20180147

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 13, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Biological & Environmental Solutions, LLC, Plaintiff, vs. TMD Technologies Group, LLC; Go Green Bioproducts, LLC; Go Green Plastics, LLC; T.M. "Chuck" Davis; and The Moody Company, LLC, Defendants.	Case No. 09-2014-CV-3386 **PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR A SUPERVISORY WRIT CONCERNING THE EAST CENTRAL JUDICIAL DISTRICT, JUDGE SUSAN L. BAILEY**

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I

STATEMENT OF JURISDICTION

[1] This Brief in Support of Petition for Supervisory Writ is filed pursuant to N.D. Const. art. VI. §2, Rule 21, N.D.R. App. P., and NDCC § 27-02-04. There is no time limit in the rules or statute for filing this petition. Even if the district court's current deadlines in its order for trial were binding on this Court, the petition would be timely. The district court's current deadline for filing dispositive motions is April 13, 2018.

II

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[2] Whether the settlement agreement calling for the promissory note that has been paid in full was fairly entered into;

[3] Whether Biological & Environmental Solutions, LLC's ("B&E") prior judgments and other rights merged into the agreement calling for the note;

[4] Whether B&E gave timely notice that it sought to rescind the agreement;

[5] Whether B&E, in order to rescind the agreement, returned to the defendants everything of value it received because of the agreement;

[6] Whether B&E also sought to or did return, revoke or rescind the separate note delivered to it and paid in full by the cashier's check tendered in open court;

[7] Whether B&E is prohibited from rescinding the agreement because it accepted the benefits of it; and

[8] Whether a supervisory writ is necessary to prevent multiple recoveries for B&E under circumstances where the recoveries could not be recovered after a trial occurs and an appeal from the final judgment entered after the trial is completed.

[9] Whether a supervisory writ is necessary to prevent disclosure of proprietary information, confidential financial information about the wealth of the defendants and the prejudice a punitive damages claim will have with the jury.

III

STATEMENT OF THE CASE BRIEFLY INDICATING THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS AND THE DISPOSITION BELOW

[10] This case began as an action to obtain money judgments on promissory notes. After money judgments were entered against two of the defendants, all parties entered into a settlement agreement and mutual release of all claims, Appendix item #2, while B&E was represented by litigation counsel. The agreement required Go Green Bioproducts, LLC ("GGB") to provide B&E with a note for $950,000, payable without interest, on April 14, 2017, Appendix item #3, along with a letter of credit assuring payment of the note. The agreement's stated purpose was ." . . to resolve all claims and disputes between [the parties] and [the parties] have reached an agreement . . . under which all claims and disputes, including, without limitation, all actual or potential claims and disputes will be released as set forth [in the agreement]."

[11] The agreement contained mutual releases, effective when the note was paid. The agreement says that upon receipt of the signed note and a letter of credit, B&E will file satisfactions of judgment, and the mutual releases would

become effective. The agreement states: "This Agreement constitutes a fully negotiated agreement among sophisticated parties, each having an opportunity to hire legal counsel . . ."

[12] GGB delivered the note, but discovered it could not obtain the letter of credit.

[13] B&E's first attorney, who negotiated the agreement, made a motion to compel GGB to issue the letter of credit. The district court declined to do so since the agreement did not provide a deadline for providing the letter of credit.

[14] After the note became due on April 14, 2017, B&E hired new counsel, which moved to have the court determine that the agreement was void, due to "breach of contract."

[15] B&E tried to suggest for the first time in its reply brief that the court should "void or rescind" the agreement and that it "is rescinded", but B&E never returned the note, nor the $250,000 it received in July 2017. Never did B&E offer any proof of breach of contract damages nor that it had ever given notice of rescission nor returned everything of value, such as the note or the $250,000.

[16] At the hearing on B&E's motion to void the agreement, the defendants tendered a cashier's check to B&E for $725,205.80, Appendix item #4, representing full payment of the $950,000 note, taking into account the $250,000 already received by B&E, and including interest at the legal rate of six percent per annum from April 14, 2017, to the date of tender, October 16, 2017.

[17] The district court entered its Order on Plaintiff's Motion for Determination of Enforceability of Settlement Agreement on October 25, 2017,

Appendix item #5. The court held that there had been an enforceable agreement signed by all parties. But the court held that B&E had rescinded the agreement, not mentioning the delivered note, and held that the doctrine of merger did not bar rescission because "Here, the Settlement Agreement cannot be characterized as 'fairly made' when there has been a material failure of Defendant's [sic.] consideration."

[18] The order purported to address only "Plaintiff's Motion for Determination that any purported Settlement Agreement between the parties is now void due to Defendant's [sic.] breach of contract."

[19] The order discusses no notice of rescission as the email it cites does not even contain the word "rescission."

[20] The order acknowledges the duty of restoration under NDCC § 9-09-04(2) but fails to mention either the separate note or the fact that B&E never rescinded it.

IV

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

[21] The parties fairly entered into an agreement calling for, among other things, B&E to receive a note for $950,000. The agreement settled judgments B&E had obtained against TMD Technologies Group, LLC ("TMD") and GGB.

[22] When the agreement was entered into, B&E was represented by the Fargo office of Fredrikson and Byron and attorney Todd Zimmerman, described by B&E in court on October 16, 2017 as a "smart guy."

[23] The agreement recites that it was "fully negotiated . . . among sophisticated parties", after B&E "consulted with counsel."

[24] Because of the doctrine of merger, the prior judgments, and all of the rights of B&E, including fraud and punitive damages claims, were merged into the agreement, and only the defendants' obligations under the agreement remained.

[25] These rights were to receive the note, a letter of credit to assure its payment, and retain its judgments until the note was paid when the judgments would be satisfied, and releases would become effective.

[26] The defendants delivered the signed agreement to B&E, along with the original note payable by GGB to B&E for $950,000.

[27] B&E sought to specifically enforce the agreement, which also called for it to receive a letter of credit, to insure the payment of the note.

[28] The district court correctly held that B&E is judicially estopped from claiming that no agreement was entered into.

[29] GGB delivered the original note to B&E. B&E accepted it. B&E has never returned it, revoked it nor rescinded it.

[30] The note is a negotiable instrument that B&E may try to sell, encumber and otherwise continue to collect.

[31] B&E accepted the original note, as well as another $250,000 from GGB. B&E no longer had any interest in the $250,000 as collateral proceeds. The agreement did not preserve security interests.

[32] B&E moved to void the agreement because, according to its motion, notice of motion and brief, there had been a "breach of contract."

[33] Breach of contract damages are money damages for breach, and do not allow unilateral and unconditional rescission, and do not include punitive damages.

[34] B&E did not mention the term "rescission" until its reply brief, and then in unauthorized post-hearing letter briefs to the court, one of which had an underlined purpose to prejudice the court against the defendants because of an email between the undersigned and B&E's prior counsel the defendants shared with B&E's prior counsel to get the note paid on time, and to show B&E's prior counsel the efforts defendants' counsel was undertaking to get it paid.

[35] The hearing on B&E's motion to have the agreement determined void due to breach of contract occurred on October 16, 2017. At that hearing GGB tendered to B&E a cashier's check for $725,205.80, Appendix item #4, the remaining amount due on the $950,000 note, taking into account the $250,000 B&E received on July 12, 2017, and including interest accrued from April 14, 2017 through October 16, 2017, thus curing any breach of contract, and fully performing the agreement.

[36] Approximately five weeks after B&E received that $250,000 payment, it partially satisfied its judgment against TMD on August 24, 2017.

[37] The note for $950,000 was due April 14, 2017. The note provided, "There shall be no interest accruing on this Note."

[38] Nevertheless, the cashier's check tendered to B&E on October 16, 2017, included the entire remaining amount due of the $950,000 principal balance, taking into account the $250,000 payment, with interest at the legal rate of six

percent per annum, from April 14, 2017, through the date of tender on October 16, 2017.

[39] B&E refused the tender saying it had rescinded the agreement, but making no mention of the separate note.

[40] The defendants confirmed at the hearing that they had delivered the note and that B&E had never returned it.

[41] The court took the matter under advisement but then vacated the agreement saying that it had not been fairly entered into, reinstated the judgments that had been merged into the agreement and left B&E with possession of the note given because of the agreement and paid by tender in full with interest.

[42] B&E could not and did not rescind the agreement itself.

[43] Its motion, notice of motion and brief only sought to void the agreement because of "breach of contract." It did not suggest the issue of rescission until its reply brief, and its unauthorized post hearing letter briefs. Matters not raised until the first time in a reply brief cannot be considered by the North Dakota Supreme Court, and the same rule should apply in district court, as a matter of fairness, and due process.

[44] Even if B&E had properly noticed and briefed the issue of rescission, it was not entitled to rescission because it did nothing to carry its burden of proving it had given notice of rescission and returned everything of value it received because of the agreement, as the price of electing rescission as a remedy. B&E did not return the $250,000 it received in July 2017. It did not and has never returned the $950,000 note, paid in full by tender of certified funds on October 16, 2017. For all

the defendants know B&E may have already sold, or borrowed against the note, and may no longer be in possession of it. Meanwhile, it is still in the position to collect $2,116,006.94 in unsatisfied judgments against two of the defendants, seek judgment against a new defendant, and punitive damages against the defendants and a new defendant.

[45] The agreement and the note are separate things. The note has been paid by a full tender with interest, and B&E never returned, revoked nor rescinded the note. B&E never argued that it had rescinded the note. It simply suggested, for the first time in its reply brief, that the court should void or rescind the agreement. It never returned everything of value it received because of the agreement. B&E never did, and cannot now argue that by somehow rescinding the agreement, it also rescinded the note, a separate thing, which it accepted, and never returned, revoked nor rescinded.

[46] So now B&E has received $250,000 and full payment of the remaining amount due, with interest, because of the $950,000 note; and it still has possession of the note, and, according to the district court, can now continue to try to collect the judgments.

[47] This error in fairness, notice, fact, and law will result in circumstances and multiple recoveries and losses that cannot be undone.

[48] The note is a negotiable instrument and B&E can try to sell the note to a third party and, according to the district court, keep the proceeds, continue its trial preparation, and continue to attempt to collect the judgments merged into and settled because of the agreement.

[49] The defendants have no ability to control B&E's collection efforts or see to it that the note is not sold to or encumbered by a third party. As far as the defendants and the record knows, this may have already occurred.

[50] The very real possibility exists that B&E will be able to make a recovery far greater than the existing judgments, and there is no assurance that the defendants will ever be able to recover the difference, after a trial, final judgments are entered, and an appeal is completed, along with all the attorney's fees incurred along the way. A trial, and an eventual appeal, will be too late.

[51] Likewise, with the district court's most recent order, Appendix item #7, B&E will likely conduct discovery on the relative wealth of the parties leading to disclosure of confidential and proprietary information, and can prejudice the jury with a claim for punitive damages.

[52] Public policy requires courts to encourage settlement discussions and settlement agreements entered into between competent parties, represented by excellent counsel, particularly where the sole object of the settlement agreement, as in this case, was actual payment of a $950,000 note, something that was done with interest by tender of a cashier's check at the hearing on October 16, 2017.

[53] There are no facts in dispute related to the issues presented for review. There is no dispute the note was paid in full by tender of a cashier's check at the hearing in district court. Whether B&E's prior judgments and rights merged into the agreement is an issue of law. There was no issue before the district court about whether B&E rescinded the agreement, since it never raised the issue in its principal brief. It offered no evidence of breach of contract damages. It offered no evidence of

and therefore failed to carry its burden of proof that it gave notice of rescission to the defendants and returned everything of value it got because of the agreement it sought to void. It never argued, even in its reply brief, at oral argument, or anywhere else that it rescinded the separate note. There is no dispute that B&E received $250,000 and the note it still holds, which was paid at the hearing.

[54] The problem is that the district court misapplied the doctrine of merger, did not treat the note as a separate contract, and wrongfully concluded that B&E rescinded the agreement and the separate note.

V

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

[55] This is a petition for a supervisory writ, not an appeal. Thus, there is no applicable standard of review. However, the defendants do acknowledge that a petition for a supervisory writ asks for an extraordinary remedy, one that rests within the sound discretion of the Supreme Court, and something that requires a showing of substantial prejudice where an appeal could not provide an adequate remedy.

[56] There are no disputed material facts. Instead, the district court allowed arguments not properly before it, and decided issues not before it, such as the conclusion that the agreement was not fairly entered into. Other errors in the district court are errors of law that would be fully reviewable on appeal. The district court abuses its discretion if it misapplies the law.

VI

LAW AND ARGUMENT

A. The agreement was fairly entered into.

[57] The agreement was made between sophisticated parties, while B&E was represented by excellent counsel during litigation. The note required by the agreement was delivered to B&E, accepted by B&E, and never returned, revoked nor rescinded. B&E was presumably still in possession of the note at the time of the October 16, 2017, hearing, unless it had already sold or encumbered the note. B&E never argued that it returned, revoked or rescinded the note.

B. B&E's prior judgments and other rights merged into the agreement.

[58] At the October 16, 2017, hearing, the defendants presented the court with a one page memorandum on the doctrine of merger, rather than just reading the memorandum, to save the court the time of having to take notes. B&E used this as its excuse to file unauthorized post-hearing briefs, one of which had its underlined purpose to prejudice the court against the defendants.

[59] In North Dakota it is long established that:

> A compromise and agreement fairly made operates as a merger of, and bars all right to recovery on, the claim or right of action included therein. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement.

Production Credit Ass'n of Minot v. Geving, 218 N.W.2d 185, 194 (N.D. 1974).

[60] B&E sought to void the agreement because of "breach of contract." But B&E never presented any breach of contract damages, and, any breach of contract

by the defendants failing to provide the letter of credit, or paying the no-interest note when due, was cured with full payment of the note, with interest, in open court. The purpose of the letter of credit was only to make sure the note was paid, something that happened, with interest, at the October 16, 2017, hearing.

C. B&E did not rescind the agreement, said nothing about the note, and did not return everything of value it received because of the agreement.

[61] Other than the April 14, 2017, email message cited by the district court, the same date as the due date of the note, B&E did nothing to rescind the agreement, nor more importantly, the separate note. The email message does not even use the word "rescission." To rescind a contract there must be a notice of rescission that must be clear, unambiguous and unequivocal. Schipper Const., Inc. v. American Crystal Sugar Co., 2008 ND 226, ¶8, 758 N.W.2d 744.

[62] North Dakota Law treats breach of contract, separately from rescission. NDCC § 9-09-01. If there has been a breach of contract, the party claiming the breach must prove the breach, causation and its damages.

[63] But if a party elects to rescind a contract, then it can only do so for the reasons listed in NDCC § 9-09-02, and then only by following the requirements of NDCC § 9-09-04.

[64] In its initial brief supporting its motion to void the agreement, B&E alleged none of the grounds of NDCC § 9-09-02, other than complaining that the note was not paid when due. B&E did not then, and has not since, claimed or shown that it also rescinded the note.

[65] This Court has repeatedly refused to address issues raised for the first time in a reply brief. See Koehly v. Levi, 2016 ND 202, ¶ 9, 886 N.W.2d 689. This Court has stated that a reply brief is limited to issues raised in the principal brief. Id. There is no reason a different standard would apply to briefing in district court than in this Court. Raising issues for the first time in a reply brief deprives the other party of its opportunity to address the new arguments.

[66] As far as rescinding the agreement itself is concerned, B&E has not complied with the requirements of NDCC § 9-09-04. That section requires that if a party elects the remedy of rescission, it must promptly rescind. Again, B&E has never rescinded the note, itself a separate contract.

[67] In addition, B&E has not restored to the defendants everything of value it received under the agreement, specifically required by NDCC § 9-09-04(2). It did not pay the defendants the $250,000 it received in July 2017. It did not return the note, something that turned out to be worth $725,205.80, by certified funds at the October 16, 2017, hearing.

[68] If B&E, using hindsight, did not like the requirements of rescission under North Dakota Law, it could have elected another remedy, such as pursuing breach of contract damages, or other remedies.

D. B&E never returned, revoked nor rescinded the separate note paid in full at the October 16, 2017 hearing.

[69] The email by which the district court said B&E rescinded the agreement, says nothing about the note. There is nothing in the record to show B&E ever attempted to return, revoke or rescind the note. It has never argued as much, nor placed anything in the record about this.

[70] This Court has treated a promissory note as a contract in cases concerning the rescission of the promissory note. See Industrial Com'n of North Dakota v. Noack, 2006 ND 195, ¶ 9, 721 N.W.2d 698. North Dakota Century Code section 9-09-02 provides the circumstances under which rescission is permitted. North Dakota Century Code section 9-09-04 provides the rules governing how rescission is made. Notably, under N.D.C.C. § 9-09-04, a party seeking rescission must provide notice of rescission to the other party promptly upon discovery facts entitling it to rescind the promissory note. Moreover, under N.D.C.C. § 9-09-04, the party rescinding must restore the other party everything of value which the party rescinding has received from the other party under the contract. Compliance with N.D.C.C. § 9-09-04 is a condition precedent to an action to rescind. See Industrial Com'n of North Dakota v. Noack, 2006 ND 195, ¶ 16, 721 N.W.2d 698.

[71] An excellent and complete discussion of when the disfavored remedy of rescission is allowed is contained in another East Central Judicial District district court decision of Judge Frank L. Racek in Jordahl Custom Homes, Inc., v. MBL Properties, LLP et. al., Order on Motion for Summary Judgment and Order for Final Judgment, Case No.: 09-2017-CV-00959, January 4, 2018, summarizing and citing only this Court's decisions, Appendix item #6.

[72] The agreement and note are separate and distinct transactions. As such, under North Dakota law, B&E needed to comply with the applicable statutes in rescinding both the agreement and the note. Rescinding the agreement does not somehow automatically rescind the note when they are separate and distinct transactions. See Industrial Com'n of North Dakota v. Noack, 2006 ND 195, 721

N.W.2d 698 (holding that the purchase agreement for home and the financing of the purchase, i.e., the promissory note and mortgage, involved separate and distinct transactions and that separate notice of rescission was required for both the purchase agreement and the promissory note).

E. B&E cannot rescind the agreement after accepting its benefits and consideration.

[73] B&E is prohibited from electing the remedy of rescission after previously accepting the benefits of the agreement. In North Dakota, the doctrine of election of remedies is applied when three elements are present: (1) the existence of two or more remedies; (2) inconsistency between the remedies; and (3) the choice of one remedy. See Farmers Elevator & Mercantile Co. v. Farm Builders, Inc., 432 N.W.2d 864, 870 (N.D. 1988).

[74] B&E had numerous remedies available to it. It could have sued for breach of contract or specific performance. Instead, B&E sought to belatedly and improperly rescind the agreement as an afterthought as a suggestion in its reply brief but did not comply with the requirements of rescission and said nothing of the separate note.

[75] B&E is also prohibited from rescinding the agreement because it accepted benefits and consideration for the agreement. In North Dakota the voluntary acceptance of a benefit of a transaction is equivalent to consent to all the obligations arising from it. Westby v. Schmidt, 2010 ND 44, ¶ 23, 779 N.W.2d 681. B&E accepted a payment of $250,000 and the note, paid by tender of $725,205.80 on October 16, 2017.

F. A supervisory writ is necessary because without it, the agreement, negotiated between sophisticated parties during litigation with counsel will be rendered void by an argument not properly noticed and raised by B&E, leaving it in a position to obtain multiple unrecoverable recoveries, discovery of confidential and proprietary information and seek prejudicial punitive damages.

[76] B&E's notice of motion, motion and brief to void the agreement only referred to "breach of contract." Not until B&E's reply brief did it ever mention the term "rescission." And even then, and ever since, it has never argued that it also rescinded the note. The note is a "negotiable instrument," satisfying requirements of NDCC § 41-03-04. It represents an unconditional promise to pay a fixed amount of money payable to the order of B&E at a definite time and does not state any other undertaking or instruction preventing its payment.

[77] Presumably, B&E still holds the note, unless it has already negotiated it, for consideration. For all the defendants know, and the record knew on October 16, 2017, B&E might have already sold or encumbered the note.

[78] NDCC § 27-02-04 allows this court, in the exercise of its appellate jurisdiction, and in its superintending control over inferior courts, to issue original and remedial writs as are necessary to the proper exercise of such jurisdiction. For a supervisory writ to issue, the action of the trial court must be such that it will result in grave or serious prejudice to the applicant for which the applicant has no adequate remedy. Ingalls v. Bakken, 167 N.W.2d 516, 518 (N.D. 1969). A supervisory writ can issue in cases where the remedy by appeal is inadequate and the supervisory power is discretionary. Patten v. Green, 369 N.W.2d 105, 106 (N.D. 1985).

[79] B&E is in a position to obtain multiple recoveries of the $950,000, under circumstances where the defendants will likely never be able to recover them, after a jury trial scheduled for August 21 through 25, 2018, after B&E amends the complaint to name and serve a new defendant and seek punitive damages. An eventual appeal or appeals in 2019 will come too late.

[80] B&E currently holds an unsatisfied judgment against GGB for $2,011,742 and an unsatisfied judgment against TMD for $104,264.32. Both judgments continue as judgment liens against any real property owned now, or in the future by GGB or TMD. B&E presumably continues to hold the $950,000 note, a negotiable instrument. B&E can continue to collect the unsatisfied judgments by garnishment, levy and execution, or other remedies. It still has financing statements concerning GGB that have not been terminated. It causes the defendants to continue to incur substantial and ongoing attorney's fees.

[81] Likewise with the district court's most recent order, Appendix item #7, B&E will likely conduct discovery on the relative wealth of the parties leading to disclosure of confidential and proprietary information, and can prejudice the jury with a claim for punitive damages.

[82] Once these circumstances play themselves out, there is no way the defendants can "un-ring the bell."

[83] The defendants will likely find themselves in the position of paying many times the amount tendered because of the note, under circumstances where the defendants will not be able to recover anything back from B&E.

[84] B&E contacted the defendants about making an investment with them. The defendants did not seek out B&E.

[85] Efforts by B&E to obtain local investors were spearheaded by Bruce Hager, who had plead guilty to and been found guilty of selling unregistered securities and acting as an unregistered agent in 2007 in District Court, State of North Dakota, Cass County North Dakota, Case No. 09-05-K-02261. Defendant T.M. "Chuck" Davis only came to North Dakota once, at his own expense, at the request of B&E.

[86] The defendants had moved to dismiss this action because of improper venue. The motion was denied by the district court. Along the way, the district court, sua sponte, dismissed the defendant's fact laden, well supported and serious counterclaims, so they would not stand in the way of entry of the judgments settled by and merged into the agreement and note and paid in full by the $250,000 accepted by B&E in July 2017, and tender of the cashier's check for $725,205.80 at the hearing on October 16, 2017, to pay the remaining amount due on the note in full, with interest at the legal rate.

G. B&E, is entitled to no interest on the $725,205.80 tendered on October 16, 2017.

[87] B&E refused the tender of the Cashier's check, Appendix item #4, and thus is entitled to no interest from October 16, 2017 on payment of the instrument. N.D.C.C. § 41-03-65(3).

VII

CONCLUSION AND THE PRECISE RELIEF SOUGHT

[88] The defendants request a supervisory writ directing the district court to dismiss with prejudice the litigation below, order B&E to satisfy its judgments against defendants TMD and GGB, conditioned on GGB retendering a cashier's check to B&E for $725,205.80, to replace that tendered in open court on October 16, 2017, order B&E to return the note to GGB marked "paid" and order B&E to release and terminate any security agreements and financing statements it has concerning the defendants.

[89] Under these unusual and prejudicial circumstances, this Court can issue a supervisory writ to prevent substantial undue prejudice to the defendants which cannot be avoided or undone by an appeal, but also to save itself from inevitable appeals, all the while making sure that the law of merger, rescission, judicial estoppel, payment, acceptance of benefits, contract, negotiable instruments and due process is respected and followed at an earlier, rather than a later, necessarily prejudicial time.

[90] The district court still has control over its order and decisions, can overlook irrelevancies, and might well moot this petition. If not, given the serious prejudice the defendants face, the serious public policy issues at stake, coupled with the fact that the arguments made herein are likely winners for the defendants in any eventual appeals; this Court might order a response to this petition and favor oral argument. And, if the petition is granted, the result will be to allow B&E to get everything it was entitled to because of an agreement entered into, with the

assistance of excellent litigation counsel, with great savings of judicial resources at the district court level and this Court's level, as well as very substantial and ongoing attorney's fees being incurred and to be incurred by all parties.

Respectfully submitted this 12th day of April, 2018.

/s/ Roger J. Minch
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Go Green Plastics, LLC; and
T.M. "Chuck" Davis

CERTIFICATE OF COMPLIANCE

[1] The undersigned, as attorney for the defendants, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and Rule 32(8)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals **5, 053**.

Dated this 12th day of April, 2018.

/s/ Roger J. Minch
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Biological & Environmental Solutions, LLC, Plaintiff, vs. TMD Technologies Group, LLC; Go Green Bioproducts, LLC; Go Green Plastics, LLC; T.M. "Chuck" Davis; and The Moody Company, LLC, Defendants.	Case No. 09-2014-CV-3386 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA
COUNTY OF CASS

[1] Sheryl Newberger, being first duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within:

- **Petition for a Supervisory Writ**
- **Petitioner's Brief in Support of Petition for a Supervisory Writ Concerning the East Central Judicial District, Judge Susan L. Bailey**
- **Petitioner's Appendix**

on April 13, 2018, by sending a true and correct copy thereof by electronic means only to the following e-mail addresses, to-wit:

Christopher M. Kennelly **Benjamin J. Williams** **KENNELLY BUSINESS LAW** chris@kennellybusinesslaw.com ben@kennellybusinesslaw.com	**Honorable Susan L. Bailey** **Judge of the District Court** **East Central Judicial District** sbailey@ndcourts.gov

[2] To the best of affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served. The above documents were emailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Sheryl Newberger
Sheryl Newberger

Subscribed and sworn to before me this 13th day of April, 2018.

/s/ Robyn L. Tande
Robyn L. Tande, Notary Public
Cass County, North Dakota
(SEAL) Commission Expires: Oct. 9, 2018

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Biological & Environmental Solutions, LLC, Plaintiff, vs. TMD Technologies Group, LLC; Go Green Bioproducts, LLC; Go Green Plastics, LLC; T.M. "Chuck" Davis; and The Moody Company, LLC, Defendants.	Case No. 09-2014-CV-3386 **AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA
COUNTY OF CASS

[1] Sheryl Newberger, being first duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within:

- **Petition for a Supervisory Writ**
- **Petitioner's Brief in Support of Petition for a Supervisory Writ Concerning the East Central Judicial District, Judge Susan L. Bailey**
- **Petitioner's Appendix**

on April 13, 2018, by placing a true and correct copy thereof in an envelope addressed as follows, to-wit:

Honorable Susan L. Bailey
Judge of the District Court
Cass County Courthouse
211 S. Ninth St.
P.O. Box 2806
Fargo, ND 58108-2806

and depositing the same with postage prepaid in the United States mail at Fargo, North Dakota.

[2] To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above document was mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Sheryl Newberger
Sheryl Newberger

Subscribed and sworn to before me this 13th day of April, 2018.

/s/ Robyn L. Tande
Robyn L. Tande, Notary Public
Cass County, North Dakota
(SEAL) Commission Expires: Oct. 9, 2018