IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30807

RODNEY ALEXANDER,

Appellant,
v.

ESTATE OF STEVE HOBART and NICK HOBART

Appellees,

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

THE HONORABLE JOSHUA HENDRICKSON
Circuit Court Judge

BRIEF OF APPELLANT RODNEY ALEXANDER

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Preliminary Statement

This brief is submitted on behalf of Appellant, Rodney Alexander ("Rod"). Appellees, the Estate of Steve Hobart and Nick Hobart will be collectively referred to as "Hobarts". Pages of the settled record will be cited as (SR____). References to the transcript from the motions hearing held on July 22, 2024, will be cited as (HT____).

Jurisdictional Statement

The circuit court's Order and Judgment was filed with the Pennington County Clerk of Courts on July 24, 2024. (SR___). The Notice of Entry of Order and Judgment was filed on July 24, 2024. (SR____). Rod filed his Notice of Appeal on August 22, 2024. (SR____). Nick Hobart filed his Notice of Review on September 10, 2024. This court has jurisdiction over the appeal pursuant to SDCL § 15-26A-3(1).

Statement of the Issues

I. The circuit court granted Defendants' Motion for Judgment on the Pleadings, voiding the Agreement and Addendum entered into by the parties for reason of legal impossibility.

The circuit court erred in holding the Agreement void for reason of legal impossibility without providing any basis for its holding and because grazing allotments can be included in a purchase agreement for land or cattle.

- *Groseth Int'l v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987)
- *Knecht v. Evridge*, 2020 S.D. 9, 940 N.W.2d 318
- *Heinert v. Home Fed. Save & Loan Ass'n*, 444 N.W.2d 718 (S.D. 1989)

II. The circuit court voided the entire Agreement and Addendum for reason of legal impossibility, including Rod's right of first refusal on the purchase of cattle owned by the Hobarts.

Even if the transfer of the Grazing Allotment permit were void, Rod should have still had the right of first refusal on the cattle subject to the Agreement and Addendum.

- *Thunderstik Lodge, Inc. v. Reuer*, 2000 S.D, 84, 613 N.W.2d 44

Statement of the Case

Steve and Nick Hobart blatantly violated the Agreement and Addendum they signed when they knowingly did not give Rodney Alexander notice of their intent to sell cattle they owned and that they intended to transfer the Gillette Prairie Grazing Allotment to the third-party purchaser. They proceeded to go forward with the sale and transfer in December of 2021, in complete disregard to the Agreement and Addendum they signed years before the sale. Despite receiving notice from Rod's counsel of his intent to enforce his first right of refusal given to him by the Hobarts, they ignored this request. As such, Rod filed his initial Complaint on April 14, 2023, alleging Breach of Contract and Fraud against Steve and Nick Hobart. (SR 1-14). An Amended Complaint was filed by Rod on January 18, 2024, pursuant to a Stipulation of the parties. (SR 66-77).

Notably, Steve Hobart did not file an Answer to Plaintiff's Amended Complaint. However, he admitted in his Answer to the Initial Complaint that the Hobarts did not give Rod notice of their intent to sell the Gillette Prairie Grazing Allotment, and that the Gillette Prairie Grazing Allotment was subsequently sold without first giving Rod notice as required by the Agreement and Addendum. (SR 19-22). Nick also admitted in his Answer to the Amended Complaint that notice was not given of his intention to sell the cattle attached to the Gillette Prairie Grazing Allotment, nor was notice given of the intent to transfer the Gillette Prairie Grazing Allotment to the third-party purchaser of the cattle. (SR 82-84). Nick also admitted that the cattle were sold, and the grazing permit transferred in December of 2021 to a third party.

Nick Hobart filed an Amended Motion for Judgment on the Pleadings on June 27, 2024, which the Estate of Steve Hobart joined. (SR 145-159; 181-182). The parties

proceeded with a Motion's Hearing on July 22, 2024, and the circuit court incorrectly voided the entirety of the Agreement and Addendum for reason of legal impossibility from the bench without applying the proper standards for a Motion for Judgment on the Pleadings or the doctrine of legal impossibility and dismissed Rod's Amended Complaint in its entirety. An Order and Judgment were signed to this effect on July 24, 2024. (SR 183-184). This appeal follows.

Statement of the Facts

Rodney Alexander and Steve Hobart both ranched near the Hill City area. Like ranchers often do, Rod lent Steve a helping hand on several occasions, which resulted in Steve owing Rod a debt. (SR 70). On September 12, 2003, Rod and Steve Hobart chose to enter into an Agreement entitled "First Right of Refusal if and when he ever decides to sell." (App. 003-007). Pursuant to the Agreement, the parties identified that Steve had a United States Forest Service ("Forest Service") permit identified as the Gillette Prairie Allotment ("Grazing Allotment permit") solely in his name. *Id.* Additionally, Steve granted Rod a first right of refusal "to purchase [Steve's] cattle and grazing allotment in combination of the aforesaid USFS permit for a price to be determined as hereafter set forth." *Id.* The Agreement extended to both parties' heirs, successors, and assigns. *Id.*

The parties agreed that the Agreement would only terminate when the Grazing Allotment permit was transferred to Rod or Rod did not exercise his right to purchase Steve's cattle. *Id.* Steve further agreed that he would notify Rod in writing of his intent to sell, giving Rod the option to exercise his right of first refusal. *Id.* The parties agreed that the purchase price of the cattle would be determined on a fair market value basis by comparing prices of cattle at the Belle Fourche Livestock Barn and the Phillip Livestock

Barn. *Id.* If the parties did not agree to a price for the sale of the cattle, they agreed to arbitrate the matter. *Id.* Additionally, the parties agreed Rod would pay an additional $300.00 per head that was allocated by the Grazing Allotment permit. *Id.* The parties also signed a Short Form of the Agreement and recorded the same with the Pennington County Register of Deeds Office. *Id.*

On February 9, 2005, Steve and Rod signed an Addendum to the September 2003 Agreement ("Addendum"), along with Steve's son, Nick. (App. 008). Pursuant to the Addendum, Rod had the "Right of First Refusal to purchase up to 45 head of cattle, and the associated grazing permit on the USFS Gillette Prairie Allotment price is as agreed to in the September, 2003 document." *Id.* The Addendum extended the Agreement to Nick, should the cattle subject to the Agreement or the Grazing Allotment permit be transferred to him. *Id.* The parties acknowledged that they had a full opportunity to review the original Agreement as well as the Addendum and have the assistance of counsel. *Id.*

In December of 2021, Rod became aware that the Hobarts intended to sell the cattle that were permitted on the grazing allotment without first offering him the option to purchase the cattle and apply for the Grazing Allotment permit, in violation of the Agreement and Addendum. (SR 69). On April 5, 2022, Rod's counsel sent notice to Steve and Nick Hobart of Rod's intent to exercise his rights under the Agreement and Addendum. (SR 20, 86; App. 009-010). The Hobarts did not respond to the correspondence, and Rod later discovered that Nick Hobart sold the cattle and transferred the Grazing Allotment permit to the third-party purchaser without first giving Rod notice of his intent to do so. (SR 20, 69-70, 86).

Rod filed his Initial Complaint on April 14, 2023, and filed an Amended Complaint on January 18, 2024, both alleging breach of contract and fraud claims against the Hobarts. (SR 1-14; 66-79). Notably, Steve admitted in his Answer that the Hobarts did not give Rod notice that they intended to sell the Grazing Allotment permit, and that they sold the Grazing Allotment permit in December of 2021 without first giving Rod notice.[1] (SR 20). Further, Nick admitted in his Answer to Rod's Amended Complaint that he did not give notice to Rod of his intention to sell the cattle permitted on the grazing allotment or that he transferred the Grazing Allotment Permit to a third party, and that he did in fact sell the cattle to a third party in December of 2021. (SR 86).

Steve Hobart passed away on January 5, 2024, and an Order substituting Steve's Estate as a Defendant was signed by the circuit court on April 26, 2024. (SR 143). Nick filed an Amended Motion for Judgment on the Pleadings on June 27, 2024, asserting that the Agreement and Addendum were an unreasonable restraint on the alienation of property and were void for impossibility of performance, which the Estate of Steve Hobart joined. (SR 145-159; 181-182). The circuit court ruled from the bench after a Motions Hearing on July 22, 2024, and found that the Agreement and Addendum were not an unreasonable restraint on the alienation of property, however, it found that "the transferability of that grazing right as being something that's a legal impossibility." (HT 22:12-18). The circuit court made no reference to the right of first refusal in regard to the cattle in its oral ruling and did not address any of Rod's factual assertions or claims

[1] Steve did not file an Answer to Rod's Amended Complaint, which references the sale of cattle as well.

separately, rather, the Amended Complaint was dismissed in its entirety. The circuit court signed an Order and Judgment on July 24, 2024, and this appeal followed.

Standard of Review

SDCL § 15-6-12(c) allows for a party to move for a judgment on the pleadings after the pleadings are closed. While a judgment on the pleadings "provides an expeditious remedy to test the legal sufficiency, substance and form of the pleadings" it is only an appropriate remedy to resolve issues of law when there are no remaining issues of fact. *M.S. v. Dinkytown Day Care Ctr.*, 485 N.W.2d 587, 588 (S.D. 1992) (quoting *Korstad-Tebben v. Pope Architects*, 459 N.W.2d 565, 567 (S.D. 1990). The Court "must treat as true all facts properly pleaded in the complaint" and only deal with questions of law. *Owen v. Owen*, 444 N.W.2d 710, 711 (S.D. 1989).

Even though both Hobarts denied factual assertions made by Rod in his pleadings, creating a dispute of fact, the circuit court concluded that the Amended Complaint should be summarily dismissed and granted the Motion for Judgment on the Pleadings. For the reasons stated below, the circuit court erred in its ruling.

Argument

I. The Circuit Court Erred when it Concluded the Agreement and Addendum were Void as a Matter of Law and Dismissed Rod's Claim for Breach of Contract.

a. The circuit court erred in ruling that the transferring of the Grazing Allotment permit was a legal impossibility and dismissing Rod's claims as there were still unresolved material issues of fact.

In dismissing Rod's Amended Complaint in its entirety, the circuit court orally ruled that "the transferring of [the Grazing Allotment permit], and that being not a legal possibility based upon the statute and case law essentially cited by the Defense makes that contract for the right of first refusal void." (HT 22:24-23:2). In making this ruling,

the circuit court did not analyze each of the elements of impossibility and relied on the briefing filed by Nick Hobart. (SR 183). As shown below, the determination of impossibility is a question of law and to be determined by the facts of the case, and as there are unresolved material facts at issue as shown by the pleadings of the parties, it is evident the ruling of the circuit court was made in error, making the dismissal improper.

Under South Dakota law, the doctrine of legal impossibility, which is also referred to as commercial frustration, requires proof of three elements:

> (1) the purpose that is frustrated must have been a principle purpose of that party in making the contract; (2) the frustration must be substantial; and (3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

Benedetto v. Delta Air Lines, Inc., 917 F. Supp.2d 976, 983 (D.S.D. 2013) (quoting *Mueller v. Cedar Shore Resort*, 2002 S.D. 38, ¶ 41, 643 N.W.2d 56, 69). The absence of any of the above elements causes the defense to fail. *Mueller* at ¶ 41. The doctrine of impossibility "is a question of law to be determined by the court from the facts of the case." *Groseth Int'l v. Tenneco, Inc.*, 410 N.W.2d 159, 166 (S.D. 1987). For example, in *Benedetto*, the 8th Circuit Court of Appeals found that the Defendant could not use the doctrine of impossibility on a Motion to Dismiss to defeat the Plaintiff's breach of contract claim because it needed additional facts to determine the basic assumptions on which the contract was made. *Benedetto* at 983.

In turning to the first element, the Court has determined "there must be an investigation into the principal purpose of the contract and a determination of the frustrating event that destroys the primary basis of the contract. If the frustrating event was within the promisor's control or due to the promisor's 'fault', then he is not excused." *Groseth Int'l*, 410 N.W.2d at 165 (quoting 18 Williston, *Contracts* § 1954

(1978)). This element creates an unresolved material issue of fact in what the principal purpose of the Agreement and Addendum were, which the circuit court erred in deciding on the Motion. Furthermore, In Rod's Amended Complaint, he alleged that the Agreement and Addendum were breached because the Hobarts sold the cattle and transferred the Grazing Allotment permit without first informing him, making the frustrating event wholly within their control. Therefore, there is an unresolved issue of material fact as it relates to the first element, and for this reason alone the circuit court erred in dismissing Rod's claims, and the dismissal must be reversed.

The second element requires the frustration to be substantial. *Id.* (quoting Restatement (Second) of Contracts § 265, cmt. a (1981)). "The fact that performance has become economically burdensome or unattractive is not sufficient to excuse performance." *Id.* (citations omitted). "A promise will not be discharged because the performance promised in return has lost value on account of unforeseeable supervening circumstances unless those circumstances nearly or quite completely destroy the purpose both parties to the contract had in mind." *Id.* (quoting Williston on Contracts, § 1954 (1978)).

Like the first element, this creates an unresolved material issue of fact that the circuit court should not have decided. The circuit court did not take the allegations in the Amended Complaint as true, which was required on the Motion. *Owen*, 444 N.W.2d at 711. Rod alleged that cattle were sold to a third party and the Grazing Allotment permit was subsequently transferred to the purchasing party without first informing Rod, proving that the purpose of the contract was not destroyed by unforeseeable supervening

circumstances. Taking these allegations as true, which is required, the Motion should have been denied.

Lastly, "the non-occurrence of the frustrating event must have been a *basic assumption* on which the contract was made." *Groseth Int'l*, 410 N.W.2d at 165 (quoting Restatement (Second) of Contracts § 265, cmt. a (1981) (emphasis supplied). "If the frustrating event was neither foreseen nor reasonably foreseeable, the promise was not in fact intended by the parties to extend to such a contingency." *Id.* at 166. At the time the Agreement and Addendum were entered the parties believed the Agreement and Addendum were valid and enforceable. While Rod does not concede that the documents are void, clearly the parties would not have entered into the Agreement and Addendum if it were void at its conception. At a minimum, the "basic assumption on which the contract" was made is still an unresolved question of fact looking at the pleadings. As such, the circuit court, on its own, should not have found this element in favor of the moving party.

The circuit court erred in granting the Motion for Judgment on the Pleadings and dismissing Rod's Amended Complaint in its entirety for reason of legal impossibility. Taking the allegations as set forth by Rod as true, which the circuit court was required to do, creates unresolved material issues of fact outstanding. It simply concluded the transfer of the Grazing Allotment permit was not legally possible, making factual findings on the basis of the Agreement and Addendum, which was inappropriate at the stage of the case, all while relying on the pleadings of the Defendants. For the reasons stated above, even if the circuit court did analyze the Agreement and Addendum under the doctrine of impossibility, it would have found that the Agreement and Addendum

were enforceable. Therefore, the circuit court erred when it granted Defendant's Motion for Judgment on the Pleadings and determined the documents were void for reason of legal impossibility.

b. *The circuit court erred in concluding that the transfer of a grazing permit is a legal impossibility.*

Grazing and livestock use on National Forest System lands and on other lands that the Forest Service controls must be authorized by a grazing or livestock use permit. 36 C.F.R. § 222.3(a). Grazing permits on National Forest System lands are issued for a period of 10 years or less. 36 CFR § 222.3(c)(1). "Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources." 36 CFR § 222.3(b). However, 36 CFR § 222.3(c)(1)(iv) allows for a new term permit to be issued to "the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit to the United States and provided the purchaser is otherwise eligible and qualified."

South Dakota has recognized that grazing permits may be included in lease agreements. In *Knecht v. Evridge*, the Evridges negotiated two separate lease agreements with Knecht for the lease of land they owned and the permit to graze cattle they received from the Grand River Grazing Association ("Grazing Association") for land located on the Grand River National Grassland. *Knecht v. Evridge*, 2020 S.D. 9, ¶ 4, 940 N.W.2d 318, 322-3. The parties subsequently signed two lease agreements: an "Agricultural Lease" for the land Evridge's owned and a "Supplemental Lease" for their grazing permit. *Id.* at ¶ 6. The Evridge's only filed the Agricultural Lease with the Grazing Association, and the Grazing Association transferred the grazing permit to Knecht. *Id.* Disputes arose amongst the parties and Knecht filed suit, alleging breach of contract and

requested a declaratory judgment regarding the parties' rights under the lease agreements. The Grazing Association subsequently suspended Knecht's grazing permit once it became aware of the Supplemental Lease. *Id.* at ¶ 10, 940 N.W.2d 318, 324.

The trial court issued findings of fact and conclusions of law regarding the parties' rights and concluded that "The Supplemental…Lease has all the essential elements of a valid contract and is legally binding. However, Knecht may, pursuant to the written terms of the Supplemental…Lease choose to terminate this lease because the grazing rights…did not transfer to Knecht for 2016. Therefore, the Supplemental…Lease is a voidable contract." *Id.* at ¶ 12. Both parties appealed after a jury trial on the remaining issue of damages. *Id.* at ¶¶ 18-19, 940 N.W.2d 318, 325. Of note, Knecht appealed whether the circuit court erred in concluding that the Supplemental Lease was valid and enforceable. *Id.* at ¶ 19.

The Court found that the plain language of the Supplemental Lease did not "impose an obligation upon the Evridges to obtain a grazing permit from the Grazing Association or to provide additional land controlled by the Grazing Association." *Id.* at ¶ 49, 940 N.W.2d 318, 332. While the parties may have hoped to have the grazing permit transferred to Knecht, the Supplemental Lease did not "contractually obligate the Evridges to assure that result." *Id.* Therefore, the Court found that the plain language of the Supplemental Lease for the lease of Evridge's ranch and was not unlawful nor did it violate the Department of Agriculture's regulations regarding grazing permits. *Id.*

The U.S. Forest Service also lists on their website how one acquires a term grazing permit. An individual must be a U.S. citizen, of legal age in the state they reside in, and own base property and livestock in order to qualify for a Term Grazing Permit.

How Do I get a Grazing Permit?, FS.USDA.GOV, https://www.fs.usda.gov/rangeland-management/grazing/permits.shtml (last visited September 18, 2024). The Forest Service states:

> The most common way the base property ownership requirement is met by someone who wants a Forest Service Term Permit, is through the purchase of existing base property that is recognized under an existing Term Grazing Permit…Without purchasing or acquiring base property the only other way of acquiring a Term Grazing Permit *is to purchase permitted livestock* and then providing a parcel of land that meets base property requirements. In either case, the current holder of the Term Grazing Permit who sold either base property or permitted livestock must waive their permit to the Forest Service in favor of the purchaser (applicant).

Id. (emphasis added). Moreover, the U.S. Forest Service includes form FS-2200-0012 on their website, which is the Waiver of Term Grazing Permit form for the seller of livestock or property to complete and includes provisions to list who the purchaser of the cattle or property is so that a new permit may be issued to the purchaser. (App. 011-012).

Other states, as well as federal courts, have recognized that the transfer of a grazing allotment permit are included in purchase agreements for both land and cattle. The Montana Supreme Court affirmed a jury's verdict in finding that a contract for the sale of land that included the transfer of a grazing allotment to graze 500 head of cattle in the Beaverhead National Forest required the sellers to effectively transfer the grazing permit to the buyers as a part of the total consideration of the contract. *Dooling v. Casey*, 152 Mont. 267, 448 P.2d 749, 754 (1968). The waiver forms executed by Defendants in *Dooling* are substantially similar to the Waiver of Term Grazing Permits the Forest Service still uses today. *Id.* at 752; (App. 011-012).

Furthermore, the 9th Circuit Court of Appeals found that "Federal regulations allow the issuance of a new grazing permit 'to the purchaser of a permitee's permitted

livestock and/or base property, provided the permittee waives his term permit.'" *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1133 (9th Cir. 2010) (quoting 36 C.F.R. § 222.3(c)(1)(iv)). The Court also listed documents purchasers of cattle provide to the Forest Service to obtain the grazing permit after the sale, which Rod would have done had he been given the opportunity to purchase the cattle. *Id.*

These cases, as well as the Forest Service's explanation on how a person obtains a grazing allotment permit, stand for the principal that grazing allotments can be transferred if a person purchases the base property of the grazing allotment, or the cattle allowed on the grazing allotment. The Agreement and Addendum are no different; the Hobarts granted Rod the first right of refusal on their cattle attached to the Grazing Allotment Permit which would allow Rod to then apply with the Forest Service for the permit they held. The Hobarts failed to notify Rod of their intent to sell the cattle, proceeded with a sale, and transferred the Grazing Allotment Permit to a third party by completing waiver forms with the Forest Service, all in violation of the Agreement and Addendum, as Rod properly pled in his Amended Complaint.

Holding that the Agreement and Addendum are void for reason of legal impossibility would be a substantial injustice to Rod, as he entered the Agreement and Addendum in good faith, despite the fact that the Hobarts never intended to give him notice of his right to purchase the cattle prior to selling the livestock and transferring the Grazing Allotment permit to a third-party. Therefore, in addition to erring when it concluded that there were no unresolved issues of fact, the circuit court erred in concluding that the Agreement and Addendum were void due to legal impossibility in taking the Hobarts' pleadings as true as opposed to Rod's.

c. *The circuit court erred in not treating all the facts in the Amended Complaint pled as true in dismissing Rod's breach of contract claims.*

A contract requires four elements: parties capable of entering a contract, consent, a lawful object, and consideration. SDCL § 53-1-2. "The object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed." SDCL § 53-5-2. "A void contract is invalid or unlawful from its inception. It is a mere nullity, and incapable of confirmation or ratification." *Knecht v. Evridge*, 2020 S.D. 9, ¶ 47, 940 N.W.2d 318, 331 (quoting *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶ 12, 648 N.W.2d 804, 807). Whether a contract is formed is judged objectively by the conduct of the parties, not by their subjective intent. The question is not what the party really meant, but what words and actions justified the other party to assume what was meant. *Geraets v. Halter*, 1999 S.D. 11 ¶ 17, 588 N.W.2d 231, 234. Further, "A contract should be construed to effectuate valid contractual relations rather than in a manner which would render the agreement invalid or render performance impossible." *Heinert v. Home Fed. Save & Loan Ass'n*, 444 N.W.2d 718, 821 (S.D. 1989) (citing *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312 (S.D. 1980); *Trumbauer v. Rust*, 36 S.D. 301, 154 N.W. 801 (1915)).

The Hobarts argued, and the circuit court concluded, that Rod's Breach of Contract claims must fail due to legal impossibility. The circuit court failed to acknowledge the above standard and treat all the facts properly pled in the Amended Complaint as true. To establish a breach of contract claim, the plaintiff must show (1) an enforceable promise, (2) breach of the promise, and (3) resulting damages. *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 31, 714 N.W.2d 884, 894 (inner citations omitted). Taking the facts in the Amended Complaint as true, Steve gave Rod the first

right of refusal on the cattle he owned and the Grazing Allotment permit that was issued in his name to Rod because Steve owed an outstanding debt to Rod, creating an enforceable promise. (SR 68-74).

This promise was extended to Nick through the Addendum and was breached when the Hobarts sold the cattle to a third party and completed the waiver forms of the Grazing Allotment permit for the benefit of the third party without first notifying Rod of their intent to do so. (App. 008). As indicated in the Amended Complaint, Rod suffered damages because the debt owed to him was never satisfied, he lost the profits of selling the raising the cattle and selling the cattle crop, and additional profit in being unable to graze the cattle attached to the Grazing Allotment permit. Taking these facts as true, which the circuit court was required to do, it is enough to establish that there at least exists an unresolved material issue of fact as to whether an enforceable contract or promise existed and that it was breached by the Hobarts. Therefore, the circuit court erred in dismissing on a motion for judgment on the pleadings Rod's claims for breach of contract.

d. The circuit court erred in dismissing Rod's fraud claim as a matter of law.

Similar to Rod's breach of contract claims, the circuit court summarily dismissed Rod's fraud claim for reason of legal impossibility without properly applying the standard for a Motion for Judgment on the Pleadings. A cause of action for fraud requires proof of three elements:

> First, the representation at issue must be made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made. Second, the representation must have been "made with intent to deceive and for the purpose of inducing the other party to act upon it. Finally, the person to whom the representation is made must show that he did in fact rely on it and was induced thereby to act to his injury or damage.

> To avoid summary judgment, the essential elements of fraud must be adequately supported by alleged facts.

Aqreva, LLC v. Bailly, 2020 S.D. 59, ¶ 56, 950 N.W.2d 774, 791 (inner citations omitted).

In Rod's Amended Complaint, he stated that he entered the Agreement and Addendum in exchange for a full satisfaction and waiver of defaults for debts owed to him by Steve Hobart. (SR 69). He alleged that he relied on Hobarts' promises that they would grant Rod the right of first refusal for the sale of cattle they owned and the transfer of the Grazing Allotment permit, even though they never intended to perform, and that he suffered damages due to their fraudulent promises. *Id.* The Hobarts denied these allegations, clearly creating a dispute of fact. Even if this Court finds that the Agreement and Addendum were void at their inception, there still exists a question of fact on whether the Hobarts fraudulently induced Rod with their promises to give him the right of first refusal on the sale of the cattle and priority in the transfer of the Grazing Allotment Permit, and therefore, the circuit court erred in granting the Motion.

II. The Circuit Court Erred in Concluding that the Entire Agreement was Void for Reason of Legal Impossibility and the Cattle Sold should have been Subject to Rod's First Right of Refusal.

SDCL § 53-5-4 states, "Where a contract has several distinct objects, one or more of which are lawful and one or more of which are unlawful in whole or in part, the contract is void as to the latter and valid as to the rest." The requirements for a severable agreement include: "(1) the parties' performances must be separable into corresponding pairs of part performances and (2) the parts of each pair must be regarded as agreed equivalents." *Thunderstik Lodge, Inc. v. Reuer*, 2000 S.D. 84, ¶ 7, 613 N.W.2d 44, 46 (quoting *Commercial Trust and Sav. Bank v. Christensen*, 535 N.W.2d 853, 857 (S.D. 1995) (inner citations omitted). "The agreement must not be an integrated scheme to

contravene public policy and the party seeking enforcement must not have engaged in serious misconduct." *Id.* (citing *Christensen* at 857 n.2). A court may divide the contract into "corresponding part of part performances and then enforce only those parts which do not materially advance the improper purpose of the agreement." *Id.* The Court found in *Thunderstik Lodge* that a "distinguishing mark of a divisible contract is that the consideration is not single, but can be apportioned to correspond with separate consideration offered by the other party." *Id.* at ¶ 10, 613 N.W.2d 44, 47 (quoting *Christensen* at 857).

In looking at the first element for severability of the Agreement, the performance of the parties can be separated as the Agreement is a "first right of refusal to purchase Hobart's cattle *and* grazing allotment…" (App. 003-007) (emphasis added). It also terminates either when the Grazing Allotment permit is transferred to Rod *or* "[Rod] has not exercised his right to purchase said cattle as hereinafter provided." *Id.* Furthermore, the purchase price is divided for the purchase of the cattle and consideration for the transfer of the Grazing Allotment. Rod and the Hobarts agreed Rod would pay the fair market value of the cattle on the date Rod received notice of the offer to purchase his cattle. The parties further agreed that Rod would pay an additional $300.00 for the livestock that is allocated by the Grazing Allotment Permit. Therefore, the first element is satisfied.

Next, the parties agreed that if the permit was transferred to Rod, he would pay an additional $300.00 per head that were allocated by the Grazing Allotment permit on top of the fair market value of the cattle. *Id.* If the Grazing Allotment permit was not transferred, Rod would still pay the fair market value of the cattle. The additional

$300.00 is separate consideration for the transfer of the Grazing Allotment permit and therefore, the Agreement was severable.

Lastly, Rod did not engage in any misconduct in entering the Agreement and Addendum, and it was not an "integrated scheme to contravene public policy." As stated in the Amended Complaint, a debt was owed to Rod and the Hobarts used the Grazing Allotment and the cattle as collateral for the debt owed. The parties believed the Grazing Allotment and the sale of the cattle at fair market value was sufficient collateral for the debt owed and signed as such. Therefore, the cattle were a separate and distinct object from the Grazing Allotment, and if the Court finds that the Grazing Allotment could not be transferred to Rod for reason of legal impossibility, the Agreement and Addendum should still be enforced as to the sale of the cattle.

Conclusion

The parties met the essential elements of a valid and binding contract when Steve and Rod signed the Agreement on September 12, 2003. This Agreement was extended to Nick through the Addendum signed on February 9, 2005. The Agreement and Addendum contained two lawful objects: the Grazing Allotment permit and the cattle owned by Hobarts. Sufficient consideration was given, in that Rod was owed a debt by Hobarts and they used the Grazing Allotment permit and the cattle as collateral for the debt. In the event the Hobarts chose to sell the cattle or transfer the Grazing Allotment permit, they merely had to inform Rod of their intent to do so, giving him the option to purchase the cattle and have the grazing allotment transferred to him under the terms and conditions. Admittedly, they failed to do so.

The circuit court erred in concluding that the Agreement and Addendum were void for reason of legal impossibility because, as shown above, grazing permits have been the subject of enforceable contracts. Further, the circuit court erred when it voided the Agreement and Addendum in their entirety, without severing the cattle and holding that the Hobarts still had an obligation to inform Rod of their intent to sell. Therefore, Rod respectfully requests the Court reverse and remand the circuit court's Judgment and Order dismissing his Complaint.

Dated this 3rd day of October 2024.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Garrett J. Keegan*
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Certificate Of Compliance

I hereby certify that this brief complies with SDCL 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 19 pages long and the word count is 5,450 and character count is 24,420, exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word counts from that program were relied upon in determining the word count of this brief.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2024, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was served upon the following counsel of record, by placing the same in the service indicated, addressed as follows:

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APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

RODNEY ALEXANDER, Plaintiff, v. ESTATE OF STEVE HOBART and NICK HOBART, Defendants.	)	51CIV23-000485 **ORDER AND JUDGMENT**

This matter having come before the Court on July 22, 2024, for a motion hearing on Defendant, Nick Hobart's, Amended Motion for Judgment on the Pleadings, and the Court having considered the pleadings, briefing of the parties, arguments of counsel at the motion hearing, and all other documents filed with this Court, it is hereby

ORDERED that Defendant, Nick Hobart's, Amended Motion for Judgment on the Pleadings is GRANTED because the Right of First Refusal upon which Plaintiff's Amended Complaint relies is void as a matter of law. The Court incorporates into this Order and Judgment the reasons stated by the Court at the July 22, 2024, hearing on Defendant's Amended Motion for Judgment on the Pleadings, and the reasons stated by Defendant, Nick Hobart, in his briefing in support of his Amended Motion for Judgment on the Pleadings with regard to enforceability of the Right of First Refusal; it is further

ORDERED that Judgment is entered in favor of Defendants Estate of Steve Hobart and Nick Hobart and against Plaintiff, Rodney Alexander; it is further

ORDERED that Plaintiff, Rodney Alexander's, Amended Complaint is dismissed on its merits with prejudice and without further costs to any party.

It is therefore, **ORDERED AND ADJUDGED**,

That plaintiff take nothing, that the action be dismissed on the merits, with prejudice, and without further costs to any party.

This Order and Judgment fully and finally resolves all claims against all parties in this matter.

7/24/2024 8:45:08 AM

BY THE COURT:

Honorable Joshua Hendrickson
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy

Filed on: 07/24/2024 Pennington County, South Dakota 51CIV23-000485

To Whom It May Concern
First Right of Refusal if and when he ever decides to sell.

The parties agree: Hobart presently has a USFS permit identified as Gillette Prairie allotment in his sole name. He has the authority to enter into this agreement on his own behalf. There are no others directly or indirectly involved in the ownership, control, or use of the cattle subject to this agreement . Steve Hobart's family having first right to have permit transferred to their names or name. Hobart herewith grants Alexander the first right of refusal to purchase Hobart's cattle and grazing allotment in combination of the aforesaid USFS permit for a price to be determined as hereafter set forth. Alexander's will also have first right of refusal from Steve Hobart heirs.

Term of this Agreement:

It is agreed the term of this agreement shall commence with the signing of this agreement and shall terminate only when said permit is successfully transferred to Alexander or Alexander has not exercised his right to purchase said cattle as hereinafter provided.

Exercise of Said First Right of Refusal:

Hobart agrees to notify Alexander in writing at 11590 Gillette Prairie Road, Hill City, South Dakota 57745.

Purchase Price:

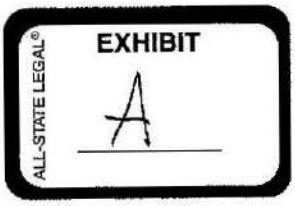
It is agreed the price of the livestock shall be determined between Alexander and Hobart by referring to the price of the similar livestock as of the date of the notice by Hobart to Alexander of the offer to purchase aforesaid. Such price shall be determined by a comparison of the price for that date established by sales at the Belle Fourche Livestock Barn and the Phillip Livestock Barn. In the event the parties do not agree to such price it is agreed the parties shall be bound by the laws of the State of South Dakota on binding arbitration through which the price shall be fully resolved.

Payment of Purchase Price:

It is agreed Alexander shall pay said livestock price in full on the date the USFS permit is transferred to Alexander. Alexander shall also pay Hobart the sum of $300.00 per head allocated by such permit. (Example: If the permit allows Alexander 50 head Alexander shall pay Hobart an additional sum of $15,000.)

Possession:

It is agreed the possession of the cattle shall transfer to Alexander on the date the permit is transferred to Alexander by the USFS. Risk of loss and expense of upkeep of said



cattle and permit shall remain in Hobart until the transfer successfully is made to Alexander.

Pro Rations:

It is agreed that if the transfer of the permit is made during the usual grazing period the parties shall agree to the usual prorating of the annual permit fees and expenses which Alexander shall add to the purchase price to be paid on the transfer possession date.

Description of Livestock: The cattle subject of this agreement are branded with Steve Hobart's brand.

Short Form of Agreement: It is agreed a short form of this agreement shall be filed with the Register of Deeds of Pennington County, SD.

Binding of Agreement: It is agreed this contract shall be binding on the parties hereto, their heirs, successors and assigns.

Dated this 12th day of September, 2003 at Rapid City, SD.

Rodney J. Alexander

Steve Hobart

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

On this the 12th day of September, 2003, before me, the undersigned officer, personally appeared Rodney J. Alexander and Steve Hobart, known to me or satisfactorily proven to be the person whose name is 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.

Dick M. Eisenbraun
Notary Seal

My Commission Expires: 10/10/2007

(SEAL)

Book: 124
Page: 8735
R03-29372.0 Page: 002 of 002
11/07/2003 02:57p 22.00
Pennington County, South Dakota
Donna M. Mayer Misc Real Est

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

On this 12th day of September, 2003 before me the undersigned officer, personally appeared Steve Hobart, known to me or satisfactorily proven to be the person whose name is subscribed to the within and foregoing instrument and acknowledged that he executed the same for the purposes therein contained.

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

(SEAL)

Notary Public
My Commission Expires: 10/10/2007

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

On this 12th day of September, 2003 before me the undersigned officer, personally appeared Rodney J. Alexander, known to me or satisfactorily proven to be the person whose name is subscribed to the within and forgoing instrument and acknowledged that he executed the same for the purposed therein contained.

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

(SEAL)

Notary Public
My Commission Expires: 10/10/2007

Document Prepared By:

Rodney J. Alexander
27 Baken Park
Rapid City, SD 57702
605-348-0800

SHORT FORM AGREEMENT ON FIRST RIGHT OF REFUSAL ON GILLETTE PRAIRIE GRAZING ALLOTMENT.

THIS AGREEMENT made and entered this 12th day of September, 2003, by and between Steve Hobart of Hill City, South Dakota and Rodney J. Alexander of Hill City, South Dakota.

WITNESSETH:

In consideration of the mutual and reciprocal covenants flowing between the parties therein, Hobart has agreed to give Alexander a first right of refusal to have grazing allotment transferred to Alexander's.

That because of the lengthy nature of the aforementioned agreement, both parties hereby agree to record this Short Form Agreement rather than the Full Length Agreement dated the 12th day of September, 2003, which contains all the terms and conditions of the transaction.

That all of the terms and conditions of said agreement of the above described allotment are set forth in the agreement entered into the 12th day of September, 2003, between the parties hereto and that each of the parties has a true and correct copy thereof and said agreement is incorporated herein by reference.

Dated this 12th day of September, 2003.

Steve Hobart
Steve Hobart

Rodney J. Alexander
Rodney J. Alexander

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

On this 12th day of September, 2003 before me the undersigned officer, personally appeared Steve Hobart, known to me or satisfactorily proven to be the person whose name is subscribed to the within and foregoing instrument and acknowledged that he executed the same for the purposes therein contained.

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

(SEAL)

Dick M. Evenhouse
Notary Public
My Commission Expires: 10/10/2007

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

On this 12th day of September, 2003 before me the undersigned officer, personally appeared Rodney J. Alexander, known to me or satisfactorily proven to be the person whose name is subscribed to the within and forgoing instrument and acknowledged that he executed the same for the purposed therein contained.

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

Dick M. Evenhouse
Notary Public
My Commission Expires: 10/10/2007

(SEAL)

Addendum to Purchase Agreement

This addendum is to the Right of First Refusal/Purchase Agreement entered into between Steve Hobart and Rodney Alexander dated September 12, 2003.

Under the terms of this addendum, the parties continue in their agreement that Alexander has the Right of First Refusal to purchase up to 45 head of cattle, and the associated grazing permit on the USFS Gillette Prairie Allotment price is as agreed to in the September, 2003 document. This addendum is to include and clarify that the Right of First Refusal extends to and includes the right to purchase the agreed upon cattle and associated Gillette Prairie Allotment from Steve Hobart's son, Nick Hobart. The agreement will include not only up to 45 head of cattle but also the US Forest Service allotment and permit to allow those cattle to graze on the Gillette Prairie Allotment, now held by Mr. Steve Hobart. This Addendum supplements the language found in paragraph) of the September, 2003 agreement establishing and granting this Right of First Refusal/option agreement as an obligation both in regard to Steve Hobart and also as to his heirs or assigns.

The parties to this agreement further acknowledge and agree that they have had an opportunity to review not only this addendum but the original agreement. The parties acknowledge entering into this agreement having had a full opportunity to not only review those documents but also have the assistance of counsel.

Dated this 9 day of February, 2005.

Steve Hobart
Steve Hobart

Rod Alexander
Rod Alexander

Nick Hobart
Nick Hobart

Greg Barnier
Greg Barnier
Counsel for Rod Alexander

ALL-STATE LEGAL®
EXHIBIT
B

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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J.M. COSTELLO
1923-2007

WILLIAM G. PORTER
1926-2004

April 5, 2022

Steve Hobart
13392 Valley Township Road
Vale, SD 57788
VIA FEDERAL EXPRESS
AND US MAIL

Steve Hobart
11477 Gillette Prairie Road
Hill City, SD 57745
VIA FEDREAL EXPRESS
AND US MAIL

Nicholas Hobart
11477 Gillette Prairie Road
Hill City, SD 57745
VIA US MAIL

Re: Sale of Livestock Permit
Our File No. 222099

Gentlemen:

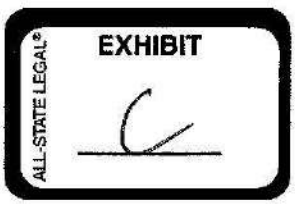
I represent Rodney Alexander regarding his rights to purchase your cattle and forest service permit. This is notice that Mr. Alexander exercises his rights to purchase and demands immediate closing on the purchase and transfer of the animals and permit. Please contact my office to set up a time to arrange for the closing. If no contact has been made with my office on or before April 8, 2022, by 4:00 p.m. (mountain time), my client will proceed with all of his legal rights.

My client looks forward to closing this matter immediately.

Sincerely,

Jess M. Pekarski

JMP/rjw
cc/client



FedEx Express **Package US Airbill**

FedEx Tracking Number 8147 4679 1390

Form ID No. 0200

om *Please print and press hard.*

te 4-5-22 Sender's FedEx Account Number

nder's me Jess DeKarske Phone 605 348-2410

mpany Costello Porter Law Firm

ddress 704 Saint Joseph ST, PO Box 290 Dept/Floor/Suite/Room

y Rapid City State SD ZIP 57709

ur Internal Billing Reference 22099 ORIGINAL
24 characters will appear on invoice.

4 Express Package Service * To most locations. *Packages up to 150 lbs. For packages over 150 lbs., use the FedEx Express Freight US Airbill.*

Next Business Day

- [ ] **FedEx First Overnight** Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless Saturday Delivery is selected.
- [X] **FedEx Priority Overnight** Next business morning.* Friday shipments will be delivered on Monday unless Saturday Delivery is selected.
- [ ] **FedEx Standard Overnight** Next business afternoon.* Saturday Delivery NOT available.

2nd Business Day

- [ ] **FedEx 2Day A.M.** Second business morning.* Saturday Delivery NOT available.
- [ ] **FedEx 2Day** Second business afternoon.* Thursday shipments will be delivered on Monday unless Saturday Delivery is selected.
- [ ] **FedEx Express Saver** Third business day.* Saturday Delivery NOT available.

5 Packaging * Declared value limit $500.

- [X] FedEx Envelope*
- [ ] FedEx Pak*
- [ ] FedEx Box
- [ ] FedEx Tube
- [ ] Other

6 Special Handling and Delivery Signature Options Fees may apply. See the FedEx Service Guide.

- [ ] **Saturday Delivery** NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

- [ ] **No Signature Required** Package may be left without obtaining a signature for delivery.
- [ ] **Direct Signature** Someone at recipient's address may sign for delivery.
- [ ] **Indirect Signature** If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only.

Does this shipment contain dangerous goods?
One box must be checked.

- [X] No
- [ ] Yes — As per attached Shipper's Declaration
- [ ] Yes — Shipper's Declaration not required
- [ ] Dry Ice — Dry Ice, 9, UN 1845 ____ x ____ kg

Restrictions apply for dangerous goods — see the current FedEx Service Guide.

- [ ] Cargo Aircraft Only

7 Payment *Bill to:*

Enter FedEx Acct. No. or Credit Card No. below.

- [X] Sender — Acct. No. in Section 1 will be billed.
- [ ] Recipient
- [ ] Third Party
- [ ] Credit Card
- [ ] Cash/Check

FedEx Acct. No. / Credit Card No. ____ Exp. Date ____

Total Packages	Total Weight	Total Declared Value†
	Lbs.	$ .00

†Our liability is limited to US$100 unless you declare a higher value. See back for details. By using this airbill you agree to the service conditions on the back of this airbill and in the current FedEx Service Guide, including terms that limit our liability.

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cipient's me Steve Hobart Phone ( )

mpany

ddress 11477 Gillette Prairie Rd Dept/Floor/Suite/Room
annot deliver to P.O. boxes or P.O. ZIP codes.

ddress
Use this line for the HOLD location address or for continuation of your shipping address.

y Hill City State SD ZIP 57745

Waiver of Term Grazing Permit

(Reference FSM 2230 and FSH 2209.13)

NOTE: The information requested on this form is voluntary; however, all the data requested is necessary if you wish to be considered as a qualified applicant for a grazing permit. The data is requested under authority of 5 USC 301, 36 CFR 222.3.

This MEMORANDUM witnesseth that:

WHEREAS, _____ of _____, hereinafter the seller, received Term Grazing Permit No. _____ from the U.S. Department of Agriculture, Forest Service on _____, authorizing the seller to graze up to _____ head of _____ and _____ head of _____ for the period of use from _____ to _____ on the _____ Allotment(s), _____ ☐ National Forest ☐ National Grassland ('**X**' *appropriate box*) ; and

WHEREAS, such term grazing permit includes a priority for renewal from one term period to the next provided that the permittee has fully complied with the terms and conditions of the expiring term grazing permit; and

WHEREAS, the seller may waive Term Grazing Permit Number _____ to the Forest Service in favor of a third party which has purchased the base property and/or permitted livestock of the seller; and

WHEREAS, the Forest Service will issue a new term grazing permit to the purchaser of the seller's base property and/or permitted livestock provided that the purchaser is eligible and qualified to hold a term grazing permit; and

WHEREAS, the seller has under date of _____ sold to _____ of _____, hereinafter, the purchaser, _____ head of _____ which are permitted livestock and/or the following base property more particularly described below:

_____

_____

_____

_____

NOW, THEREFORE, the seller here and now surrenders unto the United States all privileges heretofore allowed under Term Grazing Permit Number _____, or that portion of the permit consisting of up to _____ head of _____ and _____ head of _____, and further agrees not to apply at any future time for a renewal of the term grazing permit herein surrendered. The seller further agrees to relinquish unto the United States any and all interest in range improvements constructed or installed by the seller on the lands described in Part 1 of the surrendered term grazing permit or portion thereof or on any other allotment on which the seller may have grazed.

Executed at _____, State of _____ this _____ day of _____, _____. Subject to conditions and requirements printed on the back hereof.

_____ _____
(Witness) *(Permittee)*

_____ _____
(Witness) *(Permittee)*

(I/We) have read and agree to the conditions and requirements printed on the back hereof.

_____ _____
(Witness) *(Purchaser)*

_____ _____
(Witness) *(Purchaser)*

Received and filed subject to the conditions and requirements printed on the back hereof, this _____ day of _____, _____.

SIGNATURE OF AUTHORIZED OFFICER	NATIONAL FOREST OR GRASSLAND

CONDITIONS AND REQUIREMENTS FOR THE ISSUANCE OF A TERM GRAZING PERMIT BECAUSE OF PURCHASE OF PERMITTED LIVESTOCK OR BASE PROPERTY

1. The current permittee must complete and execute Form 2200-12, Waiver of Term Grazing Permit. When applicable, the form must also be signed by the purchaser of the permittee's base property and/or permitted livestock and the authorized officer. Two (2) witnesses must attest both the permittee's and the purchaser's signatures.
2. The permittee shall present to the Authorized Officer a properly executed and recorded or notarized bill of sale with cancelled check or receipt to document sale of permitted livestock, and/or a properly executed and recorded deed or contract to purchase base property, and additional documents related to the transaction as requested by the Authorized Officer.
3. The purchaser must provide to the Authorized Officer information to identify property upon which the application for a term grazing permit is based, and the relationship between such ranch property and the livestock to be grazed.
4. Failure to comply with the following requirements may result in disapproval of the term grazing permit application, or cancellation of the term grazing permit:

   (a) Within 30 days from the date the Authorized Officer receives Form 2200-12, Waiver of Term Grazing Permit for filing, the purchased livestock must be moved from the seller's lands to the purchaser's lands.

   (b) Purchased livestock identified on the purchaser's term grazing permit application must have been permitted to graze under the seller's term grazing permit at the time of purchase, Provided, that if the purchase did not occur during the permitted period of use, the purchased livestock may include those livestock which grazed under the term grazing permit during the most recent permitted period of use and any offspring which may have been retained for herd replacement. Yearlings that have grazed as part of the normal livestock operation may be considered permitted livestock.

   (c) A purchaser who does not desire to graze purchased livestock on National Forest System lands or other lands under Forest Service control during the permitted period of use following purchase must request permission from the Authorized Officer in writing and explain the reasons for the request, which might include culling or change in class of livestock.

   (d) Purchased base property identified in the purchaser's term grazing permit application must be used as base property by the purchaser during the year immediately following the purchase.

   (e) Except in cases of foreclosure as described in FSM 2231.8 and FSH 2209.13, livestock or base property identified in a purchaser's term grazing permit application may not revert to the seller or the seller's heirs, agents, assigns, or anyone acting in concert with the seller, within two years of the sale.

   (f) The terms and conditions of all documents submitted with the application forms the basis for the issuance of the Term Grazing Permit.

Burden Statement

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0596-0003. The time required to complete this information collection is estimated to average 30 minutes per response, including the time for reviewing conditions and requirements, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410 or call (800) 795-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer.

Appeal Nos. 30807 and 30827

In the
Supreme Court of the State of South Dakota

RODNEY ALEXANDER,

Plaintiff and Appellant

vs.

ESTATE OF STEVE HOBART and NICK HOBART,

Defendants and Appellees

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

The Honorable Joshua Hendrickson

Notice of Appeal filed August 22, 2024
Notice of Review filed September 10, 2024

BRIEF OF APPELLEE NICK HOBART

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Attorneys for Appellee Nick Hobart

Filed: 12/3/2024 3:58 PM CST Supreme Court, State of South Dakota #30807

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Attorneys for Appellee Estate of Steve Hobart

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TABLE OF AUTHORITIES

STATUTES:

RULES:

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PRELIMINARY STATEMENT

Citations to the record will appear as "(R. ___)" with the page number from the Clerk's Appeal Index. Citations to Appellant's appendix will be designated as "(APP___)" followed by the appropriate page number. Citations to the July 22, 2024, hearing transcript will be designated as "(HT___)".

Appellant Rodney Alexander will be referred to as "Alexander." Appellee Nick Hobart will be referred to as "Nick." Appellee Estate of Steve Hobart will be referred to as "Steve." Collectively, the Appellees will be referred to as "the Hobarts."

JURISDICTIONAL STATEMENT

Alexander appeals from the circuit court's Order and Judgment dated July 24, 2024. (R. 183-84; APP 0001-0002). The Order and Judgment granted Nick's Amended Motion for Judgment on the Pleadings and dismissed Alexander's Amended Complaint in its entirety on its merits with prejudice. *Id.* Nick filed a Notice of Entry of Order and Judgment on July 24, 2024. (R. 185). Alexander filed a Notice of Appeal on August 22, 2024. (R. 220). Nick filed a Notice of Review on September 10, 2024.

This Court has jurisdiction over the Order and Judgment pursuant to SDCL § 15-26A-3. Alexander's Notice of Appeal was timely filed under SDCL § 15-26A-6. Nick timely filed his Notice of Review pursuant to SDCL § 15-26A-22. Thus, this Court has jurisdiction over the issues raised by both the Notice of Appeal and Notice of Review.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the circuit court erred when it determined the right of first refusal was void under SDCL § 53-5-3 and dismissed Alexander's Amended Complaint?

The circuit court did not err. The right of first refusal upon which Alexander's Amended Complaint relied was void under SDCL § 53-

5-3 because performance of its object was impossible or its object was unlawful. The right of first refusal required the Hobarts to directly transfer their United States Forest Service Grazing Permit to Alexander. Only the United States Forest Service, however, has the authority to issue and transfer a grazing permit.

SDCL § 53-5-3
36 C.F.R. § 222.3
Hage v. United States, 35 Fed. Cl. 147 (Fed. Cl. 1996)
Knecht v. Evridge, 2020 S.D. 9, 940 N.W.2d 318

II. Whether the circuit court erred when it determined the right of first refusal was not an unreasonable restraint on the alienation of property under SDCL § 43-3-5?

The circuit court erred in this determination. The right of first refusal was an unreasonable restraint on the alienation of the Hobarts' property because it was for a quasi-fixed price, did not require the Hobarts have any intention to sell, did not require Alexander to match any offer, did not require a bona fide offer, and lasted in perpetuity.

SDCL § 43-3-5
Laska v. Barr (*Laska II*), 2018 S.D. 6, 907 N.W.2d 47

STATEMENT OF THE CASE

Alexander filed an Amended Complaint against Steve and Nick related to the Hobarts' alleged violation of a right of first refusal agreement ("ROFR"). (R. 68-74, 78). The ROFR purportedly gave Alexander the right of first refusal to purchase the Hobarts' cattle and United States Forest Service ("USFS") grazing permit, known as the Gillette Prairie Allotment. (R. 68-74; *see also* APP 0003-0008). In his Amended Complaint, Alexander alleged three counts against the Hobarts: (1) breach of contract related to the sale of the Hobarts' cattle under the ROFR; (2) breach of contract related to the transfer of the USFS Permit under the ROFR; and (3) fraud related to the ROFR. (R. 68-74). Nick filed an Answer to the Amended Complaint denying liability. (R. 85-89). Shortly after answering the Amended Complaint, Nick filed an Amended Motion for Judgment

on the Pleadings[1] seeking dismissal of Alexander's Amended Complaint in its entirety. (R. 145). The issues raised in the Amended Motion for Judgment on the Pleadings were: (1) whether the ROFR was void as an unreasonable restraint on the alienation of property under SDCL § 43-3-5; and (2) whether the ROFR was void under SDCL § 53-5-3 because performance of its object was either impossible or the ROFR's object was illegal. (R. 147-58).

The parties argued the Amended Motion for Judgment on the Pleadings to the circuit court, the Honorable Joshua Hendrickson, on July 22, 2024. (R. 183-84; APP 0001-0002). The circuit court granted Nick's Amended Motion for Judgment on the Pleadings and dismissed Alexander's Amended Complaint on its merits with prejudice. *Id.* The circuit court determined the ROFR was void under SDCL § 53-5-3 because performance of its object was impossible. (*Id.*; HT 22:12-25, 23:1-8). The circuit court rejected Nick's argument that the ROFR was also void under SDCL § 43-3-5 as an unreasonable restraint on the alienation of property. (HT 21:19-25, 22:1-11). Alexander now appeals from the Order and Judgment dismissing his Amended Complaint. (R. 220).

STATEMENT OF FACTS[2]

Because the circuit court entered judgment on the pleadings dismissing the case, Nick restates the facts as alleged in Alexander's Amended Complaint.

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[1] Nick previously filed a motion for judgment on the pleadings, but that motion became moot when Alexander amended his Complaint. (R. 52).

[2] The documents found at APP 0003-0010 do not appear to have been attached to Alexander's Amended Complaint. (*See* R. 68-74). Nick agrees, however, that those documents were attached to Alexander's original Complaint as Exhibits A, B, and C. (R. 1-13). Even though they were not attached to Alexander's Amended Complaint, they were consistently referred to as Exhibits A, B, and C in the same manner as the original Complaint. (*See* R. 68-74). Thus, these documents should be regarded as part of the pleadings in this case.

Alexander is a resident of Pennington County, South Dakota. (R. 68). Prior to his passing, Steve was a resident of Butte County, South Dakota. *Id.* Nick is a resident of Mesa County, Colorado. *Id.*

Steve ran a cow-calf operation in Butte County, South Dakota. As part of this operation, Steve held a USFS grazing permit known as the "Gillette Prairie Allotment" (hereinafter the "USFS Permit"). (R. 68; APP 0003). As is typical of USFS grazing permits, the USFS Permit issued to Steve allowed him to graze a certain number of cattle on an allotment of land owned by the USFS. *See* 36 C.F.R. § 222.3(c). Steve qualified as a permittee because the USFS Permit was tied to a designated set of acres (known as "base property") owned by Steve. 36 C.F.R. § 222.3(c)(1)(i); *see also* 36 C.F.R. § 222.1(b)(iii) (defining "base property"). While permittees like Steve can sell the base property or their permitted livestock, transfer of a USFS grazing permit to the purchaser by the USFS is not guaranteed—and is completely within the discretion of the USFS. 36 C.F.R. § 222.3(c)(1)(iv).

On September 12, 2003, Alexander and Steve allegedly entered into a written agreement purportedly giving Alexander a right of first refusal in Steve's cattle and the USFS Permit for the Gillette Prairie Allotment allocated to Steve by the USFS. (R. 68-69; *see also* APP 0003-0007). The ROFR, in pertinent part provides:

> The parties agree: [Steve] presently has a USFS permit identified as Gillette Prairie allotment in his sole name. He has the authority to enter into this agreement on his own behalf. There are no others directly or indirectly involved in the ownership, control, or use of the cattle subject to this agreement. Steve Hobart's family having first right to have permit transferred to their names or name, [Steve] herewith grants Alexander the first right of refusal to purchase [Steve's] cattle and grazing allotment in combination with the aforesaid USFS permit for a price to be determined as hereafter set forth. Alexander's [sic] will also have first right of refusal from Steve Hobart [sic] heirs.

Term of this Agreement:

It is agreed the term of this agreement shall commence with the signing of this agreement and shall terminate only when said permit is successfully transferred to Alexander or Alexander has not exercised his right to purchase said cattle . . . .

Exercise of Said First Right of Refusal:

[Steve] agrees to notify Alexander in writing at 11590 Gillette Prairie Road, Hill City, South Dakota 57745.

Purchase Price:

It is agreed the price of the livestock shall be determined between Alexander and [Steve] by referring to the price of similar livestock as of the date of the notice by [Steve] to Alexander of the offer to purchase aforesaid. . . .

Payment of Purchase Price:

It is agreed Alexander shall pay said livestock price in full on the date the USFS permit is transferred to Alexander. Alexander shall also pay [Steve] the sum of $300.00 per head allocated by such permit. . . .

Possession:

It is agreed the possession of the cattle shall transfer to Alexander on the date the permit is transferred to Alexander by the USFS. Risk of loss and expense of upkeep of said cattle and permit shall remain in [Steve] until the transfer successfully is made to Alexander.

. . .

Binding of Agreement: It is agreed this contract shall be binding on the parties hereto, their heirs, successors and assigns.

(APP 0003-0004). According to Alexander's Amended Complaint, Alexander and Steve entered into this agreement because Steve owed an outstanding debt to Alexander. (R. 69).

Subsequently, on February 9, 2005, Alexander contends he entered into a second agreement, this time with Steve and Nick. *Id.* The second agreement, titled Addendum

to Purchase Agreement, purports to extend the ROFR to Steve's son, Nick. (*Id.*; APP 0008). The Addendum modifies the ROFR in part, noting "the parties continue in their agreement that Alexander has the [ROFR] to purchase up to 45 head of cattle, and the associated grazing permit on the USFS Gillette Prairie Allotment[.]" (APP 0008). Further, the Addendum states the ROFR "extends to and includes the right to purchase the agreed upon cattle and associated Gillette Prairie Allotment from Steve Hobart's son, Nick Hobart." *Id.*

Alexander contends Steve and/or Nick sold the cattle and transferred the USFS Permit in December 2021 without giving notice of their intention to sell or the terms of the sale to Alexander. (R. 69-70). In April 2022, Alexander's counsel sent a letter to Steve and Nick regarding Alexander's rights under the ROFR. (R. 69; APP 0009). Neither Steve nor Nick responded to the letter. (R. 70). As a result, Alexander states he "has lost substantial profit in not being able to own the cattle permitted on the grazing allotment or use the allotment to his benefit and will continue to lose profit each year from his cattle operation." (R. 71).

STANDARD OF REVIEW

There are two issues before this Court on appeal: Alexander's appeal as to whether the circuit court erred when it determined the ROFR was void under SDCL § 53-5-3 and dismissed Alexander's Amended Complaint; and Nick's notice of review as to whether the circuit court erred when it found that the ROFR was not an unreasonable restraint on the alienation of property under SDCL § 43-3-5.

The circuit court made its legal determinations regarding both issues in the context of granting Nick's Amended Motion for Judgment on the Pleadings. This Court

applies the de novo standard to "a ruling granting a judgment on the pleadings." *Thom v. Barnett*, 2021 S.D. 65, ¶ 13, 967 N.W.2d 261, 267 (quoting *Slota v. Imhoff & Assocs., P.C.*, 2020 S.D. 55, ¶ 12, 949 N.W.2d 869, 873). Further, because both issues implicate interpretation of the ROFR, this Court reviews the circuit court's contractual interpretation de novo. *Knecht v. Evridge*, 2020 S.D. 9, ¶ 47, 940 N.W.2d 318, 331-32 (citations omitted).

ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT CORRECTLY APPLIED THE LEGAL STANDARD FOR JUDGMENT ON THE PLEADINGS.

As a threshold matter, it is necessary to clarify a misconception repeatedly asserted throughout Alexander's brief regarding the circuit court's application of the legal standard for a motion for judgment on the pleadings.

Motions for judgment on the pleadings are governed by SDCL § 15-6-12(c), which states "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." This Court previously noted that "[j]udgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Slota*, 2020 S.D. 55, ¶ 12, 949 N.W.2d at 873 (quoting *Loesch v. City of Huron*, 2006 S.D. 93, ¶ 3, 723 N.W.2d 694, 695). Judgment on the pleadings is appropriate to resolve legal issues when there are no facts in dispute. *Id.* Thus, for purposes of Nick's Amended Motion for Judgment on the Pleadings, South Dakota law required the circuit court to treat all facts pleaded in the Amended Complaint as true and resolve legal issues arising from those facts. *Owen v. Owen*, 444 N.W.2d 710, 711 (S.D. 1989), *abrogated on other grounds by Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992).

Here, the circuit court correctly applied the legal standard to Nick's Amended Motion for Judgment on the Pleadings and accepted Alexander's factual allegations as true. Alexander contends that, merely by filing an Answer to his Amended Complaint denying certain allegations, Nick created disputes of fact that prevented the circuit court from entering judgment on the pleadings. *See, e.g.,* App. Br. at 6. But Alexander ignores that, for purposes of his Amended Motion for Judgment on the Pleadings, Nick accepted all facts pleaded in Alexander's Amended Complaint as true. (*See* R. 148 ("The facts, as pleaded in [Alexander's] Amended Complaint *and accepted as true for purposes of this motion*, are as follows." (emphasis added))). Were this Court to accept Alexander's argument, then any defendant who files an answer denying any factual allegations in a complaint would be precluded from moving for judgment on the pleadings because there would inevitably be disputes of fact created by the answer. This interpretation is directly in conflict with SDCL § 15-6-12(c), which provides that "any party" may move for judgment on the pleadings and the moving party can only do so once the pleadings are closed. Thus, Nick could only file his Amended Motion for Judgment on the Pleadings *after* he filed his Answer to Alexander's Amended Complaint.

Further, while Alexander continually contends that the circuit court made factual findings in its Order and Judgment granting Nick's Amended Motion for Judgment on the Pleadings, Alexander is unable to point to a single factual finding allegedly made by the circuit court. For instance, Alexander contends the circuit court was required to accept as true that the ROFR was an enforceable promise because Alexander pleaded it was so in his Amended Complaint. *See* App. Br. at 14-15 ("Taking the facts in the Amended Complaint as true, Steve gave [Alexander] the first right of refusal on the cattle

he owned and the Grazing Allotment permit that was issued in his name to [Alexander] because Steve owed an outstanding debt, creating an enforceable promise."). The circuit court, however, was not required to accept Alexander's legal conclusion that the ROFR was an enforceable promise because the existence and interpretation of contracts are questions of law, squarely within the province of the circuit court on a motion for judgment on the pleadings. *Koopman v. City of Edgemont by Dribble*, 2020 S.D. 37, ¶ 14, 945 N.W.2d 923, 926-27 (citing *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 20, 698 N.W.2d 555, 566 (additional citation omitted)). Ultimately, the circuit court interpreted the ROFR and concluded, as a matter of *law*, the ROFR was void because performance was impossible under SDCL § 53-5-3.

Thus, the circuit court correctly applied the proper legal standard to Nick's Amended Motion for Judgment on the Pleadings, and Alexander's contention to the contrary is meritless.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THE RIGHT OF FIRST REFUSAL WAS VOID UNDER SOUTH DAKOTA CODIFIED LAW § 53-5-3.

Alexander alleged three causes of action against the Hobarts in his Amended Complaint: (1) breach of contract related to the sale of the cattle under the ROFR; (2) breach of contract related to the USFS Permit under the ROFR; and (3) fraud related to the ROFR. As explained below, the circuit court correctly granted judgment on the pleadings and dismissed all three causes of action.

A. The right of first refusal is void under SDCL § 53-5-3.

1. The right of first refusal's object is either impossible to perform or unlawful.

The circuit court correctly dismissed Alexander's Amended Complaint because the ROFR is void under SDCL § 53-5-3. For a contract to be valid under South Dakota law, it must be for a lawful purpose or object. *Knecht*, 2020 S.D. 9, ¶ 47, 940 N.W.2d at 331. Under SDCL § 53-5-3, "[w]here a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance . . . the entire contract is void." *See also* 17A C.J.S. Contracts § 268 (2024) ("An illegal agreement is void."). "A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful." SDCL § 53-9-1. Importantly, "[a] void contract is invalid or unlawful from its inception. It is a mere nullity, and incapable of confirmation or ratification." *Knecht*, 2020 S.D. 9, ¶ 47, 940 N.W.2d at 331 (quoting *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶ 12, 648 N.W.2d 804, 807).

Here, the circuit court correctly determined the ROFR is void because its object is impossible to perform. Alternatively, the ROFR is for an unlawful object. The ROFR purportedly grants Alexander first right of refusal to purchase Nick's cattle and USFS Permit for the Gillette Prairie allotment. (APP 0003, 0008). But it is not possible—nor is it legal—for Nick, or any other USFS grazing permit holder, to transfer the USFS Permit. A permittee of a USFS grazing permit "cannot legally assign or transfer the permit, the permit creates a personal privilege for [the permittee's] individual use for the specific purpose of grazing cattle." *Hage v. United States*, 35 Fed. Cl. 147, 167 (Fed. Cl. 1996). This is because only the USFS is entitled to issue grazing permits on USFS lands. *See* 36 C.F.R. § 222.1(a) ("The Chief, Forest Service, shall develop, administer, and protect the range resources and *permit* and regulate the grazing use of all kinds and classes of

livestock on all National Forest System lands and on other lands under Forest Service control." (emphasis added)).

Further, the Code of Federal Regulations provides that "[n]ew term [grazing] permits *may* be issued to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit *to the United States* and provided the purchaser is otherwise eligible and qualified." 36 C.F.R. § 222.3(c)(1)(iv) (emphasis added). This section of the Code of Federal Regulations makes clear that, even if a permittee sells his or her permitted livestock or base property, the permittee is not free to transfer the USFS grazing permit—only the USFS has the authority to issue a grazing permit, and that authority is discretionary. Likewise, the ROFR here is illegal because the provision requiring Nick to transfer the USFS Permit to Alexander is contrary to an express provision of 36 C.F.R. § 222.3(c)(1)(iv). *See* SDCL § 53-9-1.

Because only the USFS can transfer a USFS grazing permit, it is either impossible or illegal for Nick to transfer the USFS Permit to Alexander as required under the ROFR, and the ROFR is void at its inception under SDCL § 53-5-3. Thus, the circuit court correctly dismissed Alexander's Amended Complaint because the Amended Complaint relies entirely upon the enforceability of the ROFR, and the ROFR is void under SDCL § 53-5-3.

2. The right of first refusal has one single object.

While Alexander contends the ROFR had several distinct objects, this argument is misplaced. The plain language of the ROFR illustrates that the Hobarts' cattle and the USFS Permit for the Gillette Prairie allotment were one single object. For instance, the ROFR provides "[t]he agreement will include not only up to 45 head of cattle *but also* the

US Forest Service allotment[3] and permit to allow those cattle to graze on the Gillette Prairie Allotment[.]" (APP 0008 (emphasis added)). Further, the ROFR terminated only upon successful transfer of the USFS Permit to Alexander or if Alexander did not exercise his right to purchase the Hobarts' cattle. (APP 0003). The ROFR also provided that Alexander would only issue payment "on the date the USFS permit is transferred to Alexander." *Id.* Finally, the ROFR required the Hobarts to retain possession of the cattle until the USFS Permit was transferred to Alexander. (APP 0003-0004). The ROFR was clearly designed to include transfer of the Hobarts' cattle *and* the USFS Permit together—not one or the other. Alexander even agreed to this premise, arguing to the circuit court that if he could not receive the USFS Permit, then the entire contract was void. (*See* R. 163 ("Therefore, if the Gillette Prairie Grazing Allotment permit could not be transferred to [Alexander], then the ROFR would be null and void."); R. 168 ("If [Alexander] was unable to receive the permit, the ROFR would no longer be in effect.")). Thus, because the ROFR has a single object, and that object was either impossible to perform or illegal, the circuit court correctly determined the ROFR was void under SDCL § 53-5-3.

3. The right of first refusal is void under Knecht v. Evridge.

Further, this Court's holding in *Knecht v. Evridge* supports the notion that a USFS grazing permit cannot be the object of a valid contract under SDCL § 53-5-3, and Alexander's reading to the contrary is misguided. There, the Evridges owned a ranch adjacent to the Grand River National Grassland in Perkins County, South Dakota.

[3] The "allotment" referenced in the ROFR refers to the designated area of USFS land available for livestock grazing. 36 C.F.R. § 222.1(b).

Knecht, 2020 S.D. 9, ¶ 4, 940 N.W.2d at 322. The federal government owned the Grand River National Grassland and the USFS managed it. *Id.* The USFS entered into a cooperative agreement with the Grand River Grazing Association ("Grazing Association") for the Grazing Association to administer grazing rights among ranchers with qualifying base property. *Id.* The Evridges received annual grazing permits from the Grazing Association for decades and were familiar with the Grazing Association's rules. *Id.* ¶ 4, 940 N.W.2d at 322-23. Knecht, a South Dakota rancher, sought to lease the Evridges' ranch to run his expanding cattle herd. *Id.* ¶ 3, 940 N.W.2d at 322.

Knecht and the Evridges agreed for Knecht to lease the Evridges' ranch for three years in exchange for $157,000 yearly rent. *Id.* ¶ 5, 940 N.W.2d at 323. To effectuate the agreement, the Evridges insisted that Knecht enter into two leases for the ranch. *Id.* Under the first lease, titled "Agricultural Lease," Knecht agreed to pay $28.55 per acre, or $87,648.50 annually, for the Evridges' ranch. *Id.* ¶ 6. Under the second lease, titled "Supplemental Lease," Knecht agreed to pay a lump sum yearly rent of $69,351.50 for the Evridges' ranch. *Id.* Importantly, neither lease contractually obligated the Evridges to provide Knecht a grazing permit. *Id.* ¶ 25 n.6, 940 N.W.2d at 327 n.6. Both leases concerned only the Evridges' ranch and noted that the grazing permit was waived to the Grazing Association. *Id.* Apparently, the Evridges insisted upon the two leases because they knew the Grazing Association could restrict the price the Evridges could charge to lease their ranch and because they knew the Supplemental Lease violated the Grazing Association's rules, which prohibited subleasing grazing rights. *Id.* ¶ 8, 940 N.W.2d at 323. To that end, the Evridges only filed the Agricultural Lease with the Grazing Association, and, upon receipt of the Agricultural Lease, the Grazing Association

transferred the Evridges' grazing permit to Knecht. *Id.* ¶ 7. Eventually, relations between the parties soured, and Knecht brought suit against the Evridges alleging *inter alia* breach of contract regarding the Supplemental Lease. *Id.* ¶ 9, 940 N.W.2d at 323-24.

On appeal, Knecht contended the Supplemental Lease was void under SDCL § 53-5-3 because it violated the rules of the Grazing Association by requiring the surreptitious transfer of the Evridge's grazing permit to Knecht. *Id.* ¶ 48, 940 N.W.2d at 332. This Court rejected Knecht's argument, however, because the Supplemental Lease did not call for the transfer of the grazing permit directly from the Evridges to Knecht. *Id.* "Instead, the plain language of the Supplemental Lease describes the object of the agreement as a lease of the Evridges' 3,070-acre ranch to Knecht." *Id.* ¶ 49. This Court found significant that neither the Supplemental Lease nor the Agricultural Lease contractually obligated the Evridges to assure that Knecht received their grazing permit. *Id.* Rather, the Supplemental Lease provided that the Evridges' grazing permit was waived to the Grazing Association. *Id.* Thus, "the object of the Supplemental Lease, as expressed by its text, was the lease of the ranch, which is not unlawful and does not violate public policy as expressed in the Department of Agriculture's regulations." *Id.*

Here, the ROFR is distinguishable from the Supplemental Lease in *Knecht* because it explicitly calls for the transfer of the USFS Permit. Unlike the Supplemental Lease in *Knecht*, the ROFR does not state Nick must waive the USFS Permit to the USFS. (APP 0003-0004, 0008). Instead, the ROFR contractually obligates Nick to transfer the USFS Permit directly to Alexander. *Id.* This is a significant difference because the ROFR seeks to have Nick contravene the Department of Agriculture's regulations and USFS' authority with regard to issuance of grazing permits. *See* 36

C.F.R. § 222.3(c)(1)(iv). In other words, the ROFR is contrary to an express provision of law, and the ROFR is void under SDCL § 53-5-3. Alexander's belief that *Knecht* authorizes the inclusion transfer of grazing permits within lease agreements is simply incorrect. *See* App. Br. at 10-11. The opposite is true: had the Supplemental Lease in *Knecht* called for the Evridges to transfer the grazing permit to Knecht, it would have been an unlawful contract for the same reasons that the ROFR here is an unlawful contract and void at its inception.

4. The authority relied upon by Alexander is inapposite.

Alexander relies upon two cases for the proposition that a USFS grazing permit may be included as the object of a contract. Alexander's reliance on both cases is misplaced. First, Alexander cites to *Dooling v. Casey*, 448 P.2d 749 (Mont. 1968). *Dooling* is not pertinent to the resolution of this case because whether a USFS grazing permit is a lawful object of a contract was not at issue there; rather, the issue was whether the contract in that case required the sellers to transfer a grazing permit to buyers or whether the contract merely required the sellers to execute a waiver of the grazing permit to the USFS. 448 P.2d at 753. It does not appear that the seller challenged whether the USFS grazing permit at issue there could be the lawful object of the contract. Further, *Dooling* is inapposite because it was decided in 1968, while the federal regulations that make clear only the USFS has the authority and discretion to issue grazing permits were not enacted until October 28, 1977. 36 C.F.R. §§ 222.1, 222.3; *see also* Grazing and Livestock Use on the National Forest System, 42 Fed. Reg. 56732 (Oct. 28, 1977) (to be codified at 36 C.F.R. pt. 222).

Second, Alexander's reliance on *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125 (9th Cir. 2010) is misplaced. *See* App. Br. at 12-13. Alexander cites to that case for the proposition that "[f]ederal regulations allow the issuance of a new grazing permit 'to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit.' " *Id.* (citing *Fence Creek Cattle Co.*, 602 F.3d at 1133). The excerpt relied upon by Alexander is taken from 36 C.F.R. § 222.3(c)(1)(iv), which, as explained above, authorizes the USFS—not private parties—to transfer grazing permits. Thus, *Fence Creek Cattle Co.* supports the proposition that private parties have no authority to contract to transfer USFS grazing permits.

Finally, Alexander asks this Court to consider the USFS Waiver of Term Grazing Permit Form FS-2200-0012, which is attached to Alexander's Appendix. (APP 011-012). This Court should not consider this form, however, because Alexander never presented it to the circuit court for its consideration, and therefore, has waived any argument to this effect. *Hauck v. Clay Cnty. Comm'n*, 2023 S.D. 43, ¶ 4 n.4, 994 N.W.2d 707, 709 n.4. Even if this Court considers the form, however, it simply further reinforces the notion that only the USFS has the authority to issue and transfer grazing permits because it makes clear that the holder of the permit is waiving *to the USFS*, and it demonstrates that the USFS is the party who issues the new grazing permit.

Ultimately, the circuit court correctly determined the ROFR was void under SDCL § 53-5-3. The circuit court explained that performance of the ROFR was impossible because Nick could not transfer the USFS Permit. (HT at 22:16-25, 23:1-4). The circuit court's reasoning is supported by the federal regulations and precedent cited

above. Alternatively, the ROFR is void under SDCL § 53-5-3 because its object—the transfer of the cattle and the USFS Permit—is unlawful because it is contrary to federal regulations promulgated by the Department of Agriculture. The authority Alexander relies upon does not demonstrate that the circuit court erred. Thus, because the circuit court did not err, this Court should affirm the circuit court.

B. The arguments raised in Alexander's Brief are misplaced.

In addition to the contentions addressed above, Alexander raised several arguments for the proposition that the circuit court erred in dismissing Alexander's Amended Complaint. First, Alexander argues that the circuit court failed to apply the purported elements for impossibility of performance under South Dakota law. App. Br. at 6-10. Second, Alexander contends the circuit court should not have dismissed his fraud claim. App. Br. at 15-16. Finally, Alexander posits the circuit court erred when it failed to sever the cattle from the USFS Permit. App. Br. at 16-18. As discussed below, Alexander's additional arguments are without merit.

1. Alexander misapprehends the law regarding impossibility of performance.

Alexander's contention that the circuit court failed to apply the correct legal test for impossibility of performance under SDCL § 53-5-3 is meritless for three reasons. First, Alexander waived this argument by failing to raise the purported elements of impossibility of performance before the circuit court. Second, the cases cited by Alexander do not establish these elements are the proper test for impossibility under South Dakota law. Third, even if the circuit court did not properly apply the test for impossibility of performance, the ROFR is still void under SDCL § 53-5-3 because its object is unlawful.

Alexander contends the circuit court erred by failing to apply the elements of impossibility as stated in *Bendetto v. Delta Air Lines, Inc.*, 917 F.Supp.2d 976 (D.S.D. 2013). App. Br. at 6-10. But Alexander waived his argument by failing to raise it before the circuit court in his briefing or at the hearing on Nick's Amended Motion for Judgment on the Pleadings. (*See* R. 162-69; HT 13-20). It is well-settled that "[a]rguments not raised at the trial level are deemed waived on appeal." *Hauck,* 2023 S.D. 43, ¶ 4 n.4, 994 N.W.2d at 709 n.4 (quoting *State v. Hi Ta Lar*, 2018 S.D. 18, ¶ 17 n.5, 908 N.W.2d 181, 187 n.5); *see also Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 12 n.5, 764 N.W.2d 474, 480 n.5; *Long v. State*, 2017 S.D. 79, ¶ 19, 904 N.W.2d 502, 510. Thus, because Alexander failed to raise the purported elements of impossibility before the circuit court, Alexander waived this argument and this Court need not consider it.

Second, even if the argument is not waived, the cases cited by Alexander do not establish that these elements are the proper test for impossibility under SDCL § 53-5-3. Alexander relies upon *Bendetto* for the proposition that South Dakota law requires the proof of three elements to establish legal impossibility. App. Br. at 7 (citing *Bendetto,* 917 F.Supp.2d at 983). *Bendetto* is, of course, a federal district court opinion and is not binding on this Court. Further, *Bendetto* relies upon *Mueller v. Cedar Shore Resort Inc.*, 2002 S.D. 38, 643 N.W.2d 56, which in turn relies upon *Groseth Intl., Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987), to establish the elements for the doctrine of commercial frustration of purpose to excuse contractual performance. *Bendetto*, 917 F.Supp.2d at 983 (citing *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 41, 643 N.W.2d 56, 69); *Mueller*, 2002 S.D. 38, ¶ 41, 643 N.W.2d at 69 (citing *Groseth Intl, Inc.*

v. Tenneco, 410 N.W.2d 159, 165 (S.D. 1987)). Both *Mueller* and *Groseth* discuss the doctrine of commercial frustration, but they never once mention impossibility of performance under SDCL § 53-5-3. *See Mueller*, 2002 S.D. 38, ¶¶ 40-43, 643 N.W.2d at 69-70 (applying the test for commercial frustration but not impossibility under SDCL § 53-5-3); *Groseth*, 410 N.W.2d at 164-67 (same). Thus, these cases do not establish that the test for commercial frustration is also the test for whether a contract is void under SDCL § 53-5-3 for impossibility of performance of the contract's object.

Third, even if (1) the argument is not waived, and (2) the Court were to determine that the elements of commercial frustration are also the elements of impossibility of performance under SDCL § 53-5-3, the ROFR is still void under SDCL § 53-5-3 because its object is unlawful. The ROFR's requirement that Steve and/or Nick transfer the USFS Permit to Alexander is unlawful because it is contrary to federal regulations promulgated by the Department of Agriculture. As previously discussed, only the USFS has the authority to issue and transfer grazing permits. *See* Argument and Authorities *supra* § II.A. Thus, the circuit court correctly dismissed Alexander's Amended Complaint.

Alexander waived his argument because he failed to present the purported elements of impossibility before the circuit court. Further, the purported elements cited by Alexander are not the law on impossibility of performance under SDCL § 53-5-3. Finally, even if the elements are the law regarding impossibility of performance, the ROFR is still void under SDCL § 53-5-3 because its object is unlawful. Thus, the circuit court did not err when it dismissed Alexander's Amended Complaint.

2. The circuit court correctly dismissed Alexander's fraud claim.

Alexander's contention that the circuit court erred in dismissing his fraud claim is, again, misplaced. Alexander argues that, even if the circuit court correctly ruled that the

ROFR is void, it should not have dismissed his fraud claim. App. Br. at 15-16. But, as before, Alexander waived this argument by failing to raise it before the circuit court. Further, even if the argument is not waived, the circuit court correctly dismissed Alexander's fraud claim because it did not allege a tort separate from the breach of contract claims.

First, Alexander waived this argument by failing to raise it before the circuit court. Alexander never once argued in his briefing or at the hearing on Nick's Amended Motion for Judgment on the Pleadings that, even if the breach of contract claims were dismissed under SDCL § 53-5-3, the fraud claim should survive. (*See* R. 162-69; HT 13-20). Thus, this Court need not consider Alexander's argument for the first time on appeal. *See Hauck*, 2023 S.D. 43, ¶ 4 n.4, 994 N.W.2d at 709 n.4.

Second, even if the argument is not waived, the circuit court correctly dismissed Alexander's fraud claim because it did not constitute a tort separate from the breach of contract claims. This Court recognizes the independent tort doctrine, "which contemplates concurrent, or nearly concurrent, tort and contractual liability, but only in limited circumstances where a tort duty exists independent of the parties' contractual obligations." *Knecht*, 2020 S.D. 9, ¶ 60, 940 N.W.2d at 335. Thus, "tort liability requires 'a breach of a legal duty independent of contract' that arises from 'extraneous circumstances, not constituting elements of the contract.' " *Id.* (cleaned up) (quoting *Schipporeit v. Khan*, 2009 S.D. 96, ¶ 7, 775 N.W.2d 503, 505).

Here, Alexander alleged in his Amended Complaint that: (1) he entered into the ROFR in exchange for satisfaction and waiver of debts owed by Steve; (2) the Hobarts promised that Alexander would have the ROFR for purchase of their cattle and USFS

Permit; (3) the Hobarts never intended to perform their promise; and (4) Alexander relied upon the Hobarts' promise. (R. 72-73). These allegations do not establish tort duties separate from the duties already imposed by the ROFR. Alexander's contention, at its core, is that the Hobarts committed fraud because they did not honor the ROFR. This is simply not a claim that is "extraneous to the [ROFR]" and is not actionable as a separate tort. *Knecht*, 2020 S.D. 9, ¶ 61, 940 N.W.2d at 335 (citation omitted). Thus, because Alexander's fraud claim is not actionable as a separate tort, the circuit court correctly dismissed it.

The circuit court did not err in dismissing Alexander's fraud claim. Alexander waived the argument that the fraud claim should not have been dismissed by failing to raise it before the circuit court. Further, the fraud claim does not establish a tort duty independent of Alexander's breach of contract claims. Thus, this Court should affirm the circuit court's dismissal of the Amended Complaint.

3. The right of first refusal is not severable.

Alexander's argument that the circuit court should have severed the USFS Permit from the ROFR and enforced the ROFR as to the Hobarts' cattle is misguided. App. Br. at 16-18. Under SDCL § 53-5-4, "[w]here a contract has several distinct objects, one or more of which are lawful and one or more of which are unlawful in whole or in part, the contract is void as to the latter and valid as to the rest." A severable contract requires two elements: "(1) the parties' performances must be separable into corresponding pairs of part performance and (2) the parts of each pair must be regarded as agreed equivalents." *Thunderstik Lodge, Inc. v. Reuer*, 2000 S.D. 84, ¶ 7, 613 N.W.2d 44, 46 (quoting *Comm. Trust and Sav. Bank v. Christensen*, 535 N.W.2d 853, 857 (S.D. 1995) (citing E. Allen Farnsworth, *Contracts*, § 5.8, at 382 (2d ed. 1990); Restatement (Second) of Contracts §

183 (1979)). Importantly, "the agreement must not be an integrated scheme to contravene public policy." *Id.* (citations omitted).

Here, as previously discussed, the ROFR is not subject to divisibility under SDCL § 53-5-4 because the ROFR is for a single object, not several distinct objects. *See* Argument and Authorities *supra* § II.A.2. Even if this Court concludes the cattle and the USFS Permit are distinct objects, the Court should not divide the ROFR because it is "an integrated scheme to contravene public policy." *Thunderstik Lodge, Inc.*, 2000 S.D. 84, ¶ 7, 613 N.W.2d at 46. The ROFR is clearly dependent upon the Hobarts' transfer of the USFS Permit to Alexander. Alexander only had to pay the Hobarts for the cattle if and when the USFS Permit was transferred. (APP 0003). The ROFR only terminated upon transfer of the USFS Permit to Alexander. *Id.* The Hobarts retained possession of the cattle until they successfully transferred the USFS Permit to Alexander. (APP 0003-0004).

While Alexander contends in his brief that he would still pay fair market value for the cattle even if the USFS Permit were not transferred, App. Br. at 17, this is simply not what the ROFR says. (APP 0003-0004, 0008). Further, this is contrary to the position taken by Alexander in his briefing before the circuit court. (*See* R. 163 ("Therefore, if the Gillette Prairie Grazing Allotment permit could not be transferred to [Alexander], then the ROFR would be null and void."); R. 168 ("If [Alexander] was unable to receive the permit, the ROFR would no longer be in effect."))

Because the ROFR was entirely dependent on the Hobarts' transfer of the USFS Permit to Alexander, and because only the USFS can issue and transfer grazing permits under the regulations promulgated by the Department of Agriculture, the ROFR is "an

integrated scheme to contravene public policy." *Thunderstik Lodge, Inc.*, 2000 S.D. 84, ¶ 7, 613 N.W.2d at 46. Thus, the ROFR is void, and the circuit court did not err when it dismissed Alexander's Amended Complaint.[4]

III. ALTERNATIVELY, THE CIRCUIT COURT ERRONEOUSLY DETERMINED THE RIGHT OF FIRST REFUSAL WAS NOT AN UNREASONABLE RESTRAINT ON THE ALIENATION OF PROPERTY.[5]

At the hearing on Nick's Amended Motion for Judgment on the Pleadings, the circuit court rejected Nick's argument that the ROFR was void as an unreasonable restraint on the alienation of property. (HT 21:14-25, 22:1-11). The circuit court erred as a matter of law in this determination. However, this Court need only reach this issue if it determines the circuit court erred when it determined the right of first refusal was void because performance of its object was impossible or its object was unlawful.

In addition to the ROFR being void due to impossibility, the ROFR is likewise void as a matter of law because it unreasonably restrains Nick's ability to alienate his property. South Dakota law provides that "[c]onditions restraining alienation, when repugnant to the interest created, are void." SDCL § 43-3-5. This Court considers a right of first refusal to be a "preemptive right restraining alienation."[6] *Laska v. Barr* (*Laska*

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[4] Even if this Court were to sever the cattle from the USFS Permit under the ROFR, Alexander would have no damages under SDCL § 57A-2-713, which provides the measure of damages for repudiation by a seller is the difference between the market price at the time when the buyer learned of the breach and the contract price. Here, the contract price for the cattle was fair market value. (ADD 0003). Thus, Alexander suffered no damages.

[5] This Court has jurisdiction over this issue because Nick preserved it in his notice of review filed on September 10, 2024.

[6] "A right of first refusal is a conditional right that ripens into an enforceable option contract when the owner receives a third-party offer to purchase or lease the property subject to the right and manifests an intention to sell or lease on those terms." *Laska v. Barr* (*Laska I*), 2016 S.D. 13, ¶ 6, 876 N.W.2d 50, 53 (citation and internal quotations omitted).

II), 2018 S.D. 6, ¶ 24, 907 N.W.2d 47, 54. Thus, to survive scrutiny and be enforceable, a right of first refusal must be reasonable and for a legitimate purpose. *Id.*

A. Examination of *Laska II* is appropriate in this case.

Laska II is the preeminent case in South Dakota when analyzing the enforceability of a right of first refusal under SDCL § 43-3-5. There, the Laskas entered into an agreement with the Barr Partners granting the Barr Partners a right of first refusal to purchase real property owned by the Laskas. *Id.* ¶ 2, 907 N.W.2d at 49. The Barr Partners wanted the right of first refusal to purchase the Laskas' land because they desired to complete a commercial development. *Id.* ¶ 6, 907 N.W.2d at 50. The right of first refusal fixed the price to purchase the Laskas' land at $10,500.00 per acre. *Id.* ¶ 2, 907 N.W.2d at 49. The Laskas' receipt of a bona fide third party offer to purchase some, or all, of the pertinent property triggered the Barr Partners' right of first refusal. *Id.* The right of first refusal required the Laskas to provide the Barr Partners written notice of the offer within ten days of receipt and allowed the Barr Partners to exercise their right of first refusal within ten days of receipt of notice. *Id.* The right of first refusal lapsed if the Barr Partners failed to exercise their rights by giving the Laskas appropriate notice. *Id.* Finally, the right of first refusal provided that it "shall bind to the benefit of the heirs, successors, administrators, and executors of the . . . parties." *Id.* Several years after entering into the agreement, the Laskas sought a declaration that the right of first refusal was void as a matter of law. *Id.* ¶ 3.

On appeal, this Court held the right of first refusal unreasonably restrained the alienation of property. The *Laska II* Court considered a variety of factors in analyzing the reasonableness of the Barr Partners' right of first refusal, including: (1) whether the

purchase or lease price is fixed under the right of first refusal; (2) the duration of the restraint imposed by the right of first refusal; (3) the contracting parties' intent; (4) the purpose of the right of first refusal; (5) the nature of the right of first refusal; and (6) the nature of the property interest. *Id.* ¶ 25, 907 N.W.2d at 54. It noted "[t]he standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property *at his or her convenience* at a price determined by the market." *Id.* (emphasis added) (quoting Restatement (Third) of Prop.: Servitudes § 3.4 cmt. c (2000)).

First, the *Laska II* Court reasoned the fixed price of the Barr Partners' right of first refusal gravitated against enforceability. The *Laska II* Court emphasized the Barr Partners' right of first refusal "does not require the Barr Partners to *match* a third-party offer." *Id.* ¶ 26, 907 N.W.2d at 54 (emphasis in original). Instead, "the agreement gives the Barr Partners the right to purchase [the property] for $10,500 per acre regardless of the fair market value of [the property], regardless of any improvements made, and regardless of a bona fide third-party offer at a price considerably higher than $10,500 per acre." *Id.* ¶ 26, 907 N.W.2d at 54-55.

Second, the *Laska II* Court reasoned the right of first refusal's unlimited duration and lack of justifiable purpose weighed against enforceability. *Id.* ¶ 27, 907 N.W.2d at 55. While the fixed price and unlimited duration did not render the right of first refusal unreasonable per se, the Court stated "the greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation." *Id.* (cleaned up) (quoting Restatement (Third) of Prop.: Servitudes § 3.4 cmt. c). Ultimately, the Barr Partners' purpose for the restraint was to complete their commercial development and not to protect any property interests; the

Barr Partners attempted "to obtain more property to turn a profit and, in the process, stop the Laskas from being able to sell their property to anyone else by virtue of the right of first refusal." *Id.* ¶ 27. The Barr Partners' purpose was not sufficient to justify the fixed price and unlimited duration of the right of first refusal.

Third, and finally, the *Laska II* Court found significant that the right of first refusal was not conditioned upon the Laskas' willingness to sell their property. *Id.* ¶ 28. The *Laska II* Court reasoned "[t]he Laskas need only receive a third-party offer to trigger the Barr Partners' right to purchase the property for $10,500 per acre, which right exists for eternity." *Id.* Ultimately, the *Laska II* Court held the Barr Partners' right of first refusal was an unreasonable restraint on alienation and repugnant to the interest created "[b]ecause there is a significant interference with the Laskas' ability to transfer the property without a strong purpose justifying the restraint[.]" *Id.* Ultimately, considering these factors in the aggregate, the *Laska II* Court held the right of first refusal was unenforceable. *Id.*

B. *Laska II* is analogous.

Here, the circuit court erred when it determined Alexander's ROFR is distinguishable from the one at issue in *Laska II*. Alexander's ROFR is an unreasonable restraint on the alienation of property and repugnant to the interest created as was the case with the right of first refusal in *Laska II*. First, the ROFR is for a quasi-fixed price. The ROFR states "the price of the livestock shall be determined between Alexander and Hobart by referring to the price of similar livestock as of the date of the notice by Hobart to Alexander of the offer purchase[.]" (APP 0003). While the ROFR admittedly allows for the sale of the cattle for market price, the ROFR fixes a price of $300 per head of

cattle allocated by the USFS Permit. *Id.* But, just as in *Laska II*, the ROFR does not require Alexander to *match* any offer received by the Hobarts. Thus, if the Hobarts received an offer significantly above market price for the cattle, the ROFR would allow Alexander to undercut that offer and purchase for market price. Further, the ROFR entitled Alexander to pay $300 per head of cattle allocated on the USFS Permit regardless of the fair market value of cattle allocated on a USFS grazing permit. *Id.* The quasi-fixed price of the ROFR, coupled with the fact that the ROFR does not require Alexander to match any bona fide offer, gravitates against enforceability of the ROFR. *See Laska II*, 2018 S.D. 6, ¶ 26, 907 N.W.2d at 54-55.

Second, the ROFR lasts in perpetuity. The ROFR states it "shall be binding on the parties hereto, their heirs, successors and assigns." (APP 0004). This is analogous to the language used in the right of first refusal in *Laska II*, which this Court held lasted in perpetuity. 2018 S.D. 6, ¶¶ 2, 27-28, 907 N.W.2d at 49, 55. Just as in *Laska II*, the purpose of the restraint does not justify its unlimited duration. It is clear from the face of the ROFR and Alexander's Amended Complaint that the purpose of the ROFR was for Alexander to obtain more property to turn a profit and prevent the Hobarts from being able to sell their property to anyone else. (R. 71-73; APP 0003-0004, 0008). This exact rationale was rejected as a justification for the unlimited duration of the right of first refusal in *Laska II*. 2018 S.D. 6, ¶ 27, 907 N.W.2d at 55. Thus, because the ROFR's unlimited duration is not justified by its purpose, this factor weighs against enforceability of the ROFR.

Third, just as in *Laska II*, the ROFR is not conditioned upon the Hobarts' willingness to sell their property. Nothing in the language of the ROFR states that the

ROFR is triggered only when the Hobarts have an actual desire to sell their property when they receive an offer. (APP 0003-0004, 0008). Further, it is not clear from the face of the ROFR whether the Hobarts need even receive a bona fide offer to trigger the ROFR; instead, it appears *any* offer would trigger the ROFR. *Id.* Thus, an offer of $1 or $1,000,000 to the Hobarts would ostensibly trigger Alexander's ROFR. That the ROFR is not conditioned upon the Hobarts' willingness to sell their property gravitates against enforceability of the ROFR. *Laska II*, 2018 S.D. 6, ¶ 28, 907 N.W.2d at 55.

The ROFR at issue in this case unreasonably restrains alienation of property and is repugnant to the interest created. The ROFR is for a quasi-fixed price, allowing Alexander to undercut any bona fide offers the Hobarts may receive. Further, the ROFR lasts in perpetuity and its unlimited duration is not justified by its purpose. Finally, the ROFR is not conditioned upon the Hobarts' willingness to sell their property. These factors, taken in the aggregate, render the ROFR an unreasonable restraint on the alienation of property. Thus, because the ROFR is void as a matter of law under SDCL § 43-3-5, the circuit court erred in its determination to the contrary.

CONCLUSION

The circuit court did not err when it determined the ROFR was void under SDCL § 53-5-3. The ROFR requires the Hobarts to transfer their USFS Permit, but South Dakota and federal law preclude such an action. Thus, performance of the ROFR's object was impossible or the ROFR's object was unlawful.

The circuit court, however, erred when it determined the ROFR was not an unreasonable restraint on the alienation of property under SDCL § 43-3-5 (in addition to having an impossible or unlawful object). The ROFR is for a quasi-fixed price, does not

require Alexander to match any offer received by the Hobarts, does not require the Hobarts receive a bona fide offer, is not conditioned upon the Hobarts' willingness to sell, and it lasts in perpetuity. Taken in the aggregate, these factors render the ROFR an unreasonable restraint on the alienation of the Hobarts' property.

The circuit court correctly determined the ROFR was void under SDCL § 53-5-3. Alternatively, the circuit court erred in finding the ROFR was not an unreasonable restraint on the alienation of Hobart's property. Under either theory, Nick respectfully requests this Court find that dismissal of Alexander's Amended Complaint is appropriate.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument in this case.

Dated: December 3, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief of Appellee Nick Hobart, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 8,358 words. I have relied upon the word count of our word processing system as used to prepare this Brief of Appellee Nick Hobart. The original Brief of Appellee Nick Hobart and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Aidan F. Goetzinger*
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CERTIFICATE OF SERVICE

I hereby certify on December 3, 2024, the **BRIEF OF APPELLEE NICK HOBART** was filed through South Dakota Odyssey File and Serve and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
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and the **BRIEF OF APPELLEE NICK HOBART** was served by electronic mail and mailed by U.S. Mail to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30807

RODNEY ALEXANDER
Plaintiff/Appellant,

vs.

ESTATE OF STEVE HOBART and NICK HOBART,
Defendants/Appellees,

APPELLEE ESTATE OF STEVE HOBART'S BRIEF

Appeal from the Circuit Court, Seventh Judicial Circuit,
Pennington County, South Dakota,
The Honorable Joshua K. Hendrickson, presiding

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Notice of Appeal filed August 22, 2024

Filed: 12/3/2024 4:37 PM CST Supreme Court, State of South Dakota #30807

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellee Estate of Steve Hobart will be referenced as "Steve." Appellee Nick Hobart will be referenced as "Nick." The Estate of Steve Hobart and Nick Hobart will collectively be referenced as "Appellees." Appellant Rodney Alexander will be referenced as "Rodney" or "Appellant." References to the Settled Record will be referenced as "SR" followed by the page number. Appellant's Appendix will be referenced as "App" followed by the page number.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL § 15-26A-3 to consider the Order and Judgment entered July 24, 2024, granting Appellees' Motion for Judgment on the Pleadings. App001-002. Appellant filed a Notice of Appeal from the Order and Judgment on August 22, 2024.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE AGREEMENT WAS VOID FOR REASON OF LEGAL IMPOSSIBILITY.

The Trial Court held the Agreement void.

Most Relevant Authorities:

a. *Hage v. United States*, 35 Fed. Cl. 147, 167 (Fed. Cl. 1996)
b. *Knecht v. Evridge*, 2020 SD 9, 940 N.W.2d 318
c. *SDCL 53-5-3*

STATEMENT OF CASE AND FACTS

Appellant Rodney Alexander is a resident of Pennington County, South Dakota. Appellee Steve Hobart was a resident of Butte County, South Dakota. Steve died during the pendency of the suit on January 5, 2024, and the Estate of Steve Hobart was

substituted as a party. SR143. Appellee Nick Hobart is a resident of Mesa County, Colorado.

On September 12, 2003, Rodney and Steve signed a purported Agreement giving Rodney a right of first refusal ("ROFR"). See *Amended Complaint, Exhibit A*. SR68-74, App003-007. The pertinent part of the ROFR provides:

> The parties agree: [Steve] presently has a USFS[1] permit identified as Gillette Prairie allotment in his sole name. He has the authority to enter into this agreement on his own behalf. There are no others directly or indirectly involved in the ownership, control, or use of the cattle subject to this agreement. Steve Hobart's family having first right to have permit transferred to their names or name, [Steve] herewith grants [Rodney] the first right of refusal to purchase [Steve's] cattle and grazing allotment in combination with the aforesaid USFS permit for a price to be determined as hereafter set forth. Alexander's [sic] will also have first right of refusal from Steve Hobart [sic] heirs.
>
> Term of this Agreement:
>
> It is agreed the term of this agreement shall commence with the signing of this agreement and shall terminate only when said permit is successfully transferred to [Rodney] or [Rodney] has not exercised his right to purchase said cattle[.]
>
> . . .
>
> Purchase Price:
>
> It is agreed the price of the livestock shall be determined between [Rodney] and [Steve] by referring to the price of similar livestock as of the date of the notice by [Steve] to [Rodney] of the offer to purchase aforesaid. . . .
>
> Payment of Purchase Price:
>
> It is agreed [Rodney] shall pay said livestock price in full on the date the USFS permit is transferred to [Rodney]. [Rodney] shall also pay [Steve] the sum of $300.00 per head allocated by such permit.
>
> . . .

[1] USFS is an acronym for the United States Forest Service.

> Binding of Agreement: It is agreed this contract shall be binding on the parties hereto, their heirs, successors and assigns.

Amended Complaint, Exhibit A, App003-007.

According to Rodney's Amended Complaint[2], Rodney and Steve entered into this agreement because Steve owed an outstanding debt to Rodney. Id. It is significant, however, that neither the ROFR nor the Addendum mentions the purported antecedent debt. For that matter, the documents themselves show no consideration from Rodney to either Steve or Nick for the agreements.

Subsequently, on February 9, 2005, the parties signed a second agreement ("Addendum"), this time with Steve and Nick. App008. The second agreement, titled Addendum to Purchase Agreement, purports to extend the ROFR to Steve's son, Nick. Id. The Addendum modifies the ROFR in part, noting "the parties continue in their agreement that [Rodney] has the [ROFR] to purchase up to 45 head of cattle, and the associated grazing permit on the USFS Gillette Prairie Allotment[.]" Id. Further, the Addendum states the ROFR "extends to and includes the right to purchase the agreed upon cattle and associated Gillette Prairie Allotment from Steve Hobart's son, Nick Hobart." Id. Notably again, however, the Addendum itself does not mention the alleged antecedent debt nor any consideration. Id.

Rodney contends Nick sold the cattle and transferred the grazing allotment in December 2021, without giving notice to Rodney of his intention to sell or the terms of the sale. Notably, Steve did not sell the cattle, Nick sold the cattle. As a result, Rodney's counsel sent a letter to Steve and Nick regarding Rodney's rights under the ROFR.

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[2] The Amended Complaint was never served or filed separately after the Order Granting Leave to Amend (SR78), but was attached to Plaintiff's Motion to Amend. SR68-73

App009-010. Neither Steve nor Nick responded to the letter. Rodney contends neither Steve nor Nick intended to honor the ROFR. As a result, Rodney states he has lost substantial profit in not being able to own the cattle permitted on the grazing allotment or use the allotment to his benefit and will continue to lose profit each year from his cattle operation.

On April 14, 2023, Rodney sued Steve and Nick alleging breach of contract and fraud. The Trial Court granted Nick and Steve's Motion for Judgment on the Pleadings and this appeal followed.

STANDARD OF REVIEW

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *M.S. v. Dinkytown Day Care Center, Inc.*, 485 N.W.2d 587, 588 (S.D. 1992) (internal quotations omitted). It is only an appropriate remedy to resolve issues of law when there are no disputed facts. Id.

Rodney's arguments related solely to whether the Trial Court correctly applied the law, statutes and regulations to the Agreement (ROFR) and Addendum. There is no dispute as to the language used in the documents. The only issue is one of contract interpretation, which is a legal question to be reviewed de novo. *Schaefer v. Sioux Spine and Sport, Prof. LLC*, 2018 S.D. 5, ¶9, 906 N.W.2d 427, 431.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN HOLDING THE AGREEMENT VOID FOR REASON OF LEGAL IMPOSSIBILITY.

THE RIGHT OF FIRST REFUSAL FAILS FOR IMPOSSIBILITY OF PERFORMANCE.

The ROFR is void and fails because Steve and/or Nick's performance under the ROFR is a legal impossibility. Alternatively, the ROFR is for an unlawful object. Thus, the Trial Court properly granted Judgment on the Pleadings and dismissed all claims.

For a contract to be valid under South Dakota law, it must be for a lawful purpose or object. *Knecht v. Evridge*, 2020 S.D. 9, ¶47, 940 N.W.2d 318, 331. Under SDCL § 53-5-3, "[w]here a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance . . . the entire contract is void." Further, "[a] void contract is invalid or unlawful from its inception. It is a mere nullity, and incapable of confirmation or ratification." Id. (quoting *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶12, 648 N.W.2d 804, 807).

Here, the ROFR is void because its object is impossible to perform. Alternatively, the ROFR is for an unlawful object. The ROFR purportedly grants Rodney first right of refusal to purchase the cattle and USFS grazing permit identified as the Gillette Prairie allotment. But it is not possible—nor is it legal—for either Steve or Nick or any other USFS grazing permit holder, to transfer the USFS grazing permit. A permittee of a USFS grazing permit "cannot legally assign or transfer the permit, the permit creates a personal privilege for [the permittee's] individual use for the specific purpose of grazing cattle." *Hage v. United States*, 35 Fed. Cl. 147, 167 (Fed. Cl. 1996). This is because only the USFS is entitled to issue grazing permits on USFS lands. See, 36 C.F.R. § 222.1(a) ("The Chief, Forest Service, shall develop, administer, and protect the range resources and *permit* and regulate the grazing use of all kinds and classes of livestock on all National Forest Service lands and on other lands under Forest Service control." (emphasis added)). Further, the Code of Federal Regulations provides that "[n]ew term [grazing] permits

may be issued to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit *to the United States* and provided the purchaser is otherwise eligible and qualified." 36 C.F.R. § 222.3(c)(1)(iv) (emphasis added). This section of the Code of Federal Regulations makes clear that, even if a permittee sells his or her permitted livestock or base property, the permittee is not free to transfer the USFS grazing permit—only the USFS has the authority to grant a grazing permit. Because only the USFS can transfer a USFS grazing permit, it is either impossible or illegal for Steve or Nick to transfer the USFS grazing permit to Rodney. Because performance of the ROFR is either impossible or illegal, the ROFR is void at its inception under SDCL 53-5-3. *Nature's 10 Jewelers v. Gunderson* at ¶12. Thus, the Trial Court correctly entered Judgment on the Pleadings.

Rodney seems to argue that the Trial Court erred in holding the entire Agreement void because, according to Rodney, the Agreement between the parties is severable into a right of first refusal and a separate grazing permit assignment. It is without question, and is beyond factual dispute, that the Agreement and Addendum are one agreement which is void due to impossiblity, and is therefore a legal nullity. Id. The ROFR states throughout that "Hobart herewith grants Alexander the right of first refusal to purchase Hobart's cattle and grazing allotment in combination of the aforesaid USFS permit for a [single] price . . .." App003-004. The term of the ROFR also states that it would terminate "only when said permit is successfully transferred to Alexander or Alexander has not exercised his right to purchase said cattle." Id. In the payment of purchase price portion, it states that "Alexander shall pay said livestock price in full on the date the USFS permit is transferred to Alexander." Id. The possession portion of the ROFR states "it is agreed the

possession of the cattle shall transfer to Alexander on the date the permit is transferred to Alexander by the USFS." Id.

The Addendum states "under the terms of this Addendum, the parties continue in their agreement that Alexander has the right of first refusal to purchase up to 45 head of cattle, and the associated grazing permit on the USFS Gillette Prairie allotment . . .." App008. This is obviously one purported agreement that provided for transfer of cattle and a grazing allotment, not two separate agreements or a divisible agreement that calls for separate transactions wherein the Court could enforce one portion without the other.

Rodney also asserts that the Trial Court erred in granting the Judgment on the Pleadings on the issue of fraud which he alleges is plead in the Amended Complaint. First, the Amended Complaint was never served. Rodney obtained an Order from the Trial Court based upon a stipulation of the parties that he could amend his Complaint (SR78), however, Rodney never actually filed and served an Amended Complaint. The Amended Complaint upon which the action is based is simply attached to the Motion to Amend. SR68-73. Thus, Steve did not answer the Amended Complaint because it was never served.[3]

The purported Amended Complaint states no specific allegations of fraud. Rodney's Amended Complaint fails to allege any facts to support a claim for fraud, and judgment on the pleadings is correct when fraud is not specifically plead. See *SDCL 15-6-9(b)*, which states that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." The Amended Complaint, even if properly

[3] There was a Summons filed, but it was for a forcible entry and detainer action not applicable to this case. SR79.

served and filed, does not state any factual background or allegations to support fraud with specificity.

Finally, Judgment on the Pleadings was proper because the documents upon which the alleged Agreement is based, the ROFR and the Addendum, on their face are void of any indication of consideration by Rodney to Steve or Nick to support Rodney's claim that a contract even existed. Parol evidence is not admissible to support the claim that the ROFR and Addendum were entered into for satisfaction of an antecedent debt owed by Steve to Rodney. The Trial Court correctly granted Judgment on the Pleadings based upon the relevant documentary evidence and the applicable law.

CONCLUSION

The Amended Complaint relies entirely upon the enforceability of the ROFR. Here, the ROFR is void as a matter of law. Performance of the ROFR is impossible or, in the alternative, it is for an unlawful object. The ROFR calls for transfer of a USFS grazing permit to Rodney, which neither Steve nor Nick, nor any other USFS grazing permittee, can transfer a USFS grazing permit. Thus, the ROFR is void as a matter of law, and the Trial Court's Judgment should be affirmed.

Dated this 3rd day of December, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Gregory G. Strommen of DeMersseman Jensen Tellinghuisen & Huffman, LLP hereby certifies that on the 3rd day of December, 2024, he served via Odyssey File & Serve an electronic copy of the foregoing Appellee Estate of Steve Hobart's Brief in the above-captioned action on the following:

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CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 2,035 words and 10,228 characters, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

DATED: December 3, 2024.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30807; 30827

RODNEY ALEXANDER,

Appellant,
v.

ESTATE OF STEVE HOBART and NICK HOBART

Appellees,

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

THE HONORABLE JOSHUA HENDRICKSON
Circuit Court Judge

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PRELIMINARY STATEMENT

Appellant Rodney Alexander will be referenced as "Rod". Appellee Nick Hobart will be referenced as "Nick" and Appellee Estate of Steve Hobart will be referenced as "Steve". Collectively, the Appellees will be referenced as "Hobarts". The Agreement and Addendum refer to the documents included in Rod's Appendix at App. 0003-0008. The United States Forest Service will be referenced as "USFS". The Gillette Prairie Allotment referred to in the Agreement and Addendum will be referenced as "Grazing Allotment".

STANDARD OF REVIEW

In reviewing a judgment on the pleadings, the Court "must treat as true all facts properly pleaded in the complaint" and deal only with questions of law. *Owen v. Owen*, 444 N.W.2d 710, 711 (S.D. 1989). The circuit court found the Agreement and Addendum void in their entirety for reason of impossibility based solely on the provision that Rod was to have the option to have the Grazing Allotment transferred to him, should the Hobarts ever sell their cattle. (HT 22:16-18). The circuit court erred in not considering the facts in Rod's Amended Complaint as true, such as the Grazing Allotment being successfully transferred to the third-party purchaser of the Hobarts' cattle, as properly alleged by Rod. (SR. 69-70). Further, the circuit court disregarded that the cattle were improperly sold by Nick Hobart without first giving Rod notice of his intent to do so, as required by the Agreement and Addendum, or that the Hobarts never intended to honor the Agreement and Addendum at the time they were entered. (SR 70). Taking the allegations set forth in the Amended Complaint as true, the Motion for Judgment on the Pleadings should have been denied.

ARGUMENT

I. The Circuit Court Erred in Dismissing Rod's Amended Complaint on the Basis that the Agreement was Void due to Legal Impossibility.

a. The circuit court erred in failing to apply the doctrine of impossibility.

Nick Hobart asserts that Rod waived his right to address the contention that the Agreement was void due to impossibility of performance despite the fact his argument at the circuit court level centered around the Agreement being void for that very reason and the circuit court dismissing Rod's complaint for the same. The circuit court specifically found, "the transferring of [the Grazing Allotment] and that being not a *legal possibility* based upon the statute and case law essentially cited by the Defense makes that contract for the right of first refusal void." (HT 22:24-23:2) (emphasis added). Clearly, Rod has the right to argue that the circuit court did not correctly apply the test of impossibility as that was the core holding of the circuit court's dismissal of Rod's Amended Complaint.

As stated in *Benedetto v. Delta Air Lines, Inc*:

> Under South Dakota law, the doctrine of impossibility, *also referred to as commercial frustration*, 'requires proof of three elements: (1) the purpose that is frustrated must have been a principle purpose of that party in making the contract; (2) the frustration must be substantial; and (3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

Benedetto v. Delta Air Lines, Inc., 917 F. Supp. 2d 976, 983 (D.S.D. 2013) (emphasis added). In *Benedetto*, Mark Benedetto purchased round trip plane tickets through Delta for travel from Sioux Falls to New York City. *Id.* at 979. In accordance with Delta's regulations and the Transportation Security Administration, Benedetto declared to a Delta ticket agent that he was transporting a pistol in his checked luggage. *Id.* Benedetto was arrested at the LaGuardia Airport when he attempted to catch his return flight to Sioux

Falls for illegally possessing a firearm, despite following the instructions given from the Delta ticketing agent. *Id.* Benedetto brought, *inter alia*, a claim for breach of contract, alleging that Delta agreed to transport him from New York City to Sioux Falls and failed to do so. *Id.* at 982.

Delta argued that Benedetto's claim for breach of contract was barred by the doctrine of impossibility because they were unable to perform due to Benedetto's arrest. *Id.* at 983. The federal court concluded that it could not, without additional facts, determine whether Benedetto's arrest was either "a basic assumption on which the contract was made or foreseeable" and denied Delta's argument that the breach of contract claim was barred by impossibility. *Id.*

Similarly, the circuit court could not make the assumption that the USFS would not have transferred the Grazing Allotment to Rod had he been given notice that the Hobarts intended to sell their cattle and transfer the Grazing Allotment to a third-party. *See Mueller v. Cedar Shore Resort*, 2002 S.D. 38, ¶ 41, 643 N.W.2d 56, 69. While the parties intended for the Grazing Allotment to be transferred to Rod, they recognized that it may not be a guarantee, including the language that "the possession of the cattle shall transfer to Alexander on the date the permit is transferred to Alexander *by the USFS*." (App. 0003) (emphasis added).

Further, the circuit court erred in ruling that the transfer of the Grazing Allotment was legally impossible without analyzing the doctrine of impossibility. Unresolved issues of material fact still exist on the principal purpose of the Agreement and Addendum, the breach of the promises made in the Agreement and Addendum, and the damages incurred by Rod due to the breach. The circuit court also made no findings that

the Hobarts could not sell their cattle and transfer the Grazing Allotment, which Rod properly alleged in his Amended Complaint occurred with a third-party without first giving him proper notice pursuant to the Agreement and Addendum. Had the circuit court taken Rod's factual allegations as true, which was required, it would have given credence to the fact that Rod properly alleged that the Hobarts transferred the Grazing Allotment and sold the cattle to a third-party without first giving proper notice. Therefore, the circuit court erred in finding that the Agreement and Addendum were void for reason of legal impossibility.

II. The Agreement and Addendum Satisfied the Elements of a Valid Contract Because a Grazing Permit is a Lawful Object.

A contract requires four elements: "(1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration." SDCL § 53-1-2. "The object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed." SDCL § 53-5-2. While grazing permits convey no right, title, or interest in land held by the United States, "New term permits may be issued to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit to the United States and provided the purchaser is otherwise eligible and qualified." 36 C.F.R. 222.3(b); 36 C.F.R. 222.3(c)(1)(iv). Contracts are construed to "effectuate valid contractual relations rather than in a manner which would render the agreement invalid or render performance impossible." *Heinert v. Home Fed. Save & Loan Ass'n*, 444 N.W2d (citing *Kuhfeld v. Kuhfeld*, 292 N.W.2d 312 (S.D. 1980); *Trumbauer v. Rust*, 36 S.D. 301, 154 N.W. 801 (1915)). As indicated in Rod's opening brief, the caselaw relied upon shows that a

grazing permit may be a lawful subject of a contract, therefore, the circuit court erred in dismissing the Amended Complaint.

Steve Hobart argues that proper consideration was not given for the Agreement and Addendum because the Amended Complaint does not mention the antecedent debt. This argument is easily defeated per the plain language of the documents, as the Hobarts would have received the fair market value for the sale of the cattle and an additional $300.00 per head allowed on the Grazing Allotment. Even if the Amended Complaint does not include the amount of debt for which Steve Hobart chose to enter into the Agreement for, clearly there is sufficient consideration given for the sale of the cattle at market value price and an additional $300.00 per head allowed on the Grazing Allotment.

a. Both South Dakota and out-of-state caselaw support Rod's contention that a grazing permit can be the object of a contract.

The Supplemental Lease in *Knecht* is similar to the Agreement and Addendum in this case and stands for the principal that parties can negotiate the transfer of a grazing allotment as part of a contract. In *Knecht*, the Supplemental Lease included annual rent payments in exchange for the right to graze livestock on land tied to a grazing permit. *Knecht v. Evridge*, 2020 S.D. 9, ¶ 12, 940 N.W.2d 318, 324. The circuit court held that the Supplemental Lease was a voidable contract, in that if the grazing permit did not transfer, the lessee could choose to terminate the lease. *Id.* This Court affirmed, holding that the Supplemental Lease did not impose an obligation upon the lessors to obtain a grazing permit for the lessee. *Id.* at ¶ 49, 940 N.W.2d 318, 332.

Similarly, the Agreement and Addendum clearly give Rod the right to purchase the cattle attached to the Grazing Allotment and to have the Grazing Allotment transferred to him by the USFS. The Agreement and Addendum do not state that the

Hobarts will personally transfer the Grazing Allotment to Rod, rather, they merely state that the Grazing Allotment will be transferred to Rod if he exercises the right to purchase the cattle. In fact, the parties agreed that Rod would not take possession of the cattle until the permit was transferred to him *by the USFS*. (App. 0003). The parties acknowledged that the USFS would need to be involved with the transfer, thereby, defeating the argument that the Agreement and Addendum were for the direct transfer of the Grazing Allotment from Hobarts to Rod.

Much like the Supplemental Lease in *Knecht*, "the fact that the parties may have hoped to successfully obtain the transfer of the grazing permit to Knecht did not contractually obligate the Evridges to assure that result." *Knecht*, 2020 S.D. 9, ¶ 49, 940 N.W.2d at 332. The Agreement and Addendum did not obligate the Hobarts to ensure that Rod received the Grazing Allotment, rather, it obligated them to give Rod the option to purchase their cattle attached to the Grazing Allotment should they choose to sell and that the Grazing Allotment may be transferred by the USFS once the purchase was completed. The parties acknowledged this by stating in the Agreement that the USFS would transfer the Grazing Allotment to Rod once the purchase of the cattle was completed.

Nick also argues that *Dooling v. Casey* does not stand for the principal that a grazing permit may be the object of a contract, however, the breached contract in that case centered around the transfer of a grazing permit to the buyer. *Dooling v. Casey*, 152 Mont. 267, 448 P.2d 749, 751-2 (1968). The Montana Supreme Court emphasized that the contract included the sale of grazing permits to the buyers and affirmed that sellers assured the buyers that the grazing permits would be transferred to them as part of the

purchase. *Id.* at 753-4. Additionally, the *Dooling* case references the same waiver form the USFS uses today for the transfer of a grazing permit and that the selling party executed a "Waiver of Grazing Privileges" form. *Id.* at 752. Therefore, even though *Dooling* was decided prior to the enactment of the federal regulations, the case still stands for the principal that grazing permits may be included in contracts.

As mentioned in Rod's opening brief, *Fence Creek Cattle Co. v. United States Forest Service* also stands for the principal that a grazing permit may be transferred to the purchaser of a permit holder's livestock. In that case, Fence Creek waived its rights to a grazing permit based on a third-party purchasing the cattle that were attached to the allotment, but were unable to prove that the purchase of the cattle had actually taken place. *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1133 (9th Cir. 2010).

Here, Rod was never given the opportunity to purchase the cattle because he was never given notice of the Hobarts' intent to sell. Instead, as Rod alleged in his Amended Complaint, the cattle attached the Grazing Allotment were sold to a third-party without first giving him notice and the Grazing Allotment was transferred to the purchasing party, as permitted by the federal regulations and in complete avoidance of the Agreement and Addendum. The Agreement and Addendum account for the Grazing Allotment needing to be transferred to Rod from the USFS by stating that the purchase price for the cattle will be paid on the same date the permit is transferred to Rod. (App. 0003). Therefore, *Fence Creek Cattle Co.* reinforces the principal that had Rod had the opportunity to purchase the cattle, he would have had the opportunity to have the Grazing Allotment transferred to him.

b. The Agreement and Addendum consisted of the sale of the cattle and the transfer of the Grazing Allotment, and thus, can be severed.

Even if the Court finds that the Agreement and Addendum are void as to the Grazing Allotment, the documents can still be enforced as to Rod's right to purchase the cattle. "A court may divide a contract into 'corresponding pairs of part performances,' and then enforce only those parts which do not 'materially advance the improper purpose' of the agreement." *Thunderstik Lodge, Inc. v. Reuer*, 2000 S.D. 84, ¶ 7, 613 N.W.2d 44, 46 (citations omitted). First, contrary to Hobarts' argument that the Agreement and Addendum create "an integrated scheme to contravene public policy", the transfer of grazing permits are common practice by ranchers when the cattle attached to the permit are sold and is permitted by 36 C.F.R. 222(c)(1)(iv). Secondly, even if the Court were to find the transfer of the Grazing Allotment void, Rod's right to purchase the cattle is still enforceable because the performance of the parties is separable and the parts of each pair are regarded as agreed equivalents. *Thunderstik*, at ¶ 7 (quoting *Commercial Trust and Sav. Bank v. Christensen*, 535 N.W2.d 853, 857 (1995).

The parties entered the Agreement for a satisfaction of a debt owed by Steve Hobart and consideration was given by both parties, in that Rod would pay fair market value for the cattle *and* an additional $300.00 per head of cattle that was allowed on the Grazing Allotment. (App. 0003). The Agreement and Addendum also only commence when the Grazing Allotment is transferred to Rod *or* he has not exercised his right to purchase the cattle. Even if the Grazing Allotment were not transferred to Rod, he should have still had the option to purchase the cattle at fair market value, as agreed upon by the parties. The division of the purchase price of the cattle and the cattle allowed on the Grazing Allotment show that performance of the parties is separable. Further, there is no

misconduct alleged by the Hobarts against Rod at the time the Agreement and Addendum were signed. Therefore, the documents are severable, and even if the Court finds that the Agreement and Addendum are not enforceable as to the Grazing Allotment, Rod still should have had the option to purchase the cattle.

III. The Circuit Court Erred in Dismissing Rod's Claim of Fraud Without Stating any Reasoning for the Ruling and Steve Hobart Received Proper Notice of the Summons and Amended Complaint and Failed to Answer.

While Nick argues that Rod failed to address this at the circuit court level, the circuit court made no findings or record in regard to Rod's fraud claim. Instead, the circuit court summarily dismissed the Amended Complaint in its entirety without addressing Rod's claim of fraud against the Hobarts. Further, Nick argues that Rod's fraud claim did not constitute a tort separate from the breach of contract claims. "Conduct which merely is a breach of contract is not a tort, but the contract may establish a relationship demanding the exercise of proper care and acts and omissions in performance may give rise to tort liability." *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 18, 573 N.W.2d 493, 500 (quoting *Kunkel v. United Security Ins. Co.*, 84 S.D. 116, 168 N.W.2d 723, 733 (1969). This Court analyzed the independent tort doctrine in *Grynberg*, which involved claims of breach of contract and fraud. The Court first found that the Defendant had a duty that arose outside of the contract obligation, namely, "the legal duty which is due from every man to his fellow, to respect his rights of property and refrain from invading them by fraud." *Id.* at ¶ 22, 573 N.W.2d 493, 501 (quoting *Smith v. Weber*, 70 S.D. 232, 16 N.W.2d 537, 539 (1944)). The Court then analyzed whether the independent tort alleged existed based on the evidence and the elements of the tort. *Id.* at ¶ 23.

Here, Rod alleged that he entered into the Agreement and Addendum in exchange for a full satisfaction and waiver of defaults for a debt that Steve Hobart owed to him. (SR 72). Further, through the terms of the Agreement and Addendum, the Hobarts would receive payment for the sale of the cattle. (App. 0003). Rod also alleged that the Hobarts entered into the Agreement and Addendum without any intent of actually performing the terms and conditions which they agreed to. (SR 72). In so doing, they induced him into entering the Agreement and Addendum and to waive the debt owed by Steve Hobart despite never intending to perform. The Hobarts not only refused to give Rod the first right to purchase the cattle and have the grazing allotment transferred to him, Rod also never received payment for the debt he alleged Steve Hobart owed to him. Therefore, an independent duty arose outside of the breach of contract in the debt owed to Rod which Rod reasonably relied upon in entering the Agreement and Addendum to his detriment, because the Hobarts never intended to perform.

Steve also argues that Rod failed to state any specific allegations of fraud, however, Rod properly pled his allegations for fraud in his Amended Complaint. The essential elements of actionable fraud are:

> That a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.

N. Am. Truck & Trailer, Inc. v. M.C.I. Commun. Servs., 2008 S.D. 45, ¶ 8, 751 N.W.2d 710, 713 (quoting *Northwest Realty Co. v. Colling*, 82 S.D. 421, 147 N.W.2d 675, 683 (1966). Here, Rod alleged that he entered the Agreement and Addendum in exchange for satisfaction of a debt owed by Steve Hobart, that Hobarts promised Rod would have the

right of first refusal on the cattle and the transfer of the Grazing Allotment, but they never intended to perform on that promise. (SR 72). Rod further alleged that he reasonably relied on those promises and subsequently suffered damages because he did not receive the cattle or the Grazing Allotment. *Id.* Taking these allegations as true, Rod properly pled allegations of fraud committed by the Hobarts, which the circuit court did not consider on the Motion for Judgment on the Pleadings.

a. Steve Hobart properly received the Summons and Amended Complaint and failed to answer.

Steve claims that the Amended Complaint was not properly served upon him, despite his counsel stipulating to the Amended Complaint that is attached to the Motion to Amend Complaint. (SR. 75). Said Motion was granted by the circuit court, and Steve did not object to the signed Order. (SR. 78). Furthermore, Steve claims that the Summons is for "a forcible entry and detainer action not applicable to this case". SDCL § 15-6-4(a) states:

> The summons shall be legibly subscribed by the plaintiff or his attorney and shall include the subscriber's address. It shall be directed to the defendant, and shall require him to answer the complaint and serve a copy of his answer on the subscriber at the subscriber's address within thirty days after the service of the summons, exclusive of the day of service, and shall notify him that in case of his failure to answer, judgment by default may be rendered against him as requested in the complaint.

The Summons filed with the Amended Complaint substantially complies with SDCL § 15-6-4(a), giving Steve notice that he has thirty days to answer the Amended Complaint and that his failure to do so may result in Judgment by Default. (SR. 79). Therefore, Steve was provided proper notice of the Amended Complaint through his counsel and he simply failed to Answer the allegations in the Amended Complaint.

IV. The Circuit Court did not Err in Ruling that the Agreement and Addendum were not an Unreasonable Restraint on the Alienation of Property.

In the Notice of Review, Nick reasserts his argument that the Agreement and Addendum are an unreasonable restraint on the alienation of his property. In analyzing the *Laska* factors, the circuit court correctly concluded that the Agreement and Addendum were valid. (HT 21:19-22:11). "Conditions restraining alienation, when repugnant to the interest created, are void." SDCL § 43-3-5. "A right of first refusal is a 'conditional right that ripens into an enforceable option contract when the owner receives a third-party offer to purchase or lease the property subject to the right and manifests an intention to sell or lease on those terms.'" *Clark v. McCallum*, 2022 S.D. 42, ¶ 17, 978 N.W.2d 473, 478 (quoting *Laska v. Barr*, 2016 S.D. 13, ¶ 6, 876 N.W.2d 50, 53). While a right of first refusal restrains one's right to alienate their property, if the right of first refusal is "reasonable and for a legitimate purpose", it is valid. *Laska v. Barr*, 2018 S.D. 6, ¶ 24, 907 N.W.2d 47, 54 (citations omitted).

The Court considers several factors in determining whether a right of first refusal is valid, including "the purpose, whether the price is fixed, the parties' intent, and the duration of the restraint." *Id.* at ¶ 25 (citations omitted). "The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property at [their] convenience at a price *determined by the market.*" *Id.* (quoting Restatement (Third) of Prop.: Servitudes § 3.4 cmt. c) (emphasis added). The Court recognizes that neither a fixed price nor unlimited duration renders a restraint on property unreasonable per se. *Id.* at ¶ 27, 907 N.W.2d 47, 55.

The Court found indicative in *Laska II* that the Defendants' first right of refusal attempted to give the Defendants the right to purchase the property at $10,500 per acre, regardless of the fair market value, improvements made, or a bona fide third-party offer at a considerably higher price. *Id.* at ¶ 26. Further, nothing in the right of first refusal accounted for the appreciation in the value of land and the right to purchase existed for eternity. *Id.* at ¶ 28.

As found by the circuit court, this case is factually distinguishable from *Laska II.*[1] The Agreement and Addendum contemplate the market rate by comparing similar sale prices of cattle at local sale barns and does not require the Hobarts to sell the cattle and transfer the Grazing Allotment at a set price. (App. 0003-0008). Hobarts were also set to receive an additional $300.00 per head of cattle allowed on the Grazing Allotment, thereby increasing the amount they could have received from Rod had he been given an opportunity to exercise his rights under the Agreement and Addendum. *Id.* Further, the Agreement and Addendum allowed for the parties to arbitrate the sale price if they cannot agree, allowing the Hobarts an additional remedy if they received a higher offer than market value on the cattle. *Id.*

Secondly, the Agreement and Addendum do not last in perpetuity, as they are conditioned on the Hobarts notifying Rod in writing of an offer received and their intent to sell the cattle and have the Grazing Allotment transferred to the purchaser. *Id.* Even if the Court finds that the Agreement and Addendum do last in perpetuity, that alone does

[1] Notably, *Laska II* was a continuation of *Laska v. Barr*, 2016 S.D. 13, 876 N.W.2d 50, which proceeded to trial with the circuit court hearing testimony and receiving evidence, was considered by this Court, then remanded for additional extrinsic evidence to determine the parties' intent prior to this Court ruling on *Laska II.*

not render the Agreement and Addendum unreasonable and unenforceable. *Laska*, at ¶ 27, 907 N.W.2d 47, 55. The circuit court made no findings as to the parties' intent or the purpose of the Agreement and Addendum, as that would have been inappropriate on the Motion pending before it. The *Laska II* Court had the opportunity to review testimony from the parties about the intent of the right of first refusal, which also impacted the Court's decision in ruling that the right of first refusal was an unreasonable restraint. *Id.* at ¶ 28.

The circuit court did not err in finding that the price for the sale of the cattle and transfer of the Grazing Allotment were not fixed and that, even if the duration of the Agreement and Addendum were unlimited, it still did not render them invalid. As noted by the circuit court, this case is factually distinguishable from *Laska II,* in that the price is not fixed and the Agreement and Addendum were not an unreasonable restraint on the Hobarts' right to alienate their property. Lastly, additional evidence would be needed to render the Agreement and Addendum invalid pursuant to *Laska II*, including the parties' intent, the purpose of the documents, the nature of the documents, and the nature of the property interest. These are all factual questions, which would be inappropriate to consider on a Motion for Judgment on the Pleadings.

CONCLUSION

Contrary to the Hobarts' contentions, the transfer of grazing permits are the lawful object of contracts and the circuit court erred in holding that the Agreement and Addendum were void for reason of legal impossibility. The circuit court erred in granting the Motion for Judgment on the Pleadings without properly considering the allegations of Rod's Amended Complaint as true and not applying the doctrine of impossibility to the

Agreement and Addendum. Further, even if the transfer of the Grazing Allotment is a legal impossibility, the circuit court erred in holding that the Agreement and Addendum were not severable, as Rod should have still had the right to purchase the Hobarts' cattle.

The circuit court also erred in dismissing Rod's fraud claim when it was properly pled and made no findings as to its reason for the dismissal of the claim. Lastly, the circuit court correctly held that the Agreement and Addendum are not unreasonable restraints on the alienation of property, as the facts of this case are distinguishable from *Laska II*.

WHEREFORE, Rod respectfully requests this Court to reverse the circuit court's dismissal of Rod's Amended Complaint.

Dated this 2nd day of January 2025.

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Certificate Of Compliance

I hereby certify that this brief complies with SDCL 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 15 pages long, the word count is 4,566 and character count is 22,834 (excluding spaces), exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word counts from that program were relied upon in determining the word count of this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January 2025, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served upon the following counsel of record, by placing the same in the service indicated, addressed as follows:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota
The Honorable Joshua Hendrickson

Appeal No. 30807

RODNEY ALEXANDER,

Plaintiff and Appellant,

vs.

ESTATE OF STEVE HOBART and NICK HOBART,

Defendants and Appellees.

DEFENDANTS'/APPELLEE'S NICK HOBART'S NOTICE OF REVIEW

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Filed: 9/10/2024 12:49 PM CST Supreme Court, State of South Dakota #30807

PLEASE TAKE NOTICE that Defendant/Appellee, Nick Hobart, pursuant to SDCL § 15-26A-22, appeals to the Supreme Court of the State of South Dakota from the Order and Judgment dated July 24, 2024, to the extent that the circuit court's order found that the right of first refusal at issue in this case is not an unreasonable restraint on the alienation of property pursuant to SDCL § 43-3-5.

Dated: September 10, 2024.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

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CERTIFICATE OF SERVICE

I hereby certify September 10, 2024, I served a true and correct copy of **DEFENDANT/APPELLEE'S NICK HOBART'S NOTICE OF REVIEW** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

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By: */s/ Aidan F. Goetzinger*

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota
The Honorable Joshua Hendrickson

Appeal No. 30807

RODNEY ALEXANDER,

Plaintiff and Appellant,

vs.

ESTATE OF STEVE HOBART and NICK HOBART,

Defendants and Appellees.

DEFENDANT'S/APPELLEE'S NICK HOBART'S DOCKETING STATEMENT

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SECTION B.

TIMELINESS OF APPEAL

(If Section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

1. The date the judgment of order appealed from was signed and filed by the trial court: **July 24, 2024**

2. The date notice of entry of the judgment or order was served on each party: **July 24, 2024**

3. State whether either of the following motions were made:

   a. Motion for judgment n.o.v., SDCL 15-6-50(b): ___Yes ___x_No

   b. Motion for new trial, SDCL 15-6-59: ___Yes ___x__No

NATURE AND DISPOSITION OF CLAIMS
(Confine responses to questions 4 through 6 to the space provided.)

4. State the nature of each party's separate claims, counterclaims, or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

Appellant brought suit against Appellees, alleging two counts of breach of contract and one count of fraud. All counts were related to Appellees' alleged breach of a Right of First Refusal ("ROFR") agreement.

Appellee, Nick Hobart, moved for judgment on the pleadings pursuant to SDCL § 15-6-12(c), arguing that the ROFR was void as a matter of law because (1) it failed for impossibility of performance or illegality under SDCL § 53-5-3; and (2) the ROFR was an unreasonable restraint on the alienation of property under SDCL § 43-3-5. The Estate of Steve Hobart joined in the motion for judgment on the pleadings.

A hearing was held on July 22, 2024, at 8:45 a.m. (MT). At the hearing, the circuit court granted the motion for judgment on the pleadings, finding the ROFR was void for impossibility of performance under SDCL § 53-5-3. The circuit court, however, rejected the argument that the ROFR was void as an unreasonable restraint on the alienation of property pursuant to SDCL § 43-3-5.

Appellant timely filed a notice of appeal on August 22, 2024.

5. Appeals of right may be taken only from final, appealable orders. See SDCL § 15-26A-3 and 4.

   a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? __x__Yes _____No

   b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? N/A

      _____Yes ____No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

   I. Whether the ROFR is void as a matter of law because it is an unreasonable restraint on the alienation of property under SDCL § 43-3-5.

Attach a copy of any memorandum opinion and findings of fact or conclusions of law supporting the judgment or order appealed from. See SDCL 15-26A-4(2).

Dated: September 10, 2024.

GUNDERSON, PALMER, NELSON
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CERTIFICATE OF SERVICE

I hereby certify September 10, 2024, I served a true and correct copy of **DEFENDANT'S/APPELLEE'S NICK HOBART'S DOCKETING STATEMENT** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

RODNEY ALEXANDER, Plaintiff, v. ESTATE OF STEVE HOBART and NICK HOBART, Defendants.	)	51CIV23-000485 **ORDER AND JUDGMENT**

This matter having come before the Court on July 22, 2024, for a motion hearing on Defendant, Nick Hobart's, Amended Motion for Judgment on the Pleadings, and the Court having considered the pleadings, briefing of the parties, arguments of counsel at the motion hearing, and all other documents filed with this Court, it is hereby

ORDERED that Defendant, Nick Hobart's, Amended Motion for Judgment on the Pleadings is GRANTED because the Right of First Refusal upon which Plaintiff's Amended Complaint relies is void as a matter of law. The Court incorporates into this Order and Judgment the reasons stated by the Court at the July 22, 2024, hearing on Defendant's Amended Motion for Judgment on the Pleadings, and the reasons stated by Defendant, Nick Hobart, in his briefing in support of his Amended Motion for Judgment on the Pleadings with regard to enforceability of the Right of First Refusal; it is further

ORDERED that Judgment is entered in favor of Defendants Estate of Steve Hobart and Nick Hobart and against Plaintiff, Rodney Alexander; it is further

ORDERED that Plaintiff, Rodney Alexander's, Amended Complaint is dismissed on its merits with prejudice and without further costs to any party.

It is therefore, **ORDERED AND ADJUDGED**,

That plaintiff take nothing, that the action be dismissed on the merits, with prejudice, and without further costs to any party.

This Order and Judgment fully and finally resolves all claims against all parties in this matter.

7/24/2024 8:45:08 AM

BY THE COURT:

Honorable Joshua Hendrickson
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy

Filed on: 07/24/2024 Pennington County, South Dakota 51CIV23-000485

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

RODNEY ALEXANDER, Plaintiff, v. STEVE HOBART and NICK HOBART, Defendants.	)	51CIV23-000485 **NOTICE OF ENTRY OF ORDER AND JUDGMENT**

YOU ARE HEREBY NOTIFIED AND INFORMED that an Order and Judgment in the above-entitled action was entered by the Honorable Joshua Hendrickson, Circuit Court Judge, on July 24, 2024, and filed with the Pennington County Clerk of Court on July 24, 2024. A copy of the Order and Judgment is attached hereto and served upon you.

Dated: July 24, 2024.

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Filed: 7/24/2024 12:40 PM CST Pennington County, South Dakota 51CIV23-000485

CERTIFICATE OF SERVICE

I hereby certify on July 24, 2024, I served a true and correct copy of **Notice of Entry of Order and Judgment** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

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Filed: 7/24/2024 12:40 PM CST Pennington County, South Dakota 51CIV23-000485

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

RODNEY ALEXANDER, Plaintiff, v. ESTATE OF STEVE HOBART and NICK HOBART, Defendants.	)	51CIV23-000485 **ORDER AND JUDGMENT**

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ORDERED that Defendant, Nick Hobart's, Amended Motion for Judgment on the Pleadings is GRANTED because the Right of First Refusal upon which Plaintiff's Amended Complaint relies is void as a matter of law. The Court incorporates into this Order and Judgment the reasons stated by the Court at the July 22, 2024, hearing on Defendant's Amended Motion for Judgment on the Pleadings, and the reasons stated by Defendant, Nick Hobart, in his briefing in support of his Amended Motion for Judgment on the Pleadings with regard to enforceability of the Right of First Refusal; it is further

ORDERED that Judgment is entered in favor of Defendants Estate of Steve Hobart and Nick Hobart and against Plaintiff, Rodney Alexander; it is further

ORDERED that Plaintiff, Rodney Alexander's, Amended Complaint is dismissed on its merits with prejudice and without further costs to any party.

It is therefore, **ORDERED AND ADJUDGED,**

That plaintiff take nothing, that the action be dismissed on the merits, with prejudice, and without further costs to any party.

This Order and Judgment fully and finally resolves all claims against all parties in this matter.

7/24/2024 8:45:08 AM

BY THE COURT:

Honorable Joshua Hendrickson
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy

Filed on: 07/24/2024 Pennington County, South Dakota 51CIV23-000485

Filed: 7/24/2024 12:40 PM CST Pennington County, South Dakota 51CIV23-000485