be held in December and that Alger should have waited until spring to sell the cattle. Second, Sandpoint argues that a large public auction like this should be advertised at least 6 months in advance, rather than only 4 months. Third, Sandpoint argues that the Ogallala sale barn was predominantly used to auction commercial beef cattle, not purebred Angus. Because of the barn's reputation and typical use, Sandpoint believes the Angus cattle received lower bids. This is highlighted by the testimony of Jarold Callahan. Callahan the is President of Express Ranches in Yukon, Oklahoma, and has extensive experience in the management, care, and marketing of purebred Angus. Callahan testified that he purchased 58 bulls online and resold 30 of them immediately for a $1,500 profit per head. TT, Day 3, pg. 87, ln. 12–13. Lastly, Sandpoint argues it did not receive adequate notice of the sales, so Alger should be barred from recovering a deficiency judgment. I find that despite Sandpoint's numerous arguments, the public auction was conducted in a commercially reasonable manner.

First, as discussed above, Pirnie establishes that a secured creditor is not obligated to hold collateral for an extended period of time before offering it for sale. See Pirnie, 339 F. Supp. at 711 ("[T]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not in itself sufficient to establish that the sale was not made in a commercially feasible manner."). One reason for this is the added expense involved with keeping collateral. At trial, Sims estimated that feeding the abandoned cattle for 8 months, from the August abandonment until the following April, would have cost roughly $1.6 million.[10] TT, Day 3, pg. 70, ln. 7. Adjusting that figure for the amount of cattle sold at the December sale, had Alger kept these cattle until spring instead of selling them in December, it would have cost Alger roughly $435,600 in feed costs

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[10]Sims reached this figure by estimating that it costs an average of $3 per day to feed the cattle. Since 1,210 animals sold during the Ogallala December sale, it cost approximately $3,630 per day to feed the animals.

alone. And that doesn't account for the inherent additional costs involved with sheltering and caring for the animals, such as rent for the holding facility and veterinary expenses, as well as normal deaths that occur during the winter months. I find these are significant additional expenses that the creditor is not obligated to bear simply in the hopes that a higher price can be obtained later for the collateral. See Pirnie, 339 F. Supp. at 711 (noting that "the expenses of holding the property for an extended period of time easily could outweigh any increased value the property might obtain").

Even if it were possible that a spring sale would have generated a better outcome, Widdowson testified at one of the hearings in July 2013 in support of the motion to abandon that sales of registered Angus occur continually throughout the year. When responding to a statement that Angus sell better depending on the time of year, Widdowson responded:

> You know, the statement that buyers are not accustomed to purchasing breeding animals during the summer, crop, and hay season, or in the depth of cold winter months, I really don't agree with that. I mean, Mr. Cotton himself is managing sales in those time periods. There's sales every month of the year so I don't agree with that.

Doc. 459, pg. 15, ln. 15–21.

In Pirnie, the court held that a sale was commercially reasonable when it "was conducted at a recognized public auction in the area where possession was obtained and where a year-round market existed for the property sold." Pirnie, 339 F. Supp. at 711. The Ogallala sale barn is a recognized public auction, and as Widdowson testified, there is a year-round market for Angus cattle. Selling the cattle in December may not have yielded the highest price possible, but it was nevertheless commercially reasonable.

Second, Sandpoint argues the Ogallala auction should have been advertised better. Cotton testified about putting together a sale catalogue in advance of the auction, TT, Day 2, pg. 27, ln. 3, and Alger said the cattle were advertised as Ray-Mar cattle with Sandpoint genetics, TT, Day 2, pg. 128, ln. 4–5. Further, Ogallala's in-house marketing team advertised the sale, and Cotton hired another internet marketing company to "broadcast[] the sale nationwide." TT, Day 2, pg. 34, ln. 15–16. The online marketing teams sent emails to prospective buyers. Purchasers who did not travel to Ogalalla for the sale could purchase cattle online or by telephone. In fact, Callahan testified that he himself purchased some of the abandoned cattle through Ogalalla's online purchasing option. TT, Day 3, pgs. 86–87, ln. 20–25, 1–2. I find the advertising was conducted in a commercially reasonable manner.

Sandpoint argues that 4 months was not sufficient to advertise a large cattle auction. Callahan testified that he likes to have "a minimum of six months" to sort the cattle and advertise. TT, Day 3, pg. 86, ln. 6–8. However, Cotton testified that a 3–4 month timeline was sufficient. TT, Day 2, pg. 41, ln. 8–23. Further, at the July 2013 hearing on the cattle abandonment motion, Widdowson agreed that Alger would have sufficient time to plan and advertise a sale in November or December. Doc 458, pg. 40, ln. 18–22 ("I mean, based upon having a sale in November or December, if he took possession of those cattle in the next ten days, he would have – he would have plenty of time to properly put that sale together."). Because Sandpoint argued in support of the timing of the abandonment that 4 months was sufficient to advertise a large sale of cattle, and that December is an appropriate time of the year to sell purebred Angus, I reject counsel's arguments now that 4 months was not enough time. Alger has shown that his preparation and advertising for the December sale was commercially reasonable.

Third, Sandpoint argues that the Ogallala sale barn was typically used for auctioning cattle for commercial beef, not for auctioning Angus cattle. Tom Burke

testified for Sandpoint. Burke manages registered Angus auctions and has extensive experience in the Angus industry. Burke testified about his impressions of the Ogallala facility:

> [I]t's a great place to sell commercial cattle. They have a wonderful facility. But when you start talking about registered Angus cattle, I guess I couldn't think of a much worse place, because they take on what I call that sale barn atmosphere. Because commercial cattle, they can only bring so much because they sell by the pound, but registered Angus cattle can bring considerably more. And so Ogallala, where it's a great place to sell commercial cattle, it would be pretty substandard when it comes to competing against selling on a farm or a ranch. Because when people go to buy registered cattle, they're always concerned about disease, and things that they may pick up at a yard that you don't normally have to worry about on a farm or ranch. So I'd say that there's no substitute for having a sale on a farm or ranch.

TT, Day 2, pgs. 151–52, ln. 22–25, 1–10.

Everyone who testified during the March hearing seemed to agree on two things: (1) registered Angus cattle net the highest price if they are sold on a ranch; and (2) the abandoned cattle could not, for various reasons, be sold on the Sandpoint ranch. That left Alger with a lot of cattle to sell but very few options for doing so. Cotton agreed with Burke's testimony that the Ogallala sale barn's primary focus is commercial cattle, which are sold there nearly every week. TT, Day 2, pg. 43, ln. 18–20. However, on occasion, Cotton testified that Ogallala would conduct some "pure bred sales." Id. at ln. 20. In addition, the Ogallala sale barn was close to the Sandpoint ranch, so the expenses of transporting the animals was reduced.

It is clear that Ogallala was not the optimal place to auction the registered Angus, but the alternatives were far worse. Holding the cattle until spring would have racked up significant additional expenses, including feed and shelter, that may

well have offset any increase in the prices fetched. No other ranch, including Ray-Mar, could accommodate the large number of abandoned cattle due to the nationwide drought. If the registered Angus cattle could not be sold on a ranch, then Ogallala was likely the best facility available, even though it typically sold commercial beef. Both sides agree that Ogallala was otherwise an excellent facility, and it was near the Sandpoint ranch, which minimized trucking expenses and trauma to the animals. Because Alger has shown his decision to use Ogallala was reasonable, and because neither side presented me with better available alternatives, I find that the decision to use the Ogallala sale barn to auction the cattle was commercially reasonable. See Pirnie, 339 F. Supp. at 711 (noting that when a quick sale of repossessed collateral is involved, "the price obtained may not be as high as the price would be if a farmer were selling his own property"); cf. 4 White & Summers, Uniform Commercial Code § 34–11 ("[T]he secured creditor is selling not only in the wholesale market, but usually at the low end of that market. . . . In some cases the low value of the goods after repossession may be related to the reasons why the debtor's business could not make a go of it with such goods as inventory or equipment.").

Lastly, Sandpoint argues they never received notice of the December sales. I disagree. Alger submitted a declaration containing notice of the December sale in October 2013 that was *entered into evidence in this case* on November 1, 2013. See Docs. 264 & 269. This declaration not only supplies actual notice to Sandpoint regarding his intention to sell the cattle on December 9 and 10, but it also complies with nearly all the U.C.C.'s requirements. The declaration described the debtor, described the collateral, stated the method of disposition, and stated the time and place of the disposition. See Neb. Rev. Stat. U.C.C. § 9–613(1). To the extent that the declaration is insufficient because it does not contain a statement that "debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting," I find that this omission does not render the notice ineffective. See Neb. Rev. Stat. U.C.C. § 9–613(2) ("Whether the contents of a notification that lacks

any of the information specified in subdivision (1) are nevertheless sufficient is a question of fact.").

Further, Sandpoint does not even point out specifically how the lack of notice injured them, only stating that with notice, "Debtor's members may have been able to bid on or re-purchase some of the cattle, and Sandpoint could have had arranged for other people in the cattle industry to show up and bid at those auctions." Doc. 514, pg. 16. But Sandpoint *did* have actual and U.C.C.-compliant notice of the sale. See Neb. Rev. Stat. U.C.C. § 9–613(2); White & Summers, Uniform Commercial Code § 26–11, at 1352 ("We are always skeptical of debtor claims that with proper notice, they would have sprung to action and produced many aggressive bidders at the sale of the collateral."). I reject Sandpoint's position here, and I will not award any additional credit to Sandpoint against the deficiency judgment.

9. Remaining Cattle Sales

After adding up the five cattle dispositions previously discussed, 396 animals remain unaccounted for. Sandpoint argues—and Alger does not seem to dispute—that it is unknown what happened to 13 of those animals. Alger suggests that they could have died as part of a natural animal loss rate. The record supports this assertion. Sims testified that he estimated the 2,376 abandoned cattle could suffer a "one to two percent" death rate. TT, Day 3, pg. 71, ln. 6–10. So, if 13 of the abandoned cattle died, that amounts to a .547% death rate (a little over ½ of 1%), which would have been even lower than Sandpoint's estimate. For this reason, I will treat the 13 unaccounted-for animals as part of the herd's natural death rate and will not give Sandpoint a credit for those animals.

Alger sold the remaining 383 animals in public and private sales between August 7, 2013 and January 31, 2014. Most of these cows were sold as beef or

feeders, and most were removed from the December Ogallala sale at Cotton's recommendation due to their poor quality. Cotton testified:

> [Some of the cattle sold for beef] were probably females that maybe they got hurt on the truck or something happened to them, they were not ones that you would move on and breed. [Of the cows born in 2013], 35 were just lighter, smaller heifers that we didn't think would be advantageous to put added dollars into them, both labor and feed, to sell them on December 9th and 10th.

TT, Day 2, pg. 47, ln. 6–11. Alger testified that crippled cows were also sent to be sold as beef, TT, Day 1, pg. 82, ln. 20, as well as were cows that had abscesses, were blind, or had other maladies, TT, Day 2, pg. 106, ln. 8–10. Alger testified that his "decision was beef is the best thing and [he] would have done the same practice in [his] own operation." TT, Day 2, pg. 109, ln. 20–21.

At the end of December 2013, nearly three weeks after the large Ogallala public auction, Alger sold 132 steers for an average price of $1,197.30 each at a livestock market in California. When asked about Alger's decision to sell the steers as feeders, Burke testified that he thought it was a "drastic move," stating:

> [T]he bull demand today in the Angus breed is the greatest it's ever been in the 141 years that Angus cattle have been in the United States of America. Bulls are bringing on ranches between four and eight thousand dollars, and I think any time you have a herd the calabur [sic] of Sandpoint . . . I guess I'd have to say it was a pretty drastic move, as far as putting them in the steer category, not evaluating them a little further and making – and bringing more value to the table."

TT, Day 2, pg. 150, ln. 14–23.

Sandpoint points out the lack of evidence regarding the advertising done for the sales and the unknown number of bidders at the sales. Sandpoint also argues that because Alger has not provided evidence that these cattle were crippled or somehow otherwise not quality bulls, I should hold Alger to his burden and declare that the sale of 383 animals for commercial beef was unreasonable.

After reviewing the testimony regarding the determination that some of the animals were of poor quality and best sold for beef, I will credit the testimony of Cotton and Alger. Burke's testimony regarding the quality of Sandpoint animals pertains to their general reputation and not to the particular animals at issue in this case. Cotton and Alger prepared for the various sales by personally examining and sorting the animals. In addition, it is reasonable to infer that Sandpoint abandoned the least desirable cattle to Alger, so the likelihood of higher numbers of small, poor-quality animals is perhaps higher than what would be found in a typical Sandpoint herd. Further, as mentioned extensively above, Alger was under no obligation to hold the animals for an extended period of time. Even if the animals may have been worth more had he fed, sheltered, and cared for them through the winter and sold them in the spring, Alger was not obligated to incur these additional expenses in the hope that his efforts could result in potentially higher profits. For these reasons, I find that selling the remaining animals for beef was commercially reasonable.

10. Deficiency Calculation and Credits

In determining the credit to be applied against the secured debt in connection with the disposition of collateral, Alger presented Exhibit 345, Doc. 345, an accounting that purports to include all reasonable expenses, including feed, trucking, consulting fees, advertising, attorneys' fees, etc., incurred in connection with the holding and eventual sale of the collateral. I adopt this accounting, subject to a few adjustments.

First, Alger conceded at the hearing that he placed into the December Ogallala auction a number of his own cattle. He also acknowledged that the sale expenses should be prorated to reflect the fact that he included his own cattle in the sale. See TT, Day 2, pgs. 130–38 (cross-examination of Alger). Alger has not attempted to quantify a number to account for the presence of his own cattle in the sale. Sandpoint has presented an analysis it argues shows that Alger is responsible for at least $41,544.64 of the sale expenses. This is based on Alger being responsible for 13.2% of the total sale expenses incurred. I find this to be a reasonable estimate and will give Sandpoint a full credit for this amount.[11]

Another item of concern is Alger's inclusion of all his attorneys' fees, including fees associated with the 2008 sale of the ranch. There does not appear to be anything in the APA or loan documents that would justify inclusion of such fees. Accordingly, I will deduct from the expenses all attorneys' fees shown on invoices that predate January 1, 2012. Those fees total $35,138.26.

In summary, Sandpoint will be given credit against the secured indebtedness in the amount of $3,461,662.77. This represents the credit set forth in Exhibit 345 of $3,384,979.87, plus attorneys' fees of $35,138.26, plus Alger's pro rata share of the sale expenses of $41,544.64. Credit will be given as of the completion of the abandonment on August 13, 2013. As of that date, Alger had possession and ownership of all the cattle.

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[11]I would note in Sandpoint's accounting that Alger apparently received $381,300 out of the December sale proceeds, which totaled $2,579,042. If anything, the 13.2% credit requested by Sandpoint may be conservative.

D. AM Carrier Settlement

A significant issue in this case is whether I should give a credit to Sandpoint against the balance due on the promissory note for what has been referred to as the AM carrier cattle issue. AM carrier cattle have a genetic defect known as "AM." An agreement was reached between the parties concerning the AM carrier cattle when the defect was discovered in certain cattle after the sale of the ranch closed. In essence, the agreement was that Sandpoint would be given credit against the value of the cattle, and Alger would receive title to the cattle and their progeny.[12]

Alger appeared at one point to take the position that no agreement was ever reached. However, the evidence, based on the parties' declarations, exhibits, depositions, and trial testimony, is quite compelling that the agreement as outlined above existed between the parties long before Sandpoint filed its bankruptcy petition. There also had been a general agreement as to the amount of the credit. Ozenbaugh testified about an October 2010 meeting that took place in Wisconsin, at which all the parties were represented. Ozenbaugh represented Alger at that meeting. An agreement was reached there on the AM carrier cattle issue and amount of credit to be given against the note. At the March 2014 hearing, Alger's counsel acknowledged the agreement and agreed that the amount of the credit to be given was $835,669.51. See TT, Day 1, pgs. 27–28, ln. 21–25, 1–6. Sandpoint will be given credit against the balance owed on the promissory note in that amount, as of the date of closing.

There remains a dispute as to whether Sandpoint should be reimbursed for any expenses incurred in connection with feeding and housing the AM carrier cattle prior to the consummation of the agreement. Based on Ozenbaugh's testimony regarding his understanding of the agreement, see TT, Day 4, pgs. 121–24, I find that the

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[12]The progeny have value since they do not necessarily carry the same genetics as their parents and could therefore be born without genetic deficiencies.

expenses for feed and housing should be allowed in the amount of $314,980.60, but I will credit this amount against the unsecured claim. I find that this is part of the unsecured claim since it is part of the give and take of the parties' negotiations over how the APA is to be interpreted. Sandpoint did not specifically ask that the feed expenses be a credit against the secured debt, and there is nothing in the testimony to indicate there was any agreement to that effect.

E. $250,000 Payment

Another dispute that arose in this case after the deal closed was how to apply a $250,000 payment made by Sandpoint to Alger on January 30, 2009. Alger argues that the payment should be applied against the payment required in paragraph 2.4.4 of the APA. That provision provides that Sandpoint should reimburse Alger for the greater of $250,000, or all documented costs and expenses incurred by Alger in connection with the planting of the 2008 crop. Alger contends that the $250,000 payment made on January 30, 2009, was for payment of that contractual amount.

Sandpoint maintains that the $250,000 payment should apply as a credit against the secured note. I find that the evidence supports Sandpoint's position. First, there is no evidence in the record that any agreement was ever reached as to whether $250,000 would be the amount to be paid for the 2008 crop. $250,000 was a minimum payment, subject to possible increases based on documented crop input expenses. Second, Ozenbaugh gave credible testimony that it was the intent of the parties that the payment be made against the secured note, and Ozenbaugh was representing Alger at the time of the payment. He testified that it was important for both parties that the parties could truthfully represent that the note was current as of the end of January 2009. See TT, Day 4, pgs. 139–40. As such, I find that the payment was to be applied against the secured note.

The parties acknowledge that only one $250,000 payment was made and that if it was applied to the secured note, then the contractual obligation in paragraph 2.4.4 of the APA remains unpaid. Since I'm disallowing the $250,000 payment as a credit against the contract amount, I will increase the unsecured claim by that amount.

F. Double-Counted Cattle

As mentioned in the background section, Widdowson prepared the March 15 inventory, which reflected all the ranch's assets as of March 15, 2008. Alger created a new-purchases document to record the ranch's cattle purchases from March 15 until Sandpoint took physical possession of the ranch on August 1, 2008. At some point, it was discovered that a significant number of cattle were listed on both documents. A number of months after closing, Bruce Buethe, who works in Sandpoint's business office, analyzed the two documents and determined that there was $1,016,319.00 worth of cattle listed twice.

I asked the parties to brief the issue of whether such double counting created a mutual mistake regarding the number of cattle included in the sale of the ranch. "A mutual mistake is a belief shared by the parties, which is not in accord with the facts. It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument. Mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties." R & B Farms, Inc. v. Cedar Valley Acres, Inc., 798 N.W.2d 121, 129 (Neb. 2011) (footnotes omitted). "To overcome the presumption that the agreement correctly expresses the parties' intent and therefore should not be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." Id. (footnotes omitted).

Sandpoint insists that it should receive a $1,016,319.00 credit against the balance of the promissory note for the value of the double-counted cattle to correct the parties' mutual mistake. Alger contends that Sandpoint should receive no credit for the double-counted cattle because the total purchase price for the ranch's assets was intended to be a flat number ($16 million), and thus any double counting is irrelevant. After reviewing the evidence and testimony provided at trial, I conclude that there was a mutual mistake as to the number of cattle included in the sale and that the total value of the double-counted cattle was $1,016,319.00. I will credit this amount against the note's outstanding balance.

At trial, several witnesses testified about the double counting. For example, Alger himself acknowledged that he knew about the issue and that the parties continued to discuss it after the sale closed. See TT, Day 1, pg. 70, ln. 1–4 ("Well, my comment to Mr. Ozenbaugh was, oh, I happened to notice a couple items that were both on [the March 15 inventory] and Exhibit A. Whether that means anything or not, at that point, that wasn't material to me. It was just an observation."); see also id. at ln. 5–16 (agreeing with counsel that he talked about the issue with Ozenbaugh after the deal closed).

Deutsch testified that all parties knew about the double counting. He added, however, that the parties did not think it was necessary to resolve the issue before closing, specifically because Alger helped to finance the deal, so the parties would continue to resolve loose ends after the deal closed:

> Craig: And did you have discussion with Mr. Ozenbaugh and/or Mr. Alger when Mr. Ozenbaugh was still representing Mr. Alger concerning [the double counting] issue?
>
> Deutsch: I had discussions with Mr. Ozenbaugh about it, and once again it wasn't an issue that was needed to be addressed right then and there because both him and I had the same exact understanding that the contract would allow for adjustments to the note. *Since Mr. Alger had*

financed 10.8 million none of us felt there was any urgency to finalize that right at that moment, but we were both well-aware of this, and I know Mr. Alger was aware of it, also.

TT, Day 3, pg. 130, ln. 13–25 (emphasis added). See also Day 3, pg. 133, ln. 3–7 (testimony of Deutsch) ("There was an enumerable [sic] amount of meetings between Mr. Ozenbaugh and myself, both in person and on the telephone and both with Mr. Widdowson and Mr. Alger present. Some of them extending as long as a full day trying to work these issues out.").

Ozenbaugh corroborated Deutsch and Alger's testimony. He further explained that the parties had discussed the double-counting issue in the context of settling the AM carrier dispute:

> Plourde: Now, are you familiar with the what I'll call the double count issue?
>
> Ozenbaugh: Yes.
>
> Plourde: And would you tell the Court what that issue was?
>
> Ozenbaugh: Well, it was a, from my involvement, it was an issue subsequent to, quite a ways subsequent to the agreement itself, to this agreement that you're referring to. And it actually came to light, again, from my involvement when we were working on the schedule of the AM -- what I refer to as the AM carriers which ultimately arrived at credit for the AM.
>
> But in doing that research, it appeared or became obvious that there were some specific animals that were on both, they were on the 3/15 inventory and they were also on the Exhibit A, I think is where the term double counting came from. I first became aware of it -- I was not aware of what the ultimate magnitude was going to be, but I became aware of it when we were looking at some specific animals for the purposes of the AM and I believe that Ray did, as well, either at that point -- Ray

> Alger[], either at that point or later, in one or more of our meetings, he raised that issue with me that it appears that there needs to be some adjustment here. I don't remember the exact phrase, I may owe them some money, something like that.

TT, Day 4, pgs. 115–16, ln. 25, 1–22.

Alger maintains that the parties never intended to reduce the $16 million purchase price to account for double counting. But "[t]he fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation." R & B Farms, Inc., 798 N.W.2d at 129. Alger acknowledged that he and Ozenbaugh discussed the issue. And while Ozenbaugh eventually was hired to consult for Sandpoint, I find Ozenbaugh's testimony credible regarding his conversations with Alger at the time when Ozenbaugh represented him.

I also note that the double counting implicates a significant amount of money. While it was anticipated that there would be some fluctuation in the value of the cattle inventory (due to births, deaths, sales, and purchases), there was no evidence presented to suggest the value of the cattle was expected to decrease by over $1,000,000. This amounts represents over 6% of the total purchase price, a material sum.

Alger separately argues that Sandpoint must bear the risk of the double-counting mistake because Sandpoint had "limited knowledge with respect to the facts to which the mistake relates but treat[ed] [its] limited knowledge as sufficient." Restatement (Second) of Contracts § 154(b) (1981). Sandpoint—acting through its agent, Widdowson—assumed control of the ranch's assets beginning August 1, 2008, even though the deal didn't close until November 19, 2008. During that time, Sandpoint did not conduct an inventory to determine the amount of cattle that had been double counted. According to Alger, Sandpoint's inaction during this time period precludes a finding of mutual mistake.

I disagree. For one, while the APA notes that Sandpoint took possession of the ranch on August 1, 2008, see APA section 2.4.3, in effect this meant nothing to the status quo: Widdowson at all times remained the ranch manager. As he characterized his position,

> At that point in time, I didn't know if the transaction would be closed and final. You know, things go stray, so there could be a reality that I would still be working for Mr. Alger potentially if the deal went bad. And so it wasn't like the light switch went off on July 31st for Ray and the light switch went on for the new owners on August 1st.

TT, Day 3, pgs. 197–98, ln. 21–25, 1–2. Under such circumstances, the legal control of the assets did not carry any real weight in the context of determining who should bear responsibility for the double counting. Alger remained the ranch owner until the deal closed, and Widdowson remained tasked with managing the ranch's operations. And the testimony taken together illustrates that while the parties understood, both prior and subsequent to the closing, that some double counting had occurred, neither appeared to appreciate the magnitude of the issue until it came up in the context of settling the AM carrier dispute almost two years later. Further, Alger financed a portion of the $10.8 million note himself. See TT, Day 3, pg. 130, ln. 13–25 (testimony of Deutsch). Such self-financing suggests Alger contemplated continuing to interact with the new ownership in some capacity after the sale closed. And it at least partly explains Sandpoint's lack of urgency in determining the extent of the double-counting when it controlled, but did not yet own, the ranch.

For the above reasons, I find that Sandpoint has shown by clear and convincing evidence that the "mistake [was] common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument." R & B Farms, Inc., 798 N.W.2d at 129. The value of the double-counted cattle was $1,016,319.00, and I will credit that amount against the secured claim, as of the date of closing.

G. Interest Rate

Yet another dispute in this case is the appropriate interest rate to be charged on the outstanding unpaid balance. Arguably, there are at least three interest rates that could apply.

The APA, loan agreement, and promissory note provide that interest will accrue at 5%, simple interest, on all unpaid balances. There are two provisions that may result in an increase to that rate. The first is what has been commonly referred to as the forbearance loan provisions. See Promissory Note, ¶¶ 3–5. Essentially, these are provisions in the loan documents that allow Sandpoint to skip a payment, under certain conditions, have that payment deferred, and avoid being in default. The deferred payments will carry an interest rate of 8%. The remaining balance on the loan, other than the deferred payments, will continue to accrue interest at 5%.

There is also a provision in the loan documents for a default rate of interest. The promissory note states at paragraph 8:

> Should Borrower . . . fail to make any payment of any installment or other sum within ten (10) days after the date when due, . . . the whole sum of principal and interest shall become immediately due at the option of the Lender and regardless of any prior forbearance. Interest shall accrue following any default hereunder at the applicable rate under the Note, plus five (5.00%) (or 500 basis points).

See Exhibit 319 (Promissory Note). The above language indicates that the entire balance shall become due and payable at the option of the lender. The only evidence in the record concerning whether that option was exercised is language in the March 1, 2012, forbearance agreement. See Exhibit 329. In the recitals to that agreement the following statement appears in paragraph E:

> Lender has provided to Borrower, Unlimited Guarantor and other parties to the Loan Documents written notice that Lender considers Loan and Additional Loans to be fully due and payable as a result of the continued existence of multiple uncured monetary and non-monetary events of default under the Loan Documents and under the terms governing the Additional Loans[.]

The forbearance agreement goes on to provide in paragraph G that Sandpoint and its unlimited guarantors dispute the existence of several of the events of default and assert that the lender does not have any right to accelerate the amounts due and exercise its rights of default. It does not say, however, that Sandpoint and the unlimited guarantors contest that notice was given. The forbearance agreement is dated March 1, 2012.

Sandpoint argues that the entire debt continues to carry an interest rate of only 5%. It bases this argument on the premise that while certain payments were not made and arguably could be subject to the forbearance rate of 8%, the provisions in the loan documents have not been complied with in order to trigger any increased interest rate. Specifically, the loan documents envision that each time a payment is missed, the borrower (Sandpoint) will request forbearance from the lender (Alger), and the parties will execute a new promissory note for the amount of the missed payment with the increased interest rate of 8%. Since no action was taken by Sandpoint, other than to miss the payment, and no new notes were signed, Sandpoint contends that the interest rate remains at 5%.

So, the argument goes that if Sandpoint fails to make payments and does not invoke forbearance, that it would then be in default, but that the note does not provide for any increased interest rate in the event of default. This statement appears to run directly contrary to the terms of the promissory note, see Exhibit 319, which contains the language I quoted above. Under the terms of the promissory note itself, it appears that if Sandpoint had not invoked the forbearance provisions of the loan agreement

and promissory note, that it would be obligated to pay 10% on the entire unpaid balance since at least the date of the forbearance agreement, March 1, 2012.

Alger has not asked for the default interest rate, but rather argues that it has been the course of conduct of the parties that the missed payments, which are alleged to total $1,350,000, carry the forbearance rate of 8%. In its proof of claim, it has computed interest on the unpaid balance aside from the forbearance payments at 5%, and the forbearance amounts at 8%.

Based upon the course of conduct in this case, I conclude that Alger's position will be adopted. That is, missed payments will accrue interest at 8% from the date the payment was due, but not made.[7]

While Alger could have invoked the 10% default rate since at least March 1, 2012 (and even earlier if notice of acceleration had been given at an earlier date), it appears to me that, based on my review of all the documents in this case, it was the consistent position of the parties that the forbearance terms of the loan agreement and promissory note would apply to the missed payments.[8] I acknowledge that the literal

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[7]Based on the documents attached to Alger's declaration in support of Claim No. 6, see Doc. 264, it appears the missed payments were $600,000 on December 31, 2009, $600,000 on December 31, 2010, and $150,000 on December 31, 2011, for a total of $1,350,000.

[8]This assumes that notice was required to trigger the default rate of interest. The language quoted above indicates that if a payment is not made within ten days of the day when it is due, the whole sum of principal and interest shall become immediately due at the option of the lender and shall carry the default rate of 10%. I assume, without deciding, that the language that it becomes immediately due and payable at the option of the lender requires some type of notice of acceleration by the lender.

terms and conditions of the forbearance agreement were not complied with in this case. However, it also appears to me that from the various documents and testimony that the parties consistently took the position that the missed payments carried the 8% interest rate from the date the payments were missed.

This conclusion is supported by the testimony and evidence relating to Ozenbaugh. Alger's accountant, Scott Kerr, testified that he prepared an accounting of the unpaid balances after meeting with Ozenbaugh and while Ozenbaugh was representing Sandpoint. See TT, Day 3, pgs. 31–32. The interest rate to be applied to the missed payments (8%) was supplied by Ozenbaugh based upon his understanding of the forbearance agreement. TT, Day 4, pg. 133, ln. 3–7, 20–24.

Specifically, Ozenbaugh corroborated the fact that he met with Kerr and told him how to apply the payments, and what he believed Sandpoint owed Alger. Again, this was at a time when Ozenbaugh represented the Sandpoint entities. At the March 2014 hearing, Ozenbaugh testified:

> Weidemann: In any event, you would agree with me that with respect to the forbearance amounts, that did have a higher percentage of interest at eight percent?
>
> Ozenbaugh: It did. And the schedules that I've provided Scott Kerr would have indicated that.

TT, Day 4, pg. 133, ln. 20–24. In sum, I conclude that based upon the course of conduct and the discussions of the parties, it was clearly the understanding of all concerned that the missed payments would carry the forbearance rate of 8%, regardless of the lack of strict compliance with the formalities of the loan agreement and promissory note. It appears evident that Sandpoint wanted to take advantage of the more lenient provisions of the forbearance agreement, as opposed to the much more draconian acceleration of the entire debt and default rate of 10%. It would be

inequitable for Sandpoint to switch positions at this point, and it would open up a whole new set of issues revolving around when the note went into default, when notice of default was given (assuming notice was required), whether the amounts were accelerated, and when the 10% default rate was triggered.

In its post-trial brief, Sandpoint questions whether Alger is entitled to post-filing interest. Alger is entitled to post-filing interest and expenses of collection to the extent it is an over-secured creditor. See 11 U.S.C. § 506(b). When Alger filed its proof of claim (Claim No. 6), Sandpoint did not appear to contest Alger's status as an over-secured creditor and has, in fact, argued that Alger was adequately secured in various motions filed in this case, including motions for use of cash collateral. Presumably that position was based on Sims's cattle appraisal valuing the abandoned at cattle at roughly $8 million dollars. I have now concluded that Alger disposed of those cattle in a commercially reasonable manner and netted less than $3.5 million. No determination has been made as to what equity exists in the real estate and, so at this point, it is not possible to determine whether Alger is over-secured, and whether Alger is entitled to post-filing interest. Accordingly, my judgement in this case will include both a date of filing amount for the secured claim and an amount that accrues interest through the date of judgment, taking into account credit for the sales of abandoned cattle. To the extent a subsequent valuation determines that Alger was over-secured on filing and later became under secured, an adjustment to the allowed secured claim will be made at that time.

In conclusion, interest on the debt owed by Sandpoint to Alger on the outstanding balance of the $10.8 million note will be computed at 8% on the deferred payments (those payments being the ones outlined in the documents attached to Doc. 264) and 5% on the remaining debt as modified by the other adjustments (e.g., AM carrier cattle and double counting) as outlined in this opinion to date of filing. A separate amount will be determined for the debt owed as of the date of judgment,

using the interest rates outlined above and taking into account the post-filing sales of the abandoned cattle.[9]

H. Miscellaneous Expenses

Under the APA, Alger was responsible for any pre-sale expenses that remained unpaid at the time of closing. See APA, section 1.4, Exhibit 317. Sandpoint has set forth and presented some evidence concerning certain payments made subsequent to the closing that should have been Alger's responsibility. These payments will be allowed as a set-off against the unsecured claim arising out of the APA. Specifically, the following are allowed: (1) a guarantee obligation of Sandpoint to Tailor Cattle Farms, $12,000; (2) guarantee obligation of Sandpoint to Double R Bar ranch, $42,750.00; (3) Sterling Hunter payment, $12,000.00; (4) Prairie dog extermination expenses, $2,862.15; (5) IRS payment, $3493.57; and (6) Stegeman Services payment, $10,045.51.

To the extent Sandpoint claims any other credits, those will be disallowed for failure of proof. Sandpoint indicates in footnote 6 of its post-trial brief that there were other items identified for which no proof was presented. See Doc. 514, pg. 9. Sandpoint claims that it reserves the right to seek further payment at a later date. However, those claims are disallowed. It was always my intent and the understanding of the parties that the hearing held in March 2014 was to be a final claims determination as to all pre-petition claims and credits between the parties. To the extent there are post-petition claims, they will be dealt with separately, either by a claims determination or through a Chapter 11 plan.

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[9]To head off what will surely be another dispute in this case: I find at this point that the debtor can apply the proceeds from the disposition of the secured collateral first to the deferred payments and then to the balance on the remaining debt. The net effect will be that the outstanding balance will accrue interest from and after August 1, 2013, at the non-default, non-forbearance interest rate of 5% per annum.

I. Summary

As to Claim No. 6, the secured claim filed by Alger, the $10,800,000.00 promissory note will be reduced, as of the date of closing, by $1,016,319.00 for the mutual mistake regarding double counting, and $835,669.51 for the AM carrier cattle settlement. This results in a balance on the promissory note of $8,948,011.00 (rounded to the nearest dollar). It is that starting number that will be used to determine the applicable interest accrued and against which credits will be applied for the payments and disposition of collateral for the purposes of determining the outstanding balances at the date of filing and the date of judgment as discussed above.

As to Claim No. 9, the unsecured claim, the previously allowed claim of $273,294.00 will be increased by the failure to make the payment for crop inputs of $250,000.00, for a total of $523,294.00. Credits and offsets against that amount will be allowed as follows:

AM Cattle Feed	$314,980.60
Taylor Cattle Farms	$12,000.00
Double R Bar Ranch	$42,750.00
Sterling Hunter	$12,000.00
Prairie Dog Expenses	$2,862.15
IRS Payment	$3493.57
Stegeman Electric	$10,045.51
TOTAL	**$398,131.83**

Deducting $398,131.83 from $523,294 results in an allowed unsecured claim (Claim No. 9) of $125,162.17.

J. Conclusion

Finally, prior to entry of a final judgment and determination of a final dollar amount for Claim No. 6, I will direct the parties to do the following within ten (10) days from the date of this order:

1. The parties are to identify if there are any issues that need to be resolved that have been omitted, and whether there has been any computational errors as a result of my review of the evidence in this case. This is not an opportunity to re-argue conclusions and issues that have been resolved, but only to avoid the necessity of a further amended judgment if there are any mathematical issues or obvious factual inaccuracies.

2. The parties shall meet and confer in an attempt to compute the amount owed on Claim No. 6, both as of the date of filing and as of today's date (with an amount for daily-accruing interest) in light of my determination of the various issues in dispute. This will be a strictly mathematical computation and, hopefully, the parties can reach an agreement as to an amount. In the event the parties are unable to do so, they shall advise me within 10 days, with specificity, as to the nature of the dispute and how each side computes the amount currently due and owing on the note.

3. The parties should begin discussions as to the valuation of the remaining collateral in an attempt to determine if Alger is over-secured and the amount of the claim that will have to be addressed in any proposed plan of re-organization. I anticipate setting a hearing by separate notice on a number of outstanding issues and motions. At that hearing, I will also conduct a status conference, and I anticipate discussing with counsel each side's intentions going forward, whether a valuation hearing is necessary to determine whether Alger is an over- or under-secured creditor, the time needed to formulate a plan, and other matters, as appropriate, that need to be accomplished to bring this case to a final resolution.

4. Upon receipt of an agreed amount as to Claim No. 6, or my resolution of any dispute between the parties, a final judgment will be entered fixing the amount of Claim No. 6.

DONE AND ORDERED this 10 day of June, 2014.

Michael J. Melloy, U.S. Circuit Judge
Sitting by Designation