

7. Poppens is in default of his obligations under the Commercial Sales Agreement for failing to make payments when due.

8. Simplot Grower Solutions provided written demands to Poppens, who has failed or refused to pay the outstanding amounts owed.

9. On July 1, 2019, Simplot Grower Solutions assigned the claims against Poppens to Simplot.

10. As of August 28, 2019, the outstanding amount owed by Poppens is \$323,134.56, with interest continuing to accrue at the rate of \$132.91 per day.

11. Simplot is entitled to a judgment against Poppens for the full amount due and owing, together with all interest accruing thereon through the date of judgment.

WHEREFORE, Simplot AB Retail, Inc. respectfully requests this Court enter judgment in its favor and against Poppens as follows:

A. For the amount of \$323,134.91, together with interest through the date of judgment at the rate of \$132.91 per day;

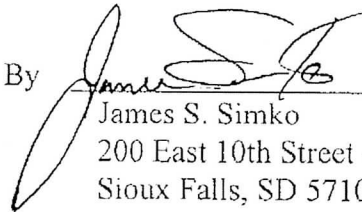
B. For all costs, attorney fees, and sales tax thereon incurred by Simplot in collecting payment;

C. For such other and further relief as the Court deems appropriate.

Dated at Sioux Falls, South Dakota, this ^{14th} 6 day of January, 2020.

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By



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STATE OF SOUTH DAKOTA)
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IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

<p>SIMPLOT AB RETAIL, INC., Plaintiff, vs. MICHAEL POPPENS. Defendant.</p>	<p>41 CIV. 20-27 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFF SIMPLOT AB RETAIL, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT MICHAEL POPPENS</p>
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Plaintiff Simplot AB Retail, Inc. (“**Simplot**”), by and through its attorneys of record, Boyce Law Firm, L.L.P., submits this Statement of Undisputed Material Facts in support of its Motion for Summary Judgment against Defendant Michael Poppens.

1. J.R. Simplot Company (the “**Company**”) and Simplot are Nevada and Delaware corporations authorized to do business in South Dakota. (Stinar’s Affidavit at ¶ 3; Complaint at ¶ 1).¹

2. Michael Poppens (“**Poppens**”) was and is, at all material times herein, a natural person who lives in Tea, Lincoln County, South Dakota. (Stinar’s Affidavit at ¶ 4; Complaint at ¶ 2).

3. On or about March 22, 2018, Poppens submitted a credit application (the “**Credit Application**”) to the Company. (Stinar’s Affidavit at ¶ 5; Exhibit A).

¹ All citations to “Stinar’s Affidavit” are to Deane Stinar’s Affidavit in Support of Plaintiff’s Motion for Summary Judgement dated June 29, 2020. All citations to “Exhibits” are to the exhibits attached to Stinar’s Affidavit. All citations to “Complaint” refer to the complaint AB Simplot Retail, Inc. filed in the above captioned matter on January 8, 2020.

4. In the Credit Application, Poppens agreed to abide by the Company's "Terms and Conditions of Sale" (the "**Terms & Conditions**"). (Stinar's Affidavit at ¶ 6; Exhibit A; Exhibit B).

5. The Credit Application and the Terms & Conditions are collectively described as "**Commercial Sales Agreement**". (Stinar's Affidavit at ¶ 7; Exhibit A; Exhibit B).

6. Pursuant to the Commercial Sales Agreement, Poppens purchased chemicals, fertilizer, and other inputs from the Company on credit between early May 2018, and late June 2018. (Stinar's Affidavit at ¶ 8; Complaint at ¶ 4; Exhibit A; Exhibit B).

7. Pursuant to the Commercial Sales Agreement, Poppens agreed to timely pay all invoices when due and, if he did not pay timely, interest would accrue on the principal balance due at the annual rate of interest of 18%. (Stinar's Affidavit at ¶ 9; Complaint at ¶ 5; Exhibit A; Exhibit B).

8. Pursuant to the Commercial Sales Agreement, Poppens agreed to pay all costs, including attorney fees, incurred by the Company in collecting payment. (Stinar's Affidavit at ¶ 10; Complaint at ¶ 6; Exhibit A; Exhibit B).

9. Poppens has failed to pay the invoices for the products he purchased from the Company in the principal amount of \$269,516.16. (Stinar's Affidavit at ¶ 11; Complaint at ¶ 7).

10. Poppens is in default of his obligations under the Commercial Sales Agreement. (Stinar's Affidavit at ¶ 12; Complaint at ¶ 7; Exhibit A; Exhibit B).

11. On or about February 22, 2019, the Company sent a letter to Poppens demanding payment for his overdue debt, and Poppens did not pay in response to that letter. (Stinar's Affidavit at ¶ 13).

12. The Company assigned the Commercial Sales Agreement and the associated accounts receivable to Simplot on or about July 1, 2019, and thus, Simplot is entitled to the rights and benefits due from Poppens under the Commercial Sales Agreement. (Stinar's Affidavit at ¶ 14; Complaint at ¶ 9).

13. Simplot filed a Complaint in the above captioned matter on or about January 8, 2020. (the "**Lawsuit**"). (Stinar's Affidavit at ¶ 15).

14. Poppens has not formally answered the Complaint. (Stinar's Affidavit at ¶ 16).

15. As of June 18, 2020, Poppens owed Simplot \$366,198.20, which is inclusive of \$269,516.16 in principal and \$96,682.04 in interest. (Stinar's Affidavit at ¶ 17; Exhibit A; Exhibit B).

16. Poppens will owe an additional amount of interest for each day from and after June 19, 2020, in the amount of \$132.91 on the current outstanding principal balance. (Stinar's Affidavit at ¶ 18; Exhibit A; Exhibit B).

/s/ John P. Mullen

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STATE OF SOUTH DAKOTA)
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IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

<p>SIMPLOT AB RETAIL, INC., Plaintiff, vs. MICHAEL POPPENS. Defendant.</p>	<p>41 CIV. 20-27 PLAINTIFF’S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT</p>
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COMES NOW Plaintiff Simplot AB Retail, Inc. (“**Simplot**”), by and through the undersigned counsel, and submits the following brief in support of its Motion for Summary Judgment. For the reasons contained herein, there is no genuine issue of material fact as to whether Michael Poppens (“**Poppens**”) breached the Commercial Sales Agreement (defined below) he entered into with J.R. Simplot Company (the “**Company**”) and that Simplot, as assignee of the Commercial Sales Agreement, has been damaged by that breach. Therefore, Simplot is entitled to judgment as a matter of law and respectfully request that this Court enter summary judgment in favor of Simplot and grant relief pursuant to SDCL 21-2-2.

FACTS

On or about March 22, 2018, Poppens applied for credit with the Company (the “**Credit Application**”). (Stinar’s Affidavit at ¶ 5; Exhibit A)¹. In the Credit Application, Poppens agreed to abide by the Company’s “Terms and Conditions of Sale” (the “**Terms & Conditions**”).

¹ All citations to “Stinar’s Affidavit” are to Deane Stinar’s Affidavit in Support of Plaintiff’s Motion for Summary Judgment dated June 29, 2020. All citations to “Exhibits” are to the exhibits attached to Stinar’s Affidavit.

(Stinar's Affidavit at ¶ 6; Exhibit A; Exhibit B). Together, the Credit Application and the Terms & Conditions are referred to herein as the "**Commercial Sales Agreement**".

Pursuant to the Commercial Sales Agreement, Poppens used credit to purchase chemicals, fertilizer, and other inputs (the "**Products**") from the Company. (Stinar's Affidavit at ¶ 8; Exhibit A; Exhibit B). Although Poppens purchased the Products using the Company's credit, he has been unable or has refused to pay the Company, resulting in Poppens being in default of his obligations under the Commercial Sales Agreement. (Stinar's Affidavit at ¶¶ 11-12; Exhibit A; Exhibit B). Pursuant to the invoices, this unpaid principal balance accrues at a rate of 18% per annum. (Stinar's Affidavit at ¶ 9; Exhibit A; Exhibit B). On or about July 1, 2019, after Poppens failed to cure his default, the Company assigned this claim to Simplot who, on or about January 8, 2020, filed a Complaint in Lincoln County titled: *Simplot AB Retail, Inc. v. Michael Poppens* Civil No. 41 CIV 20-27. (Stinar's Affidavit at ¶¶ 14-15). As of this date, Poppens has not submitted an answer to the Complaint. (Stinar's Affidavit at ¶ 16).

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate '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 and that the moving party is entitled to judgment as a matter of law.'" *Owners Insur. Co. v. Tibke Construction, Inc.*, 2017 S.D. 51, ¶ 8, 901 N.W.2d 80, 83 (quoting *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 12, 873 N.W.2d 57, 61). "While the facts must be viewed in a light most favorable to the nonmoving party, '[w]hen a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial.'" *Cashman*

v. Van Dyke, 2012 S.D. 43, ¶ 6, 815 N.W.2d 308, 311 (quoting, SDCL 15-6-56(e)). If a party does not respond to a motion for summary judgment with properly supported conclusion or statements of fact, the Court shall enter summary judgment against that party if appropriate. *Id.*

ANALYSIS

In order to be granted summary judgment on breach of contract, the moving party needs to prove that there was (1) an enforceable promise, (2) a breach of that promise, and (3) resulting damages that are established damages that are not in dispute. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 14, 699 N.W.2d 493, 498.

I. THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT POPPENS HAS BREACHED THE COMMERCIAL SALES AGREEMENT.

In this case, there is an enforceable promise between the parties. Under South Dakota law, the existence of a valid express contract is a question of law to be determined by the court. *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892 (citations omitted). A contract may be either express or implied, but not both. SDCL 53-1-3. “An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct.” SDCL 53-1-3. “An express contract results when the parties mutually express an intent to be bound by specific terms and conditions.” *Weitzel*, 2006 S.D. at ¶ 22, 714 N.W.2d at 892 (internal citations omitted). Here, Poppens and the Company both expressed mutual intent to be bound by the Commercial Sales Agreement. (Stinar’s Affidavit at ¶¶ 6-10; Exhibit A; Exhibit B).

Poppens then breached the enforceable promise he had entered with the Company. (Stinar’s Affidavit at ¶¶ 11-12; Exhibit A; Exhibit B). A breach of contract is defined as “[a] violation of a contractual obligation, either by failing to perform one’s own promise or by interfering with another party’s performance.” *Weitzel*, 2006 S.D. at ¶ 31, 714 N.W.2d at 894 (citing Black’s Law

Dictionary 182 (7th ed 1999)). Although Poppens purchased the Products using the Company's credit, he failed to pay the Company's invoices and is therefore in default of, and has breached, the Commercial Sales Agreement.

II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT SIMPLOT HAS BEEN HARMED BY POPPENS BREACH OF THE COMMERCIAL SALES AGREEMENT.

Finally, Simplot was harmed by Poppens's breach. "To recover damages for breach of contract, the loss must be clearly ascertainable in both its nature and origin. *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603 (referencing SDCL 21-2-1). Essential to proving contract damages is evidence that damages were in fact caused by the breach. *Id.* (internal citations omitted). Proof of damages requires a reasonable relationship between the method used to calculate damages and the amount claimed. *Id.* (referencing *Swenson v. Chevron Chemical Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975). Simplot, via its status as assignee of the Commercial Sales Agreement, is entitled to the amount Poppens agreed, yet subsequently refused, to pay (\$366,198.20; which is inclusive of \$269,516.16 in principal and, as of June 18, 2020, \$96,682.04 in interest) plus daily interest in the amount of \$132.91. (Stinar's Affidavit at ¶¶ 17-18; Exhibit B).

CONCLUSION

Based on the foregoing, there is no genuine issue of material fact as to whether Poppens breached the Commercial Sales Agreement, or that Simplot, as assignee of the Commercial Sales Agreement, was and currently is being harmed by this breach. Therefore, Simplot respectfully request that this Court enter summary judgment in its favor, and award damages pursuant to SDCL 21-2-2.

Dated this 2nd day of July, 2020.

/s/ John P. Mullen

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STATE OF SOUTH DAKOTA)
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COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

SIMPLOT AB RETAIL, INC.,

Plaintiff,

vs.

MICHAEL POPPENS.

Defendant.

41 CIV. 20-27

**STIPULATION FOR DISMISSAL
WITHOUT PREJUDICE**

IT IS HEREBY STIPULATED by and between Plaintiff Simplot AB Retail, Inc. and Defendant Michael Poppens, through their respective attorneys, and pursuant to SDCL 15-6-41(a)(1)(B), that the claims asserted in the above-captioned action are dismissed without prejudice and without costs to either party. Accordingly, the Court may enter Judgment dismissing the action without prejudice.



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Dated: 8-14-20



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Dated: 8-17-20

STATE OF SOUTH DAKOTA)
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COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

SIMPLOT AB RETAIL, INC.,
Plaintiff,

vs.

MICHAEL POPPENS.
Defendant.

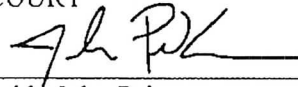
41 CIV. 20-27

**JUDGMENT OF DISMISSAL
WITHOUT PREJUDICE**

Based on the parties' Stipulation filed with the Court on August 17, 2020, all claims which were brought in the above-captioned action shall be, and hereby are dismissed, without prejudice, each of said parties to bear its own attorneys' fees and disbursements.

Dated at Canton, South Dakota this 17 day of August 2020.

BY THE COURT



The Honorable John Pekas
Circuit Court Judge

ATTEST:

KRISTIE TORGERSON, Clerk

BY Karen Nelson
Deputy (seal)



FILED
AUG 17 2020
Lincoln County, S.D.
Clerk Circuit Court