Mitchell Sharlene

From: Kooiker Sam
Sent: Sunday, October 17, 2010 2:19 PM
To: Mitchell Sharlene
Subject: FW: Sign committee appointments; LF101310-02

Sharlene, can you link this and the attachments to the appropriate agenda item so that it will be part of the record.

Thanks, Sam

From: Brendan Casey [mailto:brendan@epicoutdoor.com]
Sent: Sat 10/16/2010 4:56 PM
To: Davis Dave; Kroeger Ron; Kroeger Ron; Hadcock Deb; Petersen Bonny; Mason Jordan; Costello Aaron; Waugh Bill; Brown Gary; Kooiker Sam
Subject: FW: Sign committee appointments; LF101310-02

Dear City council,

Attached are tiny selection of pleadings wherein Pauline Casey (Stephanie Casey's mother in law and employer) is suing Epic Outdoor Advertising. Additionally, A motion filed by John Casey, Stephanie Casey's husband of 18 months, who is presently litigating his brothers in regard to ranches owned by the family, portions of which are leveraged to secure financing for Epic. I'm not sure how much of the Casey's "dirty laundry" you would like to see aired within the council chambers, but rest assured there are tens of thousands of court papers and multiple actions filed by Stephanie Casey's husband and mother in law/employer that would show that she indeed in "involved" with ongoing litigation with Epic and their principles. For her to suggest otherwise in the RCJ, and for Mayor Hanks to claim that she is unbiased, I find equally disingenuous.

In Wednesdays L and F meeting, Mayor Hanks again referred to a State Law which he maintains gives him exclusive authority to select committee members. Here is what we have found:

9-14-3. Authority to appoint municipal officers. All appointive officers of a municipality governed by a mayor and common council shall be appointed by the mayor with the approval of the council, and in other municipalities they shall be appointed by a majority vote of the members elected to the governing body, except as provided in the city manager law and subject to the provisions of the civil service applying to employees, policemen, and firemen.

I do not read this as giving him exclusive authority, particularly in light of the section which indicates "approval of the council". Perhaps City Attorney Jason Green has found other authority in State Law?

Mayor Hanks has re-installed each and every member of the initial sign committee that voted in accordance to his direction. The people who *really hate signs* are well represented on this proposed committee. There is no representation for the consumers of this media or the landowners on whose land these signs reside. I would respectfully suggest that this committee be rejected in its entirety.

Please read my email below :

From: Brendan Casey [mailto:brendan@epicoutdoor.com]
Sent: Monday, October 11, 2010 8:01 PM

To: 'dave.davis@rcgov.org'; 'ron.weifenbach@rcgov.org'; 'deb.hadcock@rcgov.org'; 'Kroeger Ron'; 'bonnie.peterson@rcgov.org'
Subject: Sign committee appointments; LF101310-02

Dear Committee Members,

I send this correspondence with some concerns about the appointments suggested by Mayor Hanks to the Ad Hoc Sign Committee. As some of you may recall, I was excluded from the first Ad Hoc Sign Committee, until the council intervened. I believe I am well qualified. I have been in the sign business for more than a decade, have been involved with ordinance construction at the municipal, county, and state levels, and represent one of the only 2 entities who deal with off premise signs, and "sign credits". My exclusion again from a committee which deals directly with my livelihood, seems both calculated and punitive.

Other concerns I have by not being included on this committee.

- Lamar Advertising of Baton Rouge La, will be representing their national concerns **only.** Lamar has been very successful worldwide at taking advantage of any and all billboard ordinance issues, and using these concerns to manipulate ordinance to ensure a monopoly within municipalities, counties, and states in which they operate. They then will eagerly use these ordinances against landowners and the consumers of outdoor advertising. I know every move they make in regard to using situations like this to their advantage, particularly in a market where they control over 80% of the inventory. Please do not think that Lamar's and Epic's concerns are aligned. Epic is not publically traded and we are locally owned. We have been consistent in keeping the market open, and advocating for the landowner, which could become prey for a large national company like Lamar. While there is only 2 off premise sign providers within the city limits of RC, we are distinctly different. I would submit that the one and only privately capitalized, locally owned company in RC has no representation on this committee.

- It appears to me that again Mayor Hanks has constructed the committee to get vote he desires. These are some of the same members from the last committee who really brought nothing other than "I hate billboards, and I want them all torn down" to the table. The assembling of slanted committees is precisely why these sign issues continue to come up; we *really never get to reasonable ordinances when the conversation is one sided and biased*. Additionally, there are some significant legal and fair compensation issues at play when a municipality starts talking about condemning and taking private property. I am not unwilling to remove ALL my sign structures from areas where a reasonable consensus agrees they adversely affect the surroundings . . but it has to make some sense and I would like to have my say as we do it. Without a balance on this committee, I believe a polarized, uninformed group could send the city down paths that would be time consuming and expensive.

- Committee member Stephanie Casey is involved with a myriad of litigation that directly affects Epic. I think all of you are aware of the litigation involving the Casey's, Bear Country USA, and our related ranches. Stephanie, by and through her husband John, is opposed to Sean and I in each and every case. She is the sworn enemy of Epic, and this is her only reason for wanting to be on this committee. I relayed this to Mayor Hanks at a meeting in his office prior to the last sign committee, and he convinced me that this was simply an oversight on his part, and agreed that this would represent a significant conflict of interest. *And then he puts her on the second committee?* I was more than dumbfounded by this maneuver. She brought literally nothing to the last sign committee meetings other than seething over a missed opportunity to "stick it" to Epic Outdoor Advertising. The rules that will come fourth out of this committee can affect Epic and my livelihood for years to come. I would ask that she be removed, or at a minimum, I be included on this committee so at least her bias could be somewhat mitigated.

For all the reasons stated above, I would respectfully ask that I be placed on this committee. I will be at

Wednesdays Legal and Finance Committee Meeting if you have any questions.

Brendan Casey
Epic Outdoor Advertising
391-9047

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF PENNINGTON	SEVENTH JUDICIAL CIRCUIT

MARGARET PAULINE CASEY, Plaintiff, vs. EPIC OUTDOOR ADVERTISING, LLP, Defendant.	Civ. No. 08-2010 **REPLY BRIEF IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT**

This Court has determined that Defendant Epic Outdoor Advertising, LLP, is liable for unlawful detainer for its maintenance of five billboard structures on Casey's land far beyond any legal right it had to such possession had expired. Before this Court today is the issue of remedies available to Casey under SDCL Chapter 21-16, which provides that "the judgment shall be for the delivery of possession to the plaintiff, and for rents and profits or damages, . . . and for costs" including attorney fees. SDCL 21-16-10, 21-16-11.

Epic does not dispute that Casey is entitled to several of her requests in her second motion for partial summary judgment: delivery of possession of the land, pre- and post-judgment interest on any damages award, and costs in the amount of $890.56. However, Epic does present arguments regarding the proper amount of annual rent which should be awarded to Casey, as well as the appropriateness of an award of attorney fees. As discussed below, Casey maintains that no dispute of any material fact exists as to the damages to which she is entitled, and she urges the Court to grant her motion for summary judgment.

I. Casey is entitled to damages for unpaid rent

A. The proper amount of annual rent is $6000.[1]

For the purposes of this summary judgment motion, Casey contends that there is no dispute that reasonable annual rent for the billboards structures is $6,000. This was the amount proposed by Epic as part of their request that Casey sign their "standard lease" agreement.[2] See Exhibit B to Plaintiff's Second Statement of Undisputed Material Facts. For the purposes of this motion, Casey accepts the $6000 proposed by Epic as a measure of a reasonable yearly lease amount and asks the Court to use that figure in calculating damages for unpaid rent from the years 2008, 2009 and 2010 as well as for all future months in which the billboards remain on Casey's land.

B. Casey is entitled to double damages because there is no dispute of fact that Epic's conduct was willful.

SDCL 21-3-8 provides for damages equal to double rent in the case of a willful holdover once "notice to quit has been duly given, and demand of possession made." Blacks Law Dictionary defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." BLACK'S LAW DICTIONARY (8th ed. 2004). One's conduct in holding over is generally willful

[1] Although Casey accepts Epic's $6,000 annual rent figure for the purposes of this motion, Epic's own numbers regarding the value of even one billboard demonstrates that the reasonable annual rent for five billboard structures would exceed $6,000, and certainly should not be limited to $3,200. For example, Epic contends that an advertiser would pay $9,000 each year for one billboard similar to the billboard occupied by BCUSA, making the value of a billboard over ten years $90,000. Taking the annual rent proposed by Epic of $6,000 divided by 11 (the total number of billboard faces on the five billboards) equals $545 of annual rent to Casey per billboard face. Using this $6,000 figure, Epic seems to believe that a landowner is entitled to only six percent of the amount Epic would be paid for the advertisement. And by arguing that the $3,200 figure which Casey had received prior to 2008 is the proper measure of damages means that Epic believes that the landowner should receive just over three percent of the income Epic gains from one billboard.

[2] Epic contends, in a footnote, that this $6,000 figure is inadmissible under SDCL 19-12-10 as a statement made in the course of compromise negotiations. Epic's Brief, at 7 n.3. Casey disagrees. Even if Epic's December 5, 2007 letter to Casey's attorney could be considered "compromise negotiations," the annual amount of rental value Epic uses in its "standard" lease would be "otherwise discoverable" and is, therefore, be admissible.

unless one "believ[es] and ha[s] reason to believe that he was entitled to continue in possession." Mabee v. Miller, 339 N.W.2d 110, 111 (S.D. 1983) (citing Banbury v. Sherin, 55 N.W. 723 (S.D. 1983)).

Casey maintains that, reading the facts in the light more favorable to Epic, no factual dispute exists that Epic's holdover conduct was willful. The following sequence of events has been oft-repeated in this case:

- On November 29, 2007, Casey notified Epic of a 30-day notice of termination of any rights it may have in Casey's property. Exhibit D to Casey's Second Statement of Undisputed Material Facts.
- On December 5, 2007, Epic admitted that "no leases were executed"; provided no documentation indicating a right to possession; admitted "We fully understand that your client is the legal owner of this property and has all rights associated with that ownership"; and tendered its "standard" lease agreement for Casey's signature and urged Casey to sign the same. Exhibit B to Casey's Second Statement of Undisputed Material Facts.
- On June 10, 2008, Epic received a written notice terminating Epic's tenancy at will or sufferance, effective July 31, 2008. Exhibit I to Casey's Second Statement of Undisputed Material Facts.
- On September 11, 2008, Casey served Epic with a Notice to Quit pursuant to SDCL 21-16-2 and 21-16-1(4). Exhibit J to Casey's Second Statement of Undisputed Material Facts.

When Epic did not remove the billboard structures, Casey brought this action for unlawful detainer. A few months ago, Casey asked for and received an order of the Court that Epic had no legal right to possession of her land. Yet, to this date, the billboard structures remain on her land. Despite having no legal right to possess Casey's land and its own admission that "no leases were executed," Epic has refused for nearly three years to return the land to Casey's possession. Under these undisputed facts, Epic's conduct is undeniably intentional and voluntary and, thus, is "willful."

Epic cites to Mabee v. Miller in support of its argument that any holdover was not willful. 339 N.W.2d 110 (S.D. 1983). However, that case is inapposite to the facts here. First, in Mabee, the parties had a written lease which they orally agreed to extend. Then, in Mabee, upon notice of termination, the tenant solicited the advice of his attorney as to the timeliness of the notice of termination and relied on that advice, which turned out to be incorrect. Id. at 110-11. The jury found that the landowner was entitled to possession, but it refused to recognize that the tenant's holdover was willful. Id. at 111. Upon review, the South Dakota Supreme Court approved the jury instruction which provided that any holdover was not willful if the "tenant believed, and had reason to believe, that he was entitled to possession of the circumstances." Id.

Unlike in Mabee, no written lease serves as the foundation for this landlord/tenant relationship, a fact which Epic has never disputed. See also Deadwood Lodge No. 508 v. Albert, 319 N.W.2d 823 (S.D. 1982) (finding no willful holdover in the case of a written lease where the parties were unable to reach an acceptable agreement for renewal within the terms of the lease). And unlike the tenant in Mabee, Epic did not act upon legal advice in choosing to maintain the billboard structures in the absence of a lease. Most significant is Epic's admission December

2007 that Casey "is the legal owner of this property and has all rights associated with that ownership." Exhibit B to Plaintiff's Second Statement of Undisputed Facts. This means that almost immediately after being asked to quit the premises, Epic admitted that Casey retained all rights associated with ownership and could provide no document which demonstrated that it ever had any legal right to possess the land. All of these undisputed facts demonstrate that Epic acted willfully in refusing to return possession of the land to Casey; hence double damages are both appropriate and necessary.

II. Adjustment to any damages award to Casey

Epic argues that the Court should take into account equitable considerations in awarding damages. Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 11-15. However, South Dakota courts have long recognized that an action for unlawful detainer "is a summary action intended to prevent protracted litigation because of the introduction of collateral issues not connected to the question of possession." Heiser v. Rodway, 247 N.W.2d 65, 67 (S.D. 1976); see also LPN Trust v. Farrar Outdoor Advertising, Inc., 1996 SD 97, ¶ 9, 552 N.W.2d 796, 798 (considering arguments for reformation of a contract because it was relevant to the issue of possession). However, it is only when the equitable consideration is "relevant to the right of *possession*" may such issues "interfere with the summary nature" of the unlawful detainer remedy. Id. at 68 (emphasis added); see also id. (stating that "evidence pertinent to the issue of possession is properly admissible in an unlawful detainer action, even though the evidence is equitable in nature").

The South Dakota Supreme Court has never extended this rule to permit a party to raise equitable defenses on the issue of damages under SDCL Chapter 21-16. Accordingly, Epic's

attempts to raise equitable considerations to minimize the damages for which it is liable is improper in this summary proceeding for unlawful detainer, as it threatens to "burden the proceeding" with "collateral issues not connected with the question of possession." LPN Trust, 1996 SD 97 at ¶ 9. Casey urges the Court to disregard the bulk of Epic's brief which concerns equitable issues which are simply not relevant to the remedies available to Casey under SDCL Chapter 21-16.

Alternatively, as is clear from Epic's brief as well as Defendant's Second Statement of Material Facts that a host of factual disputes exist as to the existence and value of any advertising to BCUSA, and any value it may have to Casey. See Plaintiff's Objections to Defendant's Second Statement of Material Facts. In particular, genuine issues of material fact exist as to Epic's claims of the existence and value of BCUSA advertising which Epic provided on its billboard structures. Resolution of these factual disputes – including the existence of two BCUSA billboards which are located somewhere in the Black Hills, secured by Epic as part of a "billboard swap agreement," and valued at $90,000 – is clearly inappropriate for this summary judgment motion. If the Court elects to consider Epic's equitable arguments as they relate to the damages to which Casey is entitled, Casey urges the Court to find that these considerations cannot be resolved at this stage, because clear factual disputes exist which are inappropriate in the context of a motion for summary judgment brought by Casey.

In the event the Court chooses to entertain such equitable considerations in this motion concerning damages, they are addressed individually below.

A. Delay

Epic contends that Casey improperly delayed this summary judgment motion in order to gain the most benefit from Bear Country USA (BCUSA) advertising through the summer months and to extend the damages Casey may claim. See Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 10-11. The absurdity of this argument is clear when one realizes the following:

1) Epic could have changed the BCUSA advertising at any time since the Court's order in March (or before), and Casey or BCUSA could have done nothing about it;
2) Epic could have removed the billboards from Casey's land at any time, thus suspending any duty to pay further lease payments; and
3) Epic could have brought a summary judgment motion on the issue of damages to suspend any further interest.

This goes to show that any damages Epic may have sustained by a delay in this matter are entirely self-inflicted and are not Casey's responsibility.

Further, to say that Casey has "allowed BCUSA's advertisements to remain standing throughout the Black Hills during the height of tourism season during the entire summer" is to imply that this advertising is within the control of Casey. Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 10-11. This is not the case. This advertising was and is within the exclusive control of Epic who had the right and ability to change the advertising at any time. Because it is Epic who "allowed" this advertising to remain and caused

any alleged damages to Epic, Casey should not be sanctioned for any delay in bringing this motion.[3]

B. Casey's damages should not be adjusted based on any benefits to BCUSA from advertising on Epic's billboard structures.

As a first matter, Epic does not provide any legal rationale or support for its contention that any award to Casey should be reduced for benefits which BCUSA may have received as a result of advertising on Epic's billboard structures, except to note that Casey is the majority shareholder of BCUSA. Simply, BCUSA is not a party to this lawsuit, and Epic fails to explain – beyond sweeping generalizations involving hosts of troublesome facts – why Casey should be held responsible to Epic for any benefits received from BCUSA billboards, or why Epic's liability for damages on this matter has anything to do with benefits BCUSA gained from advertising.[4] If Epic believes that BCUSA owes Epic for the value of these billboards, adjudication of such a dispute is not appropriate in this action for unlawful detainer. See SDCL 21-16-4 (providing that an unlawful detainer action "cannot be brought in connection with any other [claim] except for rents and profits or damages").

1. No offset is appropriate.

Even assuming for the purposes of this motion that benefit to BCUSA should be equated as a direct and equivalent benefit to Casey, any offset for these benefits is inappropriate because

[3] Further, that Epic has benefitted from its continued maintenance of these billboards since March 2010, even absent any legal right to do so, cannot be denied. The billboards continue to generate revenue for Epic for every month of their existence, and any rent payments to Casey would be pennies on each dollar of revenue that goes to Epic. Further, Epic's delay in removing the billboards allows it to operate in a way as to accommodate the eventual removal of the billboards in its contracts for advertisement.

[4] Notably, Epic's oversimplification that Casey was the sole beneficiary of BCUSA's advertising omits that numerous people have been shareholders in BCUSA since these billboards were erected, including (until recently) Epic's partners and owners. Epic's attempt to minimize its liabilities to Casey by seeking to hold her solely responsible for the value of any BCUSA advertising which Epic elected to place on its billboards is both inappropriate and opportunistic.

any benefit that Casey may have indirectly received from the billboards through BCUSA advertising was bargained-for consideration. It is Epic's position that part of its agreement with "Doc" Casey provided that BCUSA would receive "no-cost advertising" in exchange for the billboard structures' placement on Casey's land. See Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 2; Defendant's Second Statement of Material Facts and Objections to Plaintiff's Statement of Facts ¶ 3b; Second Affidavit of Brendan Casey ¶ 6. Thus, taking the facts in the light most favorable to Epic, any advertising for BCUSA was bargained-for consideration in any year-to-year oral lease agreement.

Although Epic repeatedly states that Casey gained an "undisputed benefit derived by the billboards at no cost or expense," by Epic's own admission any such advertising was bargained-for consideration in its oral lease agreements. See Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 16. Epic cannot in good conscience argue that the billboards were bargained-for consideration on leases that lasted for seven years, while also asking the Court to make Casey pay Epic for the value of the billboards during the same time.

Further, while offset may be appropriate in the case of "mutual final judgments" or where the parties are "mutually indebted," the facts here do not fit. SDCL 15-16-32; *Hoaas v. Griffiths*, 2006 SD 27, ¶ 20, 741 N.W.2d 61, 67-68. Here, Casey is not "indebted" to Epic nor is does Epic possess any judgment against Casey. Under the facts here, and for the multitude of reasons stated above, an offset would be inappropriate.

2. Casey was not unjustly enriched.

Finally, Epic argues that Casey would be unjustly enriched if her damages in this action are not diminished by any value gained by BCUSA through Epic's advertising for BCUSA. One

may prevail on a claim of unjust enrichment "when a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying." Juttelstad v. Juttelstad, 1998 SD 121, ¶ 19, 587 N.W.2d 447, 451 (citing Sporleder v. Van Liere, 1997 SD 110, ¶ 16, 569 N.W.2d 8, 12)). Said another way, this equitable remedy is available when 1) one party has received a benefit, 2) she is cognizant of that benefit, and 3) it would be inequitable for her to retain the benefit without paying for it. Johnson v. Larson, 2010 SD 20, ¶ 11, 779 N.W.2d 412, 416; see also Juttelstad, 1998 SD 121 at ¶ 19 (citing Bollinger v. Eldredge, 524 N.W.2d 118, 123 (S.D. 1994)).

As discussed above, Epic's arguments here are based on benefits gained by BCUSA, who is not a party to this lawsuit. Unjust enrichment is an equitable remedy available between parties to a lawsuit. Juttelstad, 1998 SD 121, ¶ 19; Randall Stanley Architects, Inc. v. All Saints Community Corp., 1998 SD 121 at ¶ 20 (stating that "One party may not be enriched at the expense of another"). If Epic believes that the BCUSA advertising has unjustly enriched that entity, it should bring a suit against BCUSA. Such a claim is not appropriate here. See SDCL 21-16-4.

Additionally, for Epic to argue that it is Casey who is unjustly enriched by the benefit of continued BCUSA advertising is simply disingenuous. Any BCUSA advertising on Epic's billboards was not "an involuntary or nonconsensual transfer, unjustly enriching one party." Johnson, 2010 SD 20 at ¶ 8. The advertising was within the exclusive control of Epic, and it could have been removed Epic at any time, including since the notice to quit was delivered years ago. Following Epic's argument to its natural end, it could place BCUSA advertising on multiple billboards all over the state at its own direction, and then seek an equitable remedy from

BCUSA (or from Casey) by claiming "unjust enrichment." Such conduct should not be rewarded. Instead, it would seem apparent that Epic is the one who would be unjustly enriched by receiving credit in this action for the cash value of years of BCUSA advertising, when Epic also received significant benefit for the same within any oral lease agreement.

Casey does not know why Epic continued to advertise for BCUSA even after she communicated that the billboard structures must be removed three years ago. But certainly any continued advertisement by Epic is not *unjust* enrichment. Cf. Juttelstad, 1998 SD 121, ¶ 22 (discussing unjust enrichment when "money [is] paid by mistake" or "because of an erroneous belief induced by a mistake of fact"). Nor was this a case of Epic taking affirmative steps to erect the advertising based on Casey's representations. See Johnson, 2010 SD 20 at ¶ 12 (stating that the transfer of tons of rock to Penny which required many hours and much expense to Johnson to excavate was "the very type of event contemplated by the doctrine of unjust enrichment"). In this case, all Epic did was continue any existing BCUSA advertising on the billboard structures – advertising which Epic contends was part of the lease to begin with. Epic's claim that Casey was unjustly enriched through BCUSA advertising is, therefore, unjustified.

III. An award of attorney fees is appropriate.

Finally, Epic asks the Court to refuse to exercise its authority to award Casey her attorney fees pursuant to SDCL 21-16-11. The reasons Epic gives for withholding the award are because Casey has not done equity in this case, and because of the parties' relative ability to pay.

Notably, while Epic mentions the factors generally used to determine the reasonableness of a request for attorney fees, Epic does not challenge the reasonableness of the attorney fees

Casey claims in her Affidavit of Costs and Attorney Fees or in any way dispute that these attorney fees are unreasonable. See Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 11-15-16; see also City of Aberdeen v. Lutgen, 303 N.W.2d 372, 374 (S.D. 1981) (discussing considerations the Court may use in determining reasonable attorney fees). Casey maintains that her attorney fees are reasonable in light of the factors to be considered by the Court, including the amount and value of the property involved, the labor and time required, the skill required to draw the pleadings and litigate the case, and the complexity of the legal problems. See City of Aberdeen, 303 N.W.2d at 374.

With regard to Epic's argument that equity and fairness require the Court to sanction Casey's conduct in this matter, Casey does not believe that the undisputed facts demonstrate any unclean hands. Certainly any of Casey's alleged failures to "do equity" would be factual disputes appropriate for the jury and cannot be resolved in the case's current posture. And judicial evaluation of parties' relative ability to pay is only relevant within domestic relations cases, including those cited by Epic. See Edinger v. Edinger, 2006 SD 103, ¶ 17, 724 N.W.2d 852, 858; Terca v. Terca, 2008 SD 99, ¶ 32, 757 N.W.2d 319, 327; see also Midcom, Inc. v. Oehlerking, 2006 SD 87, ¶¶ 22-24, 722 N.W.2d 722, 728-29 (discussing required considerations for attorney fees award and approving award absent any evaluation of the parties' relative ability to pay). Thus, Epic's arguments as to Casey's resources are both irrelevant and inappropriate.

Casey maintains that the Court may award her attorney fees pursuant to statute, that the attorney fees she is claiming are reasonable, and that Epic's liability for these attorney fees is clear under the undisputed facts of this case.

CONCLUSION

Epic reaped extraordinary benefits from maintaining these five billboard structures on Casey's land for ten years. The absence of any reference in Epic's brief to the significant monies it gained from its possession of Casey's land – including the time since it received the notice to quit nearly three years ago – is not unnoticed. Epic knew it had no written agreement in place to secure the continued maintenance of these billboard structures on Casey's land. Epic chose to upgrade these billboard structures anyway, in the absence of any legal right to their continued existence on Casey's land. It was Epic who chose to commit to multi-year contracts for advertisements on these billboards, on its assumption that its structures could remain on this land. It was also Epic who reaped the significant benefits of advertising sales throughout the ten years these billboard structures have stood on Casey's land, garnering Epic hundreds of thousands of dollars (according to Epic's own numbers). In light of these benefits, it was Epic – not Casey – who took on all of the risks associated with these billboard structures. That "Epic is losing far more in this lawsuit than Plaintiff" is due entirely to Epic's risk-taking over the past ten years – risk-taking from which Epic also gained huge profits. See Defendant's Brief in Opposition to Second Motion for Partial Summary Judgment, at 14.

Epic contends that this action for unlawful detainer is "not typical in any fashion," and it repeatedly raises irrelevant arguments and factual contentions in support of this belief. In contrast, Casey insists that nothing renders this action for unlawful detainer out of the ordinary. This is a case of one party who unlawfully possessed a landowner's property far beyond any right it may have had to such possession. Because the Court found that Epic had no right to possession, Epic must remove itself from the premises and must pay damages for its wrongful

possession of the Casey's land. Despite Epic's attempts to muddy the waters, the questions now before the Court are relatively uncomplicated.

Accordingly, Casey asks the Court to award the following

- The value of unpaid rent since January 2008, and double the value of rent for Epic's possession after the notice to quit in September 2008, totaling $25,500.
- Prejudgment and postjudgment interest.
- Costs in the amount of $890.56.
- Attorney fees in the amount of $19,972.50.
- Rent of $1000 per month for each month of holdover post-judgment.

Dated this 8th date of September, 2010.

GREGORY J. BERNARD
CARLA R. KOCK
Attorneys for Plaintiff, Pauline Casey
THOMAS BRAUN BERNARD & BURKE, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
605-348-7516

CERTIFICATE OF SERVICE

I, Carla R. Kock, attorney for Plaintiff, Margaret Pauline Casey, hereby certify that a true and correct copy of the foregoing *Brief in Support of Second Motion for Partial Summary Judgment* was hand-delivered to:

Michael C. Loos
Richard J. Rylance, Jr.
Clayborne, Loos & Sabers
P. O. Box 9129
Rapid City, SD 57709

this 8th day of September, 2010.

CARLA R. KOCK

STATE OF SOUTH DAKOTA

COUNTY OF PENNINGTON

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

MARGARET PAULINE CASEY, Plaintiff, vs. EPIC OUTDOOR ADVERTISING, LLP, Defendant.	Civ. No. 08-2010 **PLAINTIFF'S OBJECTIONS TO DEFENDANT'S SECOND STATEMENT OF MATERIAL FACTS**

COMES NOW Pauline Casey, by and through her attorneys, and submits *Plaintiff's Objections to Defendant's Second Statement of Material Facts.*

1. For the purposes of this motion, Casey does not object to the statements found in ¶¶ 1, 2, 4, 5, 6, 8, 10, 14, 16, 17, 25, and 26.
2. Casey objects in part to ¶ 3, in that the Court has found that there was no easement related to the billboard structures nor was there a lease for the same, beyond possibly a year-to-year oral lease.
3. Casey is without sufficient information to admit or deny the statements in ¶¶ 7, 23, and 24.
4. Casey objects to the portion of ¶ 9 which states that Plaintiff raised no objection to the billboard structures.
5. Casey objects to the portion of ¶ 11 which states that she accepted lease payments without objection from 2003 to 2007.
6. Casey objects to the statements of fact found in ¶¶ 12, 13, 19, 20, 21, and 22.

7. With regard to the statements found in ¶¶ 15 and 18, Casey admits that Bear Country USA is advertised on one billboard that is owned by Epic and is at issue in this case. Casey objects to the remainder of the statement, because the second BCUSA billboard near the Bear Country entrance is located on a structure which belongs to BCUSA and is not at issue in this case.

Dated this 8th day of September, 2010.

GREGORY J. BERNARD
CARLA R. KOCK
Attorneys for Plaintiff, Pauline Casey
THOMAS BRAUN BERNARD & BURKE, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
605-348-7516

CERTIFICATE OF SERVICE

I, Carla R. Kock, attorney for Plaintiff, Margaret Pauline Casey, hereby certify that a true and correct copy of the foregoing *Plaintiff's Objections to Defendant's Second Statement of Material Facts* was hand-delivered to:

Michael C. Loos
Richard J. Rylance, Jr.
Clayborne, Loos & Sabers
P. O. Box 9129
Rapid City, SD 57709

this 8th day of September, 2010.

CARLA R. KOCK

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
MARGARET MARGARET PAULINE CASEY	)	FILE NO. 08-2010
	)	
Plaintiff,	)	**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
v.	)	
EPIC OUTDOOR ADVERTISING, LLP, Defendant.	)	

Comes now Defendant, Epic Outdoor Advertising, LLP, by and through its undersigned counsel of record, and files this Brief in Opposition to Plaintiff's motion for Partial Summary Judgment.

Factual History

Between 1993 and 2000, six billboards were constructed or modified[1] along Highway 16 between mile markers 58.83 and 59.51. These billboards are owned and maintained by Epic Outdoor Advertising, LLP (Epic). At the time the billboards were constructed, the land on which they are situated was owned by Dennis "Doc" Casey, Plaintiff's husband. Doc Casey not only permitted, but supported the construction of the billboards; his interest was to support both of his sons in their business and to promote tourism in the Black Hills. Affidavit of Brendan Casey, ¶ 4. The family business, Bear Country, USA, is located across the highway from the billboards at issue, and that business has historically relied heavily on billboard advertising and the overall tourism industry in South Dakota's Black Hills.

[1] There is a dispute regarding the precise legal or equitable ownership of one billboard structure at issue.

At the time the billboards were constructed and during his lifetime, Doc made it clear to his sons that he intended these billboards remain on the land. Affidavit of Brendan Casey, ¶ 11. The boys relied on their father's and spent substantial time and money to construct these billboards. In fact, over the course of the years between 1998 and 2005, the billboards were erected at a total cost of $185,000.00. Affidavit of Brendan Casey, ¶ 6, 15-16.

The promises and agreements were mutual. That is, each year rent was paid from Epic to the landowner for the use of the land and Bear Country USA was advertised at no cost to the business both during and after Doc's lifetime. Affidavit of Brendan Casey, ¶ 22. Defendant's Answers to Plaintiff's Interrogatories, p. 6. Neither Doc nor his sons had anticipated that this litigation would be the eventual result of their agreement, and as a result, their agreement was never memorialized in writing. Affidavit of Brendan Casey, ¶ 6.

Doc Casey passed away in 2000, leaving the land on which the billboards stand to Plaintiff. Personal Representative's Deed of Distribution, Exhibit A to Plaintiffs Statement of Undisputed Material Facts. From that time until November 27, 2007, the billboards remained on the land without any objection from Plaintiff. Exhibit 2 (Deposition of Margaret Pauline Casey), p. 39:21-24. Epic paid rent each year to Plaintiff and advertised Bear Country USA as they had prior to Plaintiff's sole ownership of the land. Affidavit of Brendan Casey, ¶ 18.

The billboards at issue are still standing today, the vast majority of which are still employed for advertising purposes. Affidavit of Brendan Casey, ¶ 22, 25. The billboards stand at Highway 16 milemarkers 59.51, 59.37, 59.20, 59.03, 58.93, and 58.83. Relevant on the issue of Epic's reliance, the structures at issue are substantial and have dimensions up to 20 feet by 36 feet, relying on large metal structures for support. Exhibit 1 (photos of billboards with locations).

Argument and Authority

SDCL § 15-6-56(c) authorizes summary judgment only where "there is no genuine issue as to any material fact *and* . . . the moving party is entitled to judgment as a matter of law." *Id.* (emphasis added). A motion for summary judgment invokes the following legal principals binding the trial court: (1) the burden of proof is on the moving party, Margaret Margaret Pauline Casey, to show clearly that there is no genuine issue of material fact; (2) the evidence must be viewed most favorably to the nonmoving party, Epic Outdoor Advertising, LLP; (3) summary judgment is not intended to be a substitute for trial where any genuine issue of material fact exists; (4) a surmise that a party will not prevail at trial is not a sufficient basis to grant the motion in issues which are not shown to be sham, frivolous, or so unsubstantiated that it is obvious it would be futile to try them; (5) summary judgment is an extreme remedy and should be awarded only when the truth is clear, and reasonably doubt touching the existence of a genuine issue as to a material fact should be resolved against the moving party, Margaret Margaret Pauline Casey; (6) however, the court may expose sham claims and defenses by the nonmoving party. *Wilson v. Great Northern Railway Company*, 157 N.W.2d 19 (S.D. 1968); *Farmers Feed & Seed v. Magnum Enterprises*, 344 N.W.2d 699 (S.D. 1984).

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." *Discover Bank v. Stanley*, 2008 SD 111, ¶ 16, 757 N.W.2d 756, 761 (citing *Mueller v. Cedar Shore Resort, Inc.*, 2002 SD 38, ¶ 10, 643 N.W.2d 56, 62 (quoting *Hayes v. N. Hills General Hosp.*, 1999 SD 28, ¶ 12, 590 N.W.2d 243, 247 (quoting SDCL 15-6-56(c)) (emphasis added)). Further, in order for a motion for summary judgment to be granted, there must be no material facts at issue, *and* there must "be no genuine issue on the

inferences to be drawn from those facts." *Discover Bank v. Stanley,* 2008 SD 111, ¶ 16, 757 N.W.2d 756, 761 -762 (quoting *A-G-E Corp. v. State,* 2006 SD 66, ¶ 17, 719 N.W.2d 780, 786 (citations omitted) (emphasis added)).

"As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is a fact that will affect the outcome of the case under governing law. *Id.* Genuine issues of material fact preclude summary judgment. In this case, there remain issues of material fact regarding the terms, particularly duration and usage, of the lease granted to Epic by Doc Casey and the elements of promissory estoppel.

Promissory Estoppel

The doctrine of promissory estoppel is embodied in *Restatement of the Law of Contracts, § 90,* as follows: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' *Shaw v. George,* 82 SD 62, 67, 141 NW2d 405, 407 (1966).

The South Dakota Supreme Court has recently had the opportunity to clarify the specific elements of promissory estoppel in *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 2007 SD 69. In that case the court pointed out that in order to "apply the doctrine of promissory estoppel, the [circuit] court must find: 1) the detriment suffered in reliance must be substantial in an economic sense; 2) the loss to the promisee must have been foreseeable by the promisor; and 3) the promisee must have acted reasonably in justifiable reliance on the promise made." (citing *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 848 (S.D.1990) (internal citation omitted)).

Vander Heide involved an oral modification of an easement. The court ultimately found a lack of a substantial economic detriment and a promise that was at best vague, uncertain and perhaps even absent. *Id.* at 834. The present case presents a vastly different factual scenario and, ultimately, necessitates an equally different outcome.

In order to make a claim for promissory estoppel, there must be a showing that there was in fact an oral promise made. In this case, Doc Casey, the landowner at the time the signs were constructed, made a promise to his sons that the billboards were to remain on the land. This is not in dispute. The express intent of Doc in allowing these structures was to help promote trouism and to assist his sons in starting a business of their own. Affidavit of Brendan Casey, ¶ 11. Doc knew the overall value Black Hills tourism in general brought to his own business as evidenced not only by the billboards at issue, but also those on which Bear Country USA advertises along Interstate 90. Affidavit of Brendan Casey, ¶ 9. Deposition of Margaret Pauline Casey (Exhibit 2), p. 13:10-17.

The promise made by Doc Casey regarding the billboards is binding on the Plaintiff because of the privity between her and her late husband as his successor in interest. See e.g. *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (citing 28 Am.Jur.2d *Estoppel & Waiver* §§ 2, 35, 48, 71 (1966 & Supp.1994)). When she transferred full ownership of the property in question to her name, while acting as the personal representative to Doc's estate, that instrument conveyed, transferred, assigned and released all interests of the decedent in that property. In fact, according to her own testimony, she was a co-owner of the property in question during Doc Casey's lifetime. Deposition of Margaret Pauline Casey (Exhibit 2), p. 17:7-19.

Courts have previously recognized that privity is proper in actions based on promissory estoppel. In order to prevail on an estoppel claim, "the party who is to be estopped, ***or one in***

privity with that party, must have asserted a fact or claim, or made a promise, that another party relied on, that a court relied on, or that a court adjudicated." *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (emphasis added)(citing 28 Am.Jur.2d *Estoppel & Waiver* §§ 2, 35, 48, 71 (1966 & Supp.1994)).

In the case at hand, it is the privity between husband and wife, co-owners of land, decedent to heir, and/or perhaps more appropriately, successor in interest, which renders the promise on which Epic has relied attributable to the Plaintiff. As the successor in interest of Doc's interest in the land, Plaintiff is subject to the promises he made regarding the use of the land. Thus, the promise which necessitates estoppel is binding on the Plaintiff. Additionally, Plaintiff herself was present during some of the renovations, construction and repair which occurred between 2000 and 2005. Affidavit of Brendan Casey, ¶ 8. In fact, she spoke with Brendan about the renovations, construction and repair without objection. Affidavit of Brendan Casey, ¶ 8.

As to the first element of promissory estoppel, Epic has shown a series of rather serious and imminent economic consequences. First, the amount of money spent simply to construct the billboard structures at issue totals nearly $185,000. Affidavits of Sean and Brendan Casey, ¶ 15-16. Add to that the substantial loss in annual revenue totaling nearly $27,000 and the rather absorbent cost of removing the structures estimated at $27,000, and the gravity of the expense becomes painfully clear. Affidavit Brendan Casey, ¶ 21-22. These figures do not include the costs of maintenance and upkeep for which Epic is responsible for each of these billboards and the other structures which Bear Country USA owns across the state. Affidavit of Brendan Casey, ¶14. Deposition of Margaret Pauline Casey (Exhibit 2), p. 14:3-10. Additionally, Epic will have to breach lease agreements with advertising clients which extend into the future. Affidavit of

Brendan Casey, ¶ 25. Whether the economic detriment is substantial is ultimately a question of fact for the jury. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990).

The second element requiring foreseeability can be shown through the same logic as the privity analysis. Plaintiff took the land as successor in interest with the billboards already in place. There is simply no way that she did not notice a series of six large billboards, the smallest of which is 10 ft. by 30 ft., along the road she traveled several times per day for years. Deposition of Margaret Pauline Casey (Exhibit 2), pp. 17-21. Additionally, Plaintiff was concerned with the value of the billboards in question beginning in 2001. Deposition of Margaret Pauline Casey (Exhibit 2), p. 22:14-19. Foreseeability does not require that Plaintiff can recognize a precise dollar figure on the potential loss. Rather, she must be aware that some financial consequence to the detriment of Epic will result from breach of the promise. It is quite clear that Epic has already spent a great deal in constructing the billboards at issue, which necessarily lose all of their value when not attached to land. It is also clear that there will be a substantial cost in removing the signs, not to mention the loss in revenue. Whether the damage was foreseeable is a question of fact for the jury. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990).

Of course, Plaintiff's motivation for seeking this remedy is relevant particularly in an equitable action. Plaintiff was questioned regarding the reasons underlying her desire to have these billboards removed. Also, there are numerous cases pending between and among the Casey family in addition to this matter.[2] It is undisputed that Epic's owners (Brendan and Sean Casey) are on the "opposite side" as Plaintiff in each of these suits. It is no stretch of imagination to

[2] *Mike Casey et. al. v. Kevin Casey et. al.*, Civ. No. 08-2084 (dissolution of Casey Ranch partnerships; Judge Kern); *CRLP v. Margaret Pauline Casey*, Civ. No. 08-7336 (debt collection; Judge Fuller); *Kevin Casey et. al. v. Margaret Pauline Casey*, Civ. No. 08-1013 (debt collection; Judge Kern); *Bear Country USA*, Civ. No. 08-164 (shareholder dispute/corporate dissolution; Judge Delaney)

believe that the present suit is intended as nothing more than retaliation or leverage in the several additional pending family lawsuits. While she admits that the rents sought from her in the Ranch properties do not motivate her sudden distaste for billboards, there is more than enough animosity in the other matters to account for Plaintiff's sudden dislike of billboards. Deposition of Margaret Pauline Casey (Exhibit 2), p. 12:1. It should also be noted that Plaintiff is fine with the billboards which advertise Bear Country USA as she has no intention of taking down those signs, including the large LED billboard. Deposition of Margaret Pauline Casey (Exhibit 2), pp. 11:15-22, 12-13:25-3, Affidavit of Brendan Casey, ¶ 4. In other words, her problem with billboards appears to be isolated to the six billboards at issue in this case only.[3] This indicates that the Plaintiff can not only foresee the damages to Epic which would result, but it trying to use it to her advantage in the other family litigation.

The final element requires reasonable acts in justifiable reliance on the promise made on the part of the proponent. In this case, Epic, relying on the promise of future use of the land for billboards, constructed, updated and/or repaired several large billboard structures at their own expense. Additionally, they sought clients who wished to utilize the available space to advertise their businesses to take advantage of the tourist travel in the area of the billboards. Certainly, these actions would not have taken place absent Doc's unclear promise. According to Doc, the structures were to remain so long as Epic needed or wished them to remain. Given the size and number of the structures, a landowner lease would be no less than twenty years. Affidavit of Brendan Casey, ¶ 26. Whether Epic's reliance on Doc's promise was reasonable is, again, a question of fact for the jury to consider. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990).

[3] See FN 1, supra.

Ultimately, estoppel depends on the facts of each case and ordinarily presents a question for the jury. When the exact nature of the representations and the reasonableness of the reliance upon them are disputed, the issue of estoppel should be presented to a fact finder. In addition, summary judgment is not proper where a state of mind is involved. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990). Based on the holding in *Garret*, summary judgment is not appropriate in this case as the nature of the representations as well as the elements of promissory estoppel are at issue in this case.

The Statute of Frauds Does Not Apply

"The primary purpose of the statute of frauds is evidentiary in nature." *Northstream Investments, Inc. v. 1804 Country Store Co.,* 739 NW2d 44 (SD 2007). Plaintiff makes much ado in her brief about the statute of frauds and its applicability to this case. The statute of frauds is an evidentiary rule which seeks to provide certainty in regard to certain interests in land. Promissory Estoppel and partial performance, however, are long-recognized exceptions to the statute of frauds. See *Durkee v. Van Well*, 654 NW2d 807 (SD 2002) and *Shaw v. George*, 82 SD 62, 141 NW2d 405 (1966). Thus, any evidence, including testimony, is admissible to show the existence of the promise as well as the elements of promissory estoppel. It is up to the factfinder to determine whether such a promise was made and whether the elements of promissory estoppel are present. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990).

That testimony is being scrutinized by Plaintiff before it even makes it to the ears of the court, and eventually the jury. Plaintiff attacks such testimony as being self-serving. While any testimony by a party could be considered self-serving according to the other party, it is always important to view such testimony in relation to the relevant facts and circumstances.

In this case, Doc Casey made a promise to his sons that their business, Epic, could construct and manage several billboards on his land, in order to foster their business and promote tourism – the very things that allowed him to provide for his family. Affidavit of Brendan Casey, ¶ 9. Relying on that promise, Epic constructed, repaired, and leased the billboards in question at great expense. Those billboards were constructed prior to the passing of Doc Casey and remained for nearly seven years after; that is, until Plaintiff suddenly changed her feelings toward "billboards" and decided they could no longer remain on *her* land. Deposition of Margaret Pauline Casey (Exhibit 2), p.12:1-2.

Servitudes and Easements

Regarding the issue of servitudes and easements, it is undisputed that Doc Casey granted a lease to Epic, which necessarily included an easement to enter onto the land for purposes associated with the billboards. Evidence of this easement includes Epic's consistent and uninterrupted access to the land from and after Doc's original promise to construct, maintain and change out the various advertisements over the years. In her brief, Plaintiff maintains that there is no such easement. Plaintiff's Brief in Support of Motion for Partial Summary Judgment, pp 12-17. Plaintiff's position should not be overstated. For example, in her deposition, Plaintiff takes no issue with Bear Country or its employees entering onto the land for various purposes. Deposition of Margaret Pauline Casey (Exhibit 2), p. 39:21-24. Plaintiff does not have a written agreement with Bear Country USA evincing this easement. Like other members of her family, Plaintiff does not rely on written releases. Plaintiff also did not have a problem with Epic's access for any of the seven years prior to this lawsuit. It is less than coincidental that Plaintiff's issues with the billboards arose around the same time the other family lawsuits began.

Conclusion

Summary judgment is appropriate where no question of fact remains for the province of the factfinder. Ultimately, estoppel depends on the facts of each case and ordinarily presents a question for the jury. When the exact nature of the representations and the reasonableness of the reliance upon them are disputed, the issue of estoppel should be presented to a fact finder. In addition, summary judgment is not proper where a state of mind is involved. *Garrett v. BankWest, Inc.*, 459 NW2d 833, 848 (SD 1990). Based on the holding in *Garret*, summary judgment is not appropriate in this case as the nature of the representations as well as the elements of promissory estoppel are at issue in this case.

It is undisputed that Doc Casey wished his sons, through Epic, continue to use the land to promote tourism and grow their business. Obviously, the parties to that agreement did not anticipate at the time that this litigation would be the eventual result. Promissory Estoppel exists to prevent the outcome for which Plaintiff requests – a manifest injustice. Insofar as justice is required, it is up to the Court and ultimately a jury to fashion the practical outcome necessary to prevent such injustice.

Respectfully submitted this 12th day of March, 2010.

CLAYBORNE, LOOS & SABERS, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2010, I sent by first-class mail, postage prepaid, a true and correct copy of the foregoing ***Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment*** to the following:

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and that such address is the last address of the addressee known to the subscriber.

Dated this 12th day of March, 2010.

Richard J. Rylance, II

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
MIKE CASEY, JOHN CASEY, and SHANNON CASEY BALLARD,	)	Civ. No. 08-2084
	)	
Plaintiffs,	)	
	)	**DEFENDANTS' MOTIONS REGARDING ACCOUNTING AND WINDING UP ISSUES**
v.	)	
	)	
KEVIN CASEY, BRENDAN CASEY, SEAN CASEY, and DENNIS CASEY,	)	
	)	
Defendants.	)	

COMES NOW Defendants, by and through their undersigned attorneys of record, and herby moves the Court for appropriate orders and relief regarding the issues set forth below:

1. Defendants' move the Court for an order compelling the Receiver to immediately reclaim any and all buffalo currently on display or otherwise located at the Bear Country property. Ownership in each and all of these animals belongs to Milliron Bison Company, LLP (MBC), and were subsequently purchased by the Defendants as part of these proceedings. Defendants further move that the court order and compel the Receiver to pursue compensation in favor of MBC relating to the use and display of the animals at the Bear Country facility.

2. The Defendants move for an order of the Court prohibiting the Receiver or his counsel from paying the outstanding attorney fee bill of the Costello Porter law firm relating to the services of Mr. Joe Lux. Mr. Lux's services on behalf of the partnerships were terminated upon proper authority and neither the partnership nor partners should be responsible for bills relating to any services or costs from and after said termination.

3. Defendants move the Court to compel the Plaintiffs to reimburse the partnerships in an amount shown by the evidence relating to the Plaintiffs' failure to pay or honor cash calls relating to the operational expenses of the partnerships. During the course of this litigation, the Plaintiffs failed and refused to pay cash calls relating to usual and customary operational expenses.

4. Defendants move the Court for an order compelling Casey Ranch Limited Partnership to reimburse the Milliron Bison Company for expenses, including wages for hired personnel, which should have been all or at least partially borne by the CRLP.

5. Defendants move the Court for its order that a cash advance from the CRLP to Kevin Casey in the amount of $6,015 from 2005 be written off, the majority of the partners of CRLP having moved and resolved to waive collection of this advance in lieu of salary and/or bonus due Kevin Casey relating to services provided.

6. Defendants move the Court to enter an order prohibiting the Receiver or counsel from resolving by way of settlement or otherwise a supposed debt of the Milliron Bison Company LLP to Bear Country USA, Inc. There is no evidence of this supposed loan, other than the fact that it has long appeared on the books of MBC. Bear Country USA, Inc. is not a party to this action. If that non-party wishes to pursue the matter, it must do so in a separate proceeding. The lack of any credible documentary evidence, as well as the untimely nature of any collection proceedings warrant that partnership funds not be used to resolve this alleged debt.

7. These Defendants move the Court to order that CRLP be required to reimburse MBC for expenses relating to roads, fences and other infrastructure which is shown by the evidence to be an expense properly borne all or partially by CRLP.

8. Defendants move the Court to disburse the entirety of the funds from the personal property auction to the partnerships with the exception funds relating to those items for which a third party can establish legal title.

9. Defendants reserve the right to contest any motion or issue advanced by other parties to this action, which by necessity, may require additional motions or issues to be raised.

Dated this 10th day of September, 2010

CLAYBORNE, LOOS & SABERS, LLP

By: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing Defendants' Motions Regarding Accounting And Winding Up Issues upon each person herein next named, on the date shown below, by hand delivery, to:

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and that such addresses are the last addresses of the addressees known to the subscriber.

Dated this 10th day of September, 2010.

Michael C. Loos