in § V of this Brief.

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<sup>1</sup> The same Statement of Undisputed Material Facts is contained on pages 001-007 of Intervenor's Appendix.



- “It was a ‘red flag’ to Lance Vilhauer that Matthew was trying to self-deal under the trust.” (IB 6).

Mr. Vilhauer’s actual testimony was that Plains Commerce’s counsel said self-dealing was a “potential” red flag. (App 47, ¶ 19; CI 781, p. 33).

- “Betty would have wanted to know if Matt was having debt problems while he was trustee over the property.” (IB 7).

Betty’s actual testimony was that she “probably” would have wanted to know. (App 46, ¶ 9; CI 496). There is no evidence Betty would have changed any of her decisions if she had full knowledge of Matt’s debt problems.

- “Betty did not know until her October 3, 2018, deposition that Matt had a debt of approximately \$2.1 million.” (IB 7).

Although Betty testified to this effect, she acknowledged on a couple of occasions during her deposition that she had memory issues. (App 47, ¶ 10; CI 505, 529). Matt testified Betty was aware of his debt. (CI 443, p. 58).

- “Betty Beck understood that the trust land would be obligated to just \$800,000.” (IB 7).

Betty testified that she, Gary, and the kids “agreed that the trust land could have a mortgage on it in an amount of \$800,000.” (App 47, ¶ 26; CI 513). If Intervenor’s statement is meant to imply Betty was not aware the mortgage could include interest and fees, she did not make such a statement.

- “Jamie’s dad, Gary, came to her house in October or November 2015 after Betty had been there, and he was upset that Jamie had not signed the papers.” (IB 8).

This testimony was in reference to the consent to sell (which is not at issue in this case), not the Consent to Mortgage. (App 48, ¶ 38; CI 405-06, pp. 19-23).

- “With the consent to mortgage, Jamie knew her parents would not talk to her any longer if she refused to sign it.” (IB 9).

Jamie actually testified that her parents “probably” would not talk to her if she did not sign the Consent to Mortgage document. She did not testify either of her parents made such a statement to her. Her signing of the document did not improve the relationship with her parents. (App 48, ¶ 41; CR 409, p. 32).

- “Jamie thought the consent to mortgage meant Matt could take a loan up to \$800,000 and use \$800,000 value of the trust to do that, but not any more than that.” (IB 9).

This statement was denied. Jamie’s testimony was that she understood Matt could use \$800,000 of value in the Trust to get a loan. She did not think about how various other charges, such as interest and penalties, would play into it. (App 48, ¶ 44; CI 409, p. 35).

- “Jamie did not think the consent to mortgage allowed interest, charges, penalties, etc.” (IB 9).

This statement was denied. Jamie testified she did not know interest and penalties would be applied and no one told her they would not be included. Furthermore, from her personal experience, she knew that mortgages typically include interest, fees, etc. (App 48, ¶ 45; CI 409, p. 35; CI 412, pp. 46-47).

- “When she was asked to sign the consent to mortgage, Jamie never saw or had an opportunity to review the mortgage or the guaranty.” (IB 9).

Jamie never asked to see the mortgage. (App 49, ¶ 47; CI 416-17, pp. 63-64).

- “At the time she signed the consent to mortgage, Jamie had not seen a copy of the Trust Agreement, nor did she know any of the terms of the Trust Agreement.” (IB 9-10).

Jamie never asked Plains Commerce to see a copy of the Trust Agreement. (App 49, ¶ 48). Furthermore, she never personally asked Mr. Smeins for a copy of the Agreement even though her husband and son told her to get a copy before she signed the Consent. (App 49, ¶ 49; CI 418, p. 69; CI 618-19).

- On November 25, 2015, “Matt executed a Guaranty to Plains Commerce Bank to secure loans to borrowers Matt Beck and Kelley Beck.” (IB 10).

Because the mortgage secures the note directly, the Bank conceded during the summary judgment stage that it was not attempting to enforce the Guaranty. (App 50, ¶ 60).

There is one important set of facts Intervenor ignores. This has to do with loans issued by Legendary Loan Link. On August 16, 2010, Matt signed a mortgage on behalf of the Trust in favor of Legendary Loan Link for \$564,000. (CI 1120-23). He signed another mortgage on behalf of the Trust in favor of Legendary Loan Link for \$1,225,000 on October 16, 2010. (CI 1124-27). Matt approached Plains Commerce for refinancing in 2015 because Legendary Loan Link was refusing to give him any more operating funds. (CI 442, p. 53; CI 779, p. 17). What is important about these facts is that, without additional funding, Matt’s ability to operate the farm and protect the Trust property was impaired. He needed additional financing. Jamie was aware of this. She testified that she thought things could get straightened out if Matt was able to get back on his feet. (CI 409, p. 32). “I felt that this was the best way to protect the trust and protect my parents’ interest and to hopefully patch things up with my parents.” (CI 408, p. 31).

## **ARGUMENT**

### **I. The Consent to Mortgage signed by the beneficiaries gave Matthew Beck authority under SDCL 55-2-3(1) to mortgage Trust property.**

Intervenor does not dispute that SDCL 55-2-3 creates an exception to the general rule against self-dealing. *In re Estate of Stevenson*, 2000 SD 24, ¶ 11, 605 N.W.2d 818. *See also Smith Angus Ranch, Inc. v. Hurst*, 2021 SD 40, ¶ 16, \_\_\_ N.W.2d \_\_\_; *Estate of Moncur*, 2012 SD 17, ¶ 12, 812 N.W.2d 485. Instead, Intervenor argues that SDCL 55-2-3(1) did not serve to authorize Matt to mortgage Trust land because “the beneficiaries did not have full knowledge of Trustee Matt’s motives with all other facts concerning the transaction and the Bank cannot overcome the presumption of undue influence at SDCL 55-2-8.” (IB 22).

#### ***The beneficiaries had knowledge concerning the transaction***

There are three elements which must be established for SDCL 55-2-3(1) to apply. The first element is not in dispute. There is no question the beneficiaries had capacity to contract. As for the third element, although Intervenor claims there should be a presumption of undue influence, there is no evidence Matt used any influence to make Jamie sign the Consent. She acknowledged she did not talk to Matt about the Consent. (CI 409, pp. 32-33).

The second element requires that the beneficiary have “full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision. . . .” Intervenor ignores the requirement that the only concern is with facts that affect the beneficiary’s decision.

Intervenor, as did Judge Myren, focuses in part on an alleged lack of knowledge on the part of Betty and Brian Beck. Betty and Brian are not claiming they were misled into signing the Consent, nor are they here objecting to the transaction. Betty signed a document on January 29, 2018, approving all the actions taken by Matt in his capacity as Trustee, including the mortgage of Trust property given to Plains Commerce. (CI 601, ¶ 6). Brian testified that additional information about the Trust and Matt's debt would not have changed his mind about signing the Consent. (CI 560). It is, therefore, abundantly clear additional information would not have affected the decisions of Betty or Brian to sign the Consent.

Therefore, the only question regarding knowledge involves Jamie. Intervenor points out that Jamie did not even know there was a Trust until October 2015. (IB 23). Be that as it may, she had knowledge of the Trust when she signed the Consent on November 12, 2015. (App 60-61). She claims to have sent Danny Smeins an email and left two voicemails asking for a copy of the Trust Agreement. (CI 418, p. 69; CI 618). There is, however, no evidence that she ever personally spoke to Mr. Smeins or that he refused to provide her with a copy. Mr. Smeins did not represent Plains Commerce, and there is no evidence Jamie ever contacted Plains Commerce requesting a copy of the Trust. She made no attempt to obtain a copy of the Trust Agreement from anyone else, even though her husband and son told her she should not sign the Consent until she reviewed the Trust. (CI 618-19).

Intervenor's Brief makes the unusual statement that, "[i]f she had been provided with the Trust Agreement, she would have realized that she could have shut this terrible deal down entirely." (IB 24). Intervenor's Brief cites no record support for this

statement. Intervenor does not explain how reviewing the Trust would have made her realize she could shut down the deal. The fact of the matter is she already had such knowledge. When she was asked to sign a consent to sell the Trust land, she refused to do so. (CI 406, pp. 20-22). As a result, the sale did not occur. She did not have to see the Trust to realize she could prevent the mortgage by simply refusing to sign the Consent. She specifically admitted in her deposition that she knew Matt could not mortgage the Trust property if she did not sign the Consent. (CI 409, pp. 33-34). She also testified she knew, “that if [Matt] got the agreement from everyone that he was able to use part of the trust as collateral to take out a loan.” (CI 409, p. 34). Intervenor fails to point out what knowledge she could have gained from reviewing the Trust Agreement that she did not already have. Therefore, her failure to review the Trust Agreement could not have affected her decision to sign the Consent.

Furthermore, Intervenor should not be allowed to take advantage of her failure to obtain a copy of the Trust Agreement and then, more than two years later, claim she would not have signed the Consent if she had seen the Agreement. In *First Colony Life Insurance Company v. Berube*, 130 F.3d 827, 829 (8th Cir. 1997), the court stated: “Plaintiff is not entitled to rescission for mistake, because his mistake was caused by the neglect of a legal duty, which extended to making sure he understood the contents of the contract before he signed it.” This case does not involve the rescission of a contract but the situation is analogous. Jamie was not forced to sign the Consent. If she felt she needed to review the Trust Agreement before doing so, she should have insisted on being provided a copy before signing.

A similar statement is found in *Olson v. Opp*, 182 N.W.2d 220, 222 (S.D. 1970), where this Court said that, to warrant cancellation of a contract, a mistake “must not have arisen for want of such care as would be exercised by a person of reasonable prudence where the means of knowledge were readily accessible.” Intervenor may claim the Trust was not readily accessible because Mr. Smeins did not respond to her email or voicemails. Again, there is no reason she had to sign the Consent before insisting upon seeing the Trust Agreement. She could have requested a copy from her parents, Matt, or the Bank. She apparently did not do so.

Finally, in *Harding County ex rel. Board of Commissioners v. Frithiof*, 2000 U.S. Dist. LEXIS 145811, \* 14; 2008 WL 11450765, \* 4 (D.S.D. February 5, 2008), *aff’d* 575 F.3d 767 (8th Cir. 2009), the court stated: “Defendants cannot be held liable for Harding County’s lack of attention and failure to exercise ‘due diligence’ prior to executing the lease agreement.” Likewise, Plains Commerce should not be held liable for Jamie’s failure to exercise due diligence and insist upon being provided a copy of the Trust before signing the Consent. Again, even if she had seen the Trust, there is no reason to believe that would have changed her decision. Jamie testified she fully understood the implications of signing the Consent. She stated she knew that by signing the Consent, Matt would be allowed to mortgage \$800,000 of Trust property to secure his debts. (CI 409, p. 35)

Intervenor argues she did not understand the Consent to Mortgage would allow for interest and other charges. (IB 23). This is a red herring. She admitted she did not even think about such things as interest and other charges and that no one told her anything in that regard. (CI 409, p. 35). She also admitted that, from past experience,

she knew that mortgages typically included “interest, fees, etc.” (CI 412, pp. 46-47).

Moreover, even if Jamie could prove she did not understand the mortgage would include interest and fees, that is no reason to invalidate the mortgage as to the \$800,000 in principal Jamie undisputedly understood was included. In fact, in paragraph 5 of her Amended Answer, Intervenor set forth an alternative argument that the mortgage should be enforceable only to an aggregate amount of \$800,000. (CI 226).

Intervenor’s argument that she was not given material information and signed the Consent with a misunderstanding of the facts and motives has no basis in fact. The Consent is not ambiguous. It specifically states that the mortgage was going to benefit the Trustee. The document confirms the signer’s consent to the mortgage of Trust property by the Trustee. It says it is limited to an \$800,000 mortgage. Intervenor does not explain what facts were withheld from her. She testified she felt the Consent was the best way to protect the Trust and her parents’ interests, to patch things up with her parents, and to allow Matt to get back on his feet. (CI 408-09, pp. 31-32). In addition, Jamie accepted all of the benefits of the mortgage for nearly three years—i.e., allowing her brother to get additional financing that Legendary Loan Link refused to provide and to continue farming. It wasn’t until Matt defaulted that Jamie suddenly took issue with this transaction. Of all the parties who signed the Consents, only Jamie has claimed the Consents were unclear. All parties involved, including Jamie, had sufficient knowledge to approve and accept the mortgage. Consequently, SDCL 55-2-3(1) creates an exception to the rules against self-dealing and provided permission for Matt to mortgage the Trust property.



### ***Presumption of undue influence***

Intervenor's Brief spends half a page addressing the undue influence presumption. (IB 25). Plains Commerce overcame the presumption set forth in SDCL 55-2-8. As discussed above, Jamie knew what the transaction was about and went into it with her eyes wide open. There is absolutely no evidence anyone took advantage of her or that she could not stand up for herself. She certainly did so in refusing to sign the consent for sale document. Jamie has never alleged Plains Commerce took any action to influence or pressure her with respect to the Consent. Based on the authority cited on pages 15-17 of Plains Commerce's initial Brief, the court clearly erred in determining Plains Commerce failed to overcome the presumption contained in SDCL 55-2-8.

### **II. Plains Commerce had a right to rely upon the Certificate of Trust which stated the Trustee had the authority to mortgage real estate.**

Intervenor argues the Bank could not rely on the Certificate of Trust because the Bank had a copy of the Trust Agreement. Contrary to Intervenor's arguments, the Trust Agreement does not clearly establish that the Trust property could not be mortgaged. In fact, as argued in Sections III and IV of this Brief, such authority was provided.

As SDCL 55-4-53 states, "[k]nowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification." Plains Commerce entered into this transaction in good faith. The Bank knew Matt needed to refinance in order to potentially avoid foreclosure of Trust land under the agreement with Legendary Loan Link. Furthermore, the Bank took proactive steps to insure that the beneficiaries were agreeable to the

granting of the mortgage. As such, the Bank had a right, pursuant to SDCL 55-4-54, to rely upon the Certificate of Trust.

**III. Gary and Betty Beck's Consent to the Trustee mortgaging Trust property provided the Trustee with authority to do so under § 6.2 of the Trust Agreement.**

Intervenor's Brief engages in a long convoluted argument that the exception language found in the spendthrift clause somehow nullifies the provisions of § 6.2. This line of reasoning was not used by Judge Myren in discussing § 6.2. Despite this argument, in the end, Intervenor recognized that her reasoning basically made § 6.2 meaningless and arrived at the following conclusion:

A more natural reading of the two provisions – that harmonizes them, rather than sets them in contradiction – is that Article 6.2 enables Gary and Betty to authorize the trustee to sell, option, or dispose of interests in real estate *for the benefit of the trust*, while Article VIII forbids spendthrift actions that are inherently *not* for the benefit of the trust. So both provisions have the same goal: protect the trust estate – the opposite of what Matt did.

(IB 19) (emphasis in original).

Even if Intervenor's analysis is correct, what she fails to recognize is that the mortgage was for the benefit of both Matt and the Trust. As discussed in the factual section of the Brief, Matt borrowed \$1,789,000 from Legendary Loan Link for which he provided a mortgage on Trust land. Legendary Loan Link was no longer willing to provide operating funds. Matt needed money to keep the farm going. It was hoped the Plains Commerce loan would allow him to do so. Since it was limited to \$800,000, it decreased the potential claim against Trust land by nearly \$1,000,000.

Undoubtedly, Intervenor would argue that the Legendary Loan Link mortgage was invalid. Neither the Beck family nor Plains Commerce could be totally comfortable that would have been the end result. As Intervenor stated, she felt the best way to protect the Trust was by signing the Consent which allowed the mortgage. (CI 408, p. 31). In addition, she thought that was the best way to allow Matt to get back on his feet and get things straightened out. (CI 409, p. 32). The family's ultimate goal was to keep the land together. When faced with the prospect of a mortgage foreclosure from Legendary Loan Link, refinancing and a reduction of the debt against the Trust land benefitted the Trust. Therefore, under Intervenor's reasoning, the mortgage was permitted by § 6.2 since Betty and Gary consented to it.

Page 13 of Intervenor's Brief correctly states that "courts must ensure that the intentions and wishes of the trustor are honored." (IB 13). In this case, it was the intention and wish of Betty and Gary, the Trustors, that Matt had the authority to mortgage the property. Betty, individually and as Gary's attorney-in-fact, signed a document explicitly ratifying the mortgage to Plains Commerce that is at issue here. (CI 600, ¶ 3). Their intentions and wishes should not be ignored.

**IV. Section 4.1 of the Trust Agreement provided the Trustee with authority to mortgage the Trust property since there was evidence that the loan obtained by the Trustee was used, in part, to satisfy debt which existed when the Trust was created.**

Intervenor's primary argument with regard to § 4.1 of the Trust is that Plains Commerce failed to raise the issue regarding the mortgage being connected with debt of the Trust at the trial court level. That is incorrect. The issue in question was raised by Plains Commerce in its Reply Brief in Support of its Motion for Summary Judgment. (CI

1110). Section 4.1 simply provided additional authority to the Trustee to mortgage the Trust land.

**V. The Consents signed by all the beneficiaries constituted an alteration of the Trust allowing for the Trustee to mortgage Trust property.**

Contrary to Intervenor's argument, if it is determined that neither § 6.2 or § 4.1 allowed Matt to mortgage the Trust land, the consent of all the beneficiaries to permit him to do so altered the Trust. There is nothing in the Trust stating that an alteration has to be done in a particular manner. The definition of alter is set forth on pages 27 and 28 of Intervenor's Brief. If mortgaging of Trust land was not allowed under any other provisions of the Trust, the consent of the beneficiaries amounted to a change and a modification to the Trust Agreement.

Intervenor argues that any alteration to permit the mortgage would need to address the spendthrift provision. (IB 28). Article III does not say anything to the effect that the spendthrift provision cannot be altered or amended. The Article simply allows for the Trust to be altered upon the unanimous consent of all the beneficiaries. That is what was done when the Consents were signed. Intervenor's argument promotes form over substance. It is clear all primary and secondary beneficiaries of the Trust consented to allowing the Trustee to secure his debts with an \$800,000 mortgage on Trust property. This intent is clearly expressed in the Consents. The absence of certain magic words or a specific form should not override the clearly expressed intent of the parties.

Intervenor also argues that Article III required an alteration by the Grantors. (IB 28). The alteration was affected by Betty and Gary signing their Consent. (CI 597-98).

Nothing further is required under Article III. The Consents signed by all the beneficiaries did serve to alter the Trust and provides still another reason for approval of the mortgage.

**VI. The trial court erred in awarding attorney fees to Intervenor under SDCL 15-17-38.**

One of Plains Commerce's main arguments regarding the attorney fees issue is that the trial court failed to consider the interests of justice. Intervenor takes the position that the interests of justice language in SDCL 15-17-38 applies only to "cases of divorce, annulment of marriage, determination of paternity, custody, visitation, separate maintenance, support, or alimony." (IB 34). Intervenor misreads the law. It makes no sense that the interests of justice language in SDCL 15-17-38 would apply only to domestic relations matter and not to the other subjects addressed in the statute, such as probate and guardianship proceedings and mortgage foreclosures.

Furthermore, even if the statute is as limited as Intervenor claims, the court should still take interests of justice into consideration. SDCL 15-17-38 allows for certain attorney fees to be taxed as disbursements. SDCL 15-17-52 states that "[t]he court may limit the taxation of disbursements in the interests of justice." As outlined on pages 31-33 of Plains Commerce initial Brief, there are a number of facts the court should have considered with regard to the interests of justice in connection with the Motion for Attorney Fees. The court abused its discretion in failing to do so.

If it is determined Intervenor is entitled to any attorney fees, at a minimum, this case should be remanded for the court to consider the interests of justice. The trial court should also be required to take into account Plains Commerce's objection to some of Intervenor's itemized fees.

Plains Commerce joins in the arguments made by the South Dakota Bankers Association, which provides further authority for reversal of the award of attorney fees.

### **CONCLUSION**

Plains Commerce Bank proceeded in a diligent and good faith effort to provide a loan to hopefully save a farming operation while, at the same time, protecting the interests of the Trust beneficiaries. Intervenor went along with everything until such time as Matt defaulted on the loan. For all the reasons set forth herein and in Plains Commerce's initial Brief, the trial court's granting of summary judgment to Intervenor should be reversed and summary judgment entered in favor of Plains Commerce.

Dated this 9th day of August, 2021.

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### CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 4,139 words and 20,193 characters (not including spaces).

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

/s/ Reed Rasmussen

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### CERTIFICATE OF SERVICE

The undersigned, attorneys for Plaintiff/Appellant, hereby certifies that on the 9th day of August, 2021, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT PLAINS COMMERCE BANK was served via email transmission on the following:

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