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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20210258
McKenzie County District Court No. 27-2012-PR-00293

In the Matter of the Rose Henderson Peterson Mineral Trust,
Dated March 26, 1987,

Lyle M. Henderson, Clifford Henderson,
Herbert Henderson, Emmalee McKenzie, and
Dixie J. Henderson,

Petitioners/Appellees,

v.

Dennis Henderson and James Henderson,
Individually and as co-trustees of the Rose
Henderson Peterson Mineral Trust,

Respondents/Appellants,

and

Donna Foreman, Patsy Gabbert, Kimber Henderson,
Larry Henderson, Lyleen Henderson, and Penny Pitman,

Interested Parties/Appellees.

BRIEF OF PETITIONERS/APPELLEES – ORAL ARGUMENT REQUESTED

Appeal from the Memorandum Decision and Order for Judgment, dated July 22, 2021, and Judgment, dated August 18, 2021

THE DISTRICT COURT FOR THE NORTHWEST JUDICIAL DISTRICT
THE HONORABLE ROBIN A. SCHMIDT

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STATEMENT OF THE ISSUES

[¶1] Did the Appellants waive their right to appeal from the judgment by accepting a substantial benefit of the judgment, partially satisfying the judgment, and purporting to seek reversal of only part of the judgment?

[¶2] Did the District Court err in concluding Appellants committed a breach of fiduciary duties and breach of trust by taking over one million dollars for their work as trustees in six years in which they performed very little work for the Trust's benefit other than writing checks and checking numbers?

[¶3] Did the District Court correctly require appellants to reimburse the Trust for their excessive fees?

[¶4] Does the exculpatory clause exculpate the Trustees from liability for taking unreasonable compensation in violation of their fiduciary duties?

[¶5] Did the District Court correctly refuse to apply the law of the case doctrine or laches?

STATEMENT OF THE CASE

[¶6] Respectfully, Appellants' Statement of the Case is inaccurate, and omits critical facts from the course of the proceedings. Accordingly, pursuant to N.D. R. App. 28(c), Appellees submit the following corrections and additions:

[¶7] This action arises out of the Rose Henderson Peterson Mineral Trust dated March 26, 1987 (hereinafter the Trust), which holds some 1006 leased and producing mineral acres for the benefit of 13 beneficiaries. Appellees are five of those beneficiaries, representing over 38% of the Trust. Appellants are Trustees of the Trust, as well as two of its beneficiaries.

[¶8] This action was actually started via Petition served September 4, 2019 (hereinafter the 2019 Petition). An attempt of the same date to file the Petition as a new action was rejected by the District Court Clerk, McKenzie County. Appellees were directed instead to file the Petition under McKenzie County District Court No. 27-2012-PR-00293. Appellants' A. at 27.

[¶9] The 2019 Petition did indeed request an inventory and accounting, reimbursement of excessive Trustee compensation, removal of the Trustees and reimbursement of Appellees' attorneys' fees and costs. However, the 2019 Petition plainly alleged as follows:

> On August 27, 2012, Petitioner Lyle M. Henderson petitioned this Court to *inter alia* consider the reasonableness of the co-Trustees' fees. At that time, the co-Trustees were receiving a compensation rate of five percent (5%) of Trust income. A hearing was conducted as to the reasonableness of the compensation rate on February 7, 2013. ***In its Order for Judgment dated February 25, 2013, the Court found the co-Trustees compensation rate was reasonable under the circumstances, however, the Court ordered the "Trustees must continue to evaluate and assess their rate of compensation on a reasonable basis and communicate such rates to***

> ***beneficiaries." Additionally, the Court encouraged the co- Trustees to solicit input from the beneficiaries for future charges to the Trust.***
> . . . .
>
> At all times ***since the Court issued its February 25, 2013 Order,*** the co-Trustees have continued to accept compensation at a rate of five percent (5%) of Trust income. As a result, ***between 2014 and 2018, the co-Trustees paid themselves approximately $950,000.00 for an average annual compensation of over $190,000.00.***
> . . . .
>
> At no time ***since the Court issued its 2013 Order*** have the co-Trustees assessed their rate of compensation and communicated such rates to beneficiaries, nor have the co-Trustees solicited input from the beneficiaries for future charges to the Trust.
> . . . .
>
> ***While the co-Trustees' annual compensation has substantially increased since the Court's 2013 Order, their duties and obligations to the Trust have remained substantially the same.***
> . . . .
>
> Under the circumstances, the compensation rate of five percent (5%) is unreasonable and ***no longer*** serves the best interests of the beneficiaries.
> . . . .
>
> [. . .][T]he co-Trustees have breached their fiduciary duties to the beneficiaries, violated the express terms of the Trust, ***and are in violation of this Court's February 25, 2013 Order.***

[Index #44; Appellants' A. at 27].

[¶10] Furthermore, while an evidentiary hearing was held on March 23, 2021, Trial depositions of Appellees' experts of Robert Spawn Charles W. Turiano were taken by agreement of the parties on March 10, 2021. [Index ## 121-122].

[¶11] The District Court entered Judgment on August 18, 2021. Of relevance to the issues raised in this appeal, it provides as follows:

> In accordance with the Court's Memorandum Decision and Order for Judgment, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:
> . . . .

G. ***The Rose Henderson Peterson Mineral Trust shall reimburse both Petitioners and Trustees for their attorneys' fees.***

[Index #165; Appellants' A. at 36].

Thus, the Judgment very plainly included the reimbursement of fees amongst the substantive remedies afforded to both the Appellees and Appellants.

[¶12] Following the entry of Judgment, Appellees did undertake collection efforts. [Index ##178-179]. On October 6, 2021, however, the District Court entered an Order Approving Motion to Stay Execution of Judgment [Index #206]. Thus, all collection activities immediately ceased as of that date.

[¶13] ***Subsequent to the entry of the Stay,*** Appellants twice made payments which partially satisfied the Judgment, reflected by Notices of Partial Satisfaction docketed on November 8 and December 14, 2021. [Index ## 210 and 213]. These payments were in the amount of $50,000 and 42,543.05, respectively. They were made to Appellees via a Trust belonging to Lyle "Rocky" Henderson ("Rocky") (who had paid all the legal fees and costs on behalf of Appellees) via checks with "reimbursement of attorneys fees" and "Attorneys fees reimbursement" in the memo lines.

[¶14] Finally, while Appellants raise several arguments in their appeal which, if successful, would bar Appellees' claims *in toto*, they purport to appeal from only part of the District Court's Judgment in their prayer for relief: "[T]he co-trustees respectfully request this Court to reverse the District Court's *Memorandum Decision and Order for Judgment* and *Judgment* ***as it relates to any repayment by the co-trustees of trustee compensation***."

STATEMENT OF THE FACTS

[¶15] Appellants' "Statement of Facts" is also pocked with misstatements, and omits the vast majority of the record. This is understandable, as the evidence in this matter overwhelmingly supported the District Court's decision. Set forth below is a thorough rendition of the evidence heard by the District Court:

[¶16] Rose passed away on September 13, 1995. She established the Trust on March 26, 1987, as part of her Last Will and Testament to provide financial support for her grandchildren. The Trust provides, in pertinent part, as follows:

> [. . .][A]ll income generated by the Trust shall be distributed to the Paul Henderson Grandchildren and the Lyle Henderson Grandchildren in equal shares to each grandchild. ***It is my intent that . . . each grandchild of mine shall receive no more or no less share of income generated, regardless of which group of grandchildren he or she is in.***
>
> . . . .
>
> [. . .]The initial Trustees of this Trust are James Henderson and Dennis Henderson (herein at times referred to as "Trustee"). However, if one of them cannot so act or resigns, the other remaining shall act as Trustee. James or Dennis or any successor trustee may appoint his successor as Trustee either while they are living or by Last Will and Testament. ***If for any reason the position of Trustee is vacant, one shall be appointed according to North Dakota law.***
>
> . . . .
>
> [. . .]Trustee . . . shall exercise such powers at all times ***in a fiduciary capacity primarily in the interest of the beneficiary hereunder.***
>
> . . . .
>
> [. . .]Trustee is entitled to ***reasonable*** compensation, if demanded.
>
> . . . .
>
> [. . .] The Trustee shall not be liable for any ***mistake or error of judgment*** in the administration of the Trust herein created, except for willful misconduct, ***so long as she continues to***

> ***exercise her duties and powers in a fiduciary capacity primarily in the interest of the beneficiaries hereunder.*** . . . .
>
> . . . .
>
> [. . . .] The Trust shall be construed and administered according to the laws of the State of North Dakota.

[Index #13, 24].

[¶17] As indicated above, the Trust *res* consists of 1006 mineral acres located in McKenzie County. These mineral acres were leased to oil companies in 2006-2007, and subsequently developed into production. During all times pertinent the leases have been "held by production", which allowed the operators of the wells to continue drilling activity so long as production continued. Consequently, no further negotiation of the leases was required, or even allowed. [2021 Tr. at 187:24-25, 188: 1-8].

[¶18] After the Trust began producing substantial income, Appellants took 8% of the Trust's income as Trustee compensation. They maintained that level of compensation through March 2012. In April 2012, they reduced their compensation to 5%. This resulted in compensation totaling $46,878 in 2011, $74,601.30 in 2012 and $61,177 in 2013. [2021 Tr. at 41: 16-25, 42: 1-9].

[¶19] On August 27, 2012, Rocky petitioned the District Court to *inter alia* consider the reasonableness of Trustees' fees. A hearing was conducted on February 7, 2013. In its Order for Judgment dated February 25, 2013, the District Court explicitly found Appellants' ***current*** compensation reasonable under the circumstances. However, the District Court's 2013 Order further directed as follows:

- That Trustees ***must*** communicate with beneficiaries on a ***regular basis*** and otherwise provide any such documents relating to the Trust on a reasonable basis.
- ***That Trustees must continue to evaluate and assess their rate of***

compensation on a reasonable basis and communicate such rates to beneficiaries.

- ***That Trustees are encouraged to solicit input from the beneficiaries for future charges to the Trust.***

The District Court also awarded Rocky his reasonable attorney's fees and costs. [Index #41; Appellants' A. at 24].

[¶20] Beginning in 2014, the Trust saw a significant increase in income. As a result, Appellants' 5% yielded them exorbitant compensation, to wit:

Year	Trust Income	Fiduciary Fees
2014	6,152,939	307,547
2015	4,926,744	246,241
2016	2,207,830	110,290
2017	2,038,446	101,822
2018	3,978,640	198,856
2019	2,622,266	131,970

Thus, the Appellants paid themselves a whopping ***$1,096,726*** during 2014-19, averaging annual compensation of nearly ***$182,788.00***. Appellants' compensation was obviously more egregiously high in some years than in others. But in every year during 2014-19, their compensation was significantly higher than in 2011-13, when it had been previously reviewed by the District Court.

[¶21] Appellants admitted their ***duties*** did not change one iota, however. Appellants claimed they spend "5-20" hours performing services for the Trust. But they keep no records of their time, and so could not corroborate this number, or the services they provide, other than distributing income to beneficiaries. Appellants claimed their "duties" include "negotiations and conversations with various oil and gas

companies"; "preparing information to send to accountant for yearly returns"; "calculating distribution amounts to beneficiaries"; "compiling reports and letters to distribute to beneficiaries"; and "communications with beneficiaries, including the above information".[2021 Tr. at 66: 24-25, 67: 1-22, 109: 15-18].

[¶22] These claimed "duties" were completely debunked at Trial. Rocky serves as a Trustee of a materially identical (indeed in some sense related) trust, which owns more mineral acres than the subject Trust. His duties require a fraction of the time claimed by Appellants, and essentially consist of dispersing Trust funds to beneficiaries. No "negotiations" take place with oil companies because the leases are held by production; calculating distributions requires a few keystrokes on a computer; the "reports" sent out by Appellants are generated by the oil companies and simply forwarded by the Trustees; and compiling materials for taxes might take a few hours a year, maximum. Indeed, during the years in which Appellants paid themselves a whopping ***$1,096,726***, Rocky's compensation for administering a larger Trust was ***$0***. Although his Trust allowed him to take compensation, Rocky refuses to do so because, as a beneficiary, he believes it would create a conflict of interest. Rocky even offered to administer Rose's Trust for no compensation. In all events, even if the District Court had credited Appellants' uncorroborated and specious claim that they put in 5-20 hours a month for the benefit of the Trust, their compensation between 2014-19 ranged from grossly excessive to obscene. In 2014, for example, Trustees paid themselves ***$1,281.45/hour*** if they put in 20 hours a month, and ***$5,125.78/hour*** if they put in five. [2021 Tr. at 17-24, 114: 21-25; 115: 1-25].

[¶23] Significantly, Appellants admitted the Trust's circumstances changed significantly with the increase in revenue in 2014, and so bore no resemblance to those reviewed by the District Court in 2013. At the same time Appellants admitted their duties did not change in any way to justify the exorbitant increase in their compensation. [2021 Tr. at 113: 2-12, 204: 10-16, 205: 1-9].

[¶24] Appellants also clearly admitted they construed the District Court's 2013 Order as *carte blanche* to take 5% of the Trust's income, regardless how much work they did, or how much compensation would result. When asked whether there was any limit to the amount of compensation they could accept in accordance with their fiduciary duties, they answered ***no.*** Appellant Dennis Henderson testified his compensation is an ***entitlement***. Dennis also admitted Appellants' actual ***rate*** of compensation varied dramatically depending upon Trust income. [2021 Tr. at 116: 1-17, 199: 1-9].

[¶25] The evidence also overwhelmingly established that Appellants thumbed their noses at the District Court's 2013 Order. Appellants offered no competent, admissible evidence whatsoever that they "continue[d] to evaluate and assess their rate of compensation on a reasonable basis and communicate[d] such rates to beneficiaries" as required by the 2013 Order. [2021 Tr. at 117-119, 190: 20-25, 191: 1-23]. In fact, Appellants admitted they ignored this requirement, both in testimony and in response to Petitioners' discovery. Below is one example:

> **INTERROGATORY NO. 17:** Per the Court's February 22, 2013 Order in this matter, please identify in detail and not summary fashion how you have evaluated and assessed your rate of compensation on a reasonable basis and communicated such rates to the Petitioners from January 2013 to present.

> **ANSWER TO INTERROGATORY NO.17:** [. . . .]Trustees previously presented evidence in this matter regarding how the Trustees' compensation was calculated ***and have relied on the Court's February 2013 as validation for the same.***

[Index #128, page 10].

The same was true for the District Court's admonition that Appellants "solicit input from the beneficiaries for future charges to the Trust":

> **INTERROGATORY NO. 18:** Per the Court's February 22, 2013 Order in this matter please identify in detail and not summary fashion any time you have solicited input from the beneficiaries for future charges to the Trust. For each such instance, please identify the parties to the solicitation, the substance of the solicitation, and how the results of the solicitation effected future charges to the Trust.
>
> **ANSWER TO INTERROGATORY NO. 18:** [. . . .] ***[T]he Court's order does not require the Trustees from soliciting input from the beneficiaries.***

[Id, page 11; 2021 Tr. at 138: 16-25, 139: 1-9, 203; 14-25, 204: 1-9].

[¶26] Appellees introduced correspondence which made clear that Rocky repeatedly demanded Appellants reevaluate their compensation during 2014-19, with Appellants either responding "no", or not responding at all. Appellant James Henderson flatly admitted that Appellants ignored Rocky's communications. Even more gallingly, in response to Request for Admission and discovery responses, Appellants falsely claimed their compensation was never brought up by the Appellees:

> **REQUEST NO. 3:** Please admit that the Co-Trustees have failed to solicit input from the beneficiaries for future charges to the Trust.
>
> **ANSWER TO REQUEST NO. 3:** [. . . ***Other than the present petition, the Trustees do not recall any of the beneficiaries raising this issue since the Court approved the rate in 2013. Because the Trustees have continued to perform the same services, the fee charged by the Trustees has remained the same since the Court's approval of the same.***

Appellants admitted this response was false, and the correspondence in evidence established it was false. [Index #131, page 4; 2021 Tr. at 140: 24-25, 141: 1-25, 142: 1-4, 183: 7-25, 184: 1-4].

[¶27] Unfortunately, it got worse. Appellant Dennis Henderson admitted there is animus between him and Rocky. [2021 Tr. at 133: 25, 134: 1-2]. This animus is apparent in Appellants' responses (or lack thereof) to Rocky's repeated requests that they reassess their compensation in compliance with the law and the District Court's Order.[1] [2021 Tr. at 134: 24-25, 135: 1-9]. Appellant James Henderson also admitted he had obtained information regarding the economic life of the oil wells owned by the Trust, which was obviously material to the beneficiaries' interests, yet failed to disclose that information to the beneficiaries. [2021 Tr. at 206: 25, 207: 1-25, 208: 1-25, 209: 1-7].

[¶28] Appellants called no other beneficiaries to support the reasonableness of their compensation or performance. They introduced no other outside evidence to support the reasonableness of their compensation or performance. They called no expert witnesses to opine as to the reasonableness of their compensation. [2021 Tr. at 10-20].

[¶29] Conversely, Petitioners called Charles W. Turiano, Director of Mineral Management at Farmers National Company. In addition to his own extensive experience as a fiduciary, 75% of his company's business consists of working with

[1] It was also readily apparent in Appellants' response to Appellees' Petition, which Appellees had the absolute right to bring under N.D.C.C. Chapter 59. Appellants responded with an inappropriate request for sanctions under N.D.C.C. §§ 28-26-01 and -31.

over 100 fiduciaries in the management of oil and gas assets held in trust. Farmers National is the largest independent oil and gas/mineral management business in the country, with nearly 215,000 properties in 40 states, covering every oil and gas producing play or basin in the United States. Its clientele ranges from financial institutions, nonprofits, colleges, universities, railroads, and health systems to families and individuals. In sum, Mr. Turiano opined and testified that Appellants breached their fiduciary duties by both taking excessive compensation, and failing to perform any oil and gas management services to justify their compensation. He opined the total savings to the Trust during 2013-19 would have been a whopping ***$695,587.23***, or ***$99,368.32 annually***, with an increased amount and quality of services to the Trust, had Appellants retained firms which charged reasonable, market average fees. While Mr. Turiano's testimony is obviously of record, portions thereof highlight the egregiousness of Appellants' conduct in this case:

> [. . .] I can unequivocally say that somebody charging 5 percent to be a trustee and manage these assets is ***out of this world high***. And we work for over 100 fiduciaries. We work for multiple top 10 size banks in the country down to some of the smallest, little credit unions in the most rural towns in the country. And the prudentness, if that's a word, of fees does not change.
>
> . . . .
>
> [. . . .] ***I wouldn't charge more that 1 or 1 and a half percent on this account. Because I would never get the business, first of all, and the value I'm providing would not justify a fee higher than that. I'm – I would be doing a lot more than the current trustees are which is cashing checks, making distributions, manually tracking things, which creates room for error which in the regulatory world is scrutinized.***
>
> [. . . .] ***Based on what I've seen, I would charge you 1 percent to do it. And a bank, a fiduciary that understands this world of special assets I can't imagine charging more than 1 percent as a trustee fee. So***

> ***compiled that's 2 percent. <u>That's 40 percent of what's currently being charged.</u>***
>
> . . . .
>
> [. . . .] I mean, if you look at any bank fee schedule on trustee fees, I've never seen 5 percent. I've never seen anything greater than – I mean, maybe 2 and a half percent, but that is – that would be egregious in comparison to market values. [. . . .]
>
> ***<u>[. . .] [F]rom what I've reviewed, the current co-trustees are not providing oil and gas management or mineral management services that are necessary or functions that are necessary that would fulfill their fiduciary duty. . . .</u>*** Based on standards in the mineral management business, I can make an argument they're breaching their fiduciary duty. Which inherently increases risk and decreases revenue because of what they're not doing. It's pretty clear that if you do the things that you're supposed to do as a mineral manager, you can increase revenue and minimize risk to an owner of oil and gas assets.

[Index #122].

[¶30] Appellees also proffered the expert testimony of Robert Spawn, who has either served in the capacity of a fiduciary or advised fiduciaries for the better part of 30 years. Mr. Spawn testified, in pertinent part, that it appeared the ***<u>only</u>*** reason Appellants had not engaged the services of an outside provider at a lower rate to administer the Trust is that it would cost them money. [Index #121].

[¶31] In short, the evidentiary hearing in this matter was, with due respect, a completely one-sided affair. The evidence overwhelmingly established that Appellants breached their fiduciary duties, breached the Trust, and violated the District Court's 2013 Order. Indeed, given their legal burden, Appellants' performance and presentation was nothing short of shocking. They evinced a complete disregard for their legal obligations to their fellow beneficiaries, and the Court's ability to enforce them.

[¶32] The District Court's factual findings were clearly in accord with the overwhelming evidence it heard, to wit:

> [¶25] The Trustees claimed they spent between five and twenty hours per month on Trust related activities. The court finds, based on all the testimony and evidence, five hours per month is the amount a reasonable trustee would devote to administering this Trust. Based on the testimony and evidence presented, the court is unable to determine what a trustee would be doing, for the benefit of the trust, for more than five hours per month.
>
> [¶26] The Trustees' duties did not significantly change from 2013 to 2014, although the trust income and their compensation as Trustees increased five-fold in that same period of time.
> . . . .
>
> [¶37] Each year the Trustees were paid more than the court considered in the 2013 order. Some years were over four times the amount they were ever paid, and a few years it was approximately $25,000-$35,000 more per year. Either way, it is an outrageous amount of compensation for the work the Trustees have testified to completing on the Trust's behalf. In total, they have received over one million dollars for their work as trustees in six years. Six years in which they have done very little work, for the Trust's benefit, other than writing checks and checking numbers.
>
> [¶38] The fees being charged by the Trustees are excessive for the work being provided.

[Index #165; Appellants' App. at 36].

[¶33] These factual findings rendered obvious, if not compelled, the District Court's findings that Appellants' conduct constituted a breach of Trust and of their fiduciary duties (thereby rendering the Trust's exculpatory clause unavailing to them).

[¶34] Finally, the District Court concisely but thoroughly debunked the various and sundry defenses which Appellants effectively waited to raise until after the Trial, to wit:

> [¶42] The co-trustees argue the statute of limitations precludes the petitioners from requesting removal because the previous court order approving the 5% compensation was signed in 2013 and the current petition

was brought in September 2019. The statute of limitations would prevent the Petitioners from seeking repayment for any income before September 2013. However, the Court is awarding repayment for compensation paid from 2014 going forward. The statute of limitations does not prevent the current petition from being heard by this court.

[¶43] Similarly, the doctrine of laches does not prevent the Petitioners from being this issue before the court.

[¶44] Res judicata and collateral estoppel do not prevent the petitioners from bringing the current petition for removal. Administration of a Trust is not a static situation. Many facts may change throughout the Trust's life. Therefore, Res judicata and collateral estoppel do not apply to this present situation. The facts changed drastically from 2013 when the original petition was filed to 2019 when the current petition was filed. Applying these doctrines would not allow a beneficiary the ability to request removal of a Trustee once a previous petition was filed.

[¶45] Law of the case does not prevent this court from considering the compensation percentage. As previously explained, Trust administration is a fluid situation. The facts in this case have changed drastically from 2013 when the initial order was entered. Therefore, consideration of the current Petition for removal is properly before this court.

LAW AND ARGUMENT

A. Appellants Waived Their Right to Appeal.

[¶35] This Court has held an attempted appeal from a judgment that has been properly satisfied of record fails for lack of jurisdiction. Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp., 2002 ND 140, 651 N.W.2d 625. A judgment that has been paid and satisfied of record ceases to have any existence. Lyon v. Ford Motor Co., 2000 ND 12, ¶ 10, 604 N.W.2d 453. A satisfaction of judgment on the record extinguishes the claim, and the controversy is deemed ended, leaving an appellate court with nothing to review. DeCoteau v. Nodak Mut. Ins. Co., 2001 ND 182, ¶ 10, 636 N.W.2d 432. See N.D.C.C. § 28-05-10. This Court has further concluded that "a party who voluntarily pays a judgment against him waives the right to appeal from the judgment." Lyon, 2000 ND 12, ¶ 13, 604 N.W.2d 453. The Judgment herein has undisputedly been partially satisfied. In addition, Appellants have undisputedly benefitted from the Judgment, by not being required to reimburse the Trust for their own legal fees and expenses. This Court has serially held, in the foregoing cases, that a party who accepts a substantial benefit from a Judgment waives the right to appeal from the Judgment. Lyon, 2000 ND 12, ¶ 7 & n.1.

[¶36] Appellants cannot argue they paid under coercion or duress, because a stay of execution was in place when they paid. See Mr. G's Turtle Mountain Lodge, Inc., 2002 ND 140, ¶ 13; Cf. Twogood v. Wentz, 2001 ND 167, 634 N.W.2d 514. They may attempt to argue they are only appealing from that portion of the Judgment which requires them to repay the Trust. However, that argument, and tactic, is foreclosed by this Court's decision in Valley Serv., Inc. v. Himle Plumbing

& Exc., Inc., 151 N.W.2d 301 (N.D. 1967), which stands for, *inter alia*, the proposition that the failure to appeal from the whole of an indivisible and inseparable judgment is a jurisdictional defect. Reimbursement of both parties' attorneys' fees is inextricably intertwined with the other relief in the Court's Judgment. Indeed, Appellees argued vociferously below, that Appellant's should pay their own attorneys' fees.

[¶37] Appellants waived their right to appeal from the Judgment by accepting substantial benefits therefrom, partially satisfying it, and purporting to appeal from only portions of it does not cure these defects. Their appeal should be dismissed.

B. Standard of Review.[2]

[¶38] In construing a Trust, the primary objective is to ascertain the Settlor's intent. Langer v. Pender, 2009 ND 51, ¶ 13, 764 N.W.2d 159; Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶ 21, 750 N.W.2d 412. When a Trust instrument is unambiguous, the Settlor's intent is ascertained from the language of the Trust document itself. Langer, 2009 ND 51, ¶ 13 (quoting Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 230 (N.D.1994)). "Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal." Id. If the language of the Trust is clear and unambiguous, and the intent is apparent from its face, there is no room for further interpretation. Habeck v. MacDonald, 520 N.W.2d 808, 811 (N.D. 1994). Extrinsic evidence is not admissible to contradict the terms of an unambiguous Trust instrument. Sabo v. Keidel, 2008 ND 41, ¶ 10, 745 N.W.2d

[2] Appellants' Brief contains no real Standards of Review.

661. A Trust is ambiguous only when reasonable arguments can be made for different positions on its meaning. Habeck, 520 N.W.2d at 811.

[¶39] General rules of construction of written documents apply to the construction of Trust instruments. See Alerus, 2008 ND 104, ¶¶ 18, 19. Thus, the interpretation of a Trust is governed by N.D.C.C. § 9–07. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." N.D.C.C. § 9-07-08. "Particular clauses of a contract are subordinate to its general intent." N.D.C.C. § 9-07-15. "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract." N.D.C.C. § 9-07-17. "Words in a contract which are inconsistent with its nature or with the main intention of the parties are to be rejected." N.D.C.C. § 9-07-18. Under N.D.C.C. § 9–07–02, the language governs its interpretation if the language is clear and explicit and does not involve an absurdity. Trusts are construed to give effect to the Settlor's intention at the time of execution so far as the same is ascertainable and lawful. N.D.C.C. § 9–07–03. The whole of a Trust is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others. N.D.C.C. § 9–07–06; Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 9, 788 N.W.2d 312.

[¶40] More important to note is that Appellants do not—indeed cannot—take issue with the District Court's factual findings. As this Court is well-aware, a breach of Trust/fiduciary duties are questions of fact, subject to the clearly erroneous rule

under N.D. R. Civ. P. 52(a). See Matter of Curtiss A. Hogen Tr. B, 2018 ND 117, ¶ 29, 911 N.W.2d 305; Matter of John T. Gassmann GST Trust, 2017 ND 232, ¶¶ 11–12, 902, 902 N.W.2d 723; Matter of Estate of Vendsel, 2017 ND 71, ¶ 12, 891 N.W.2d 750. A finding of fact is clearly erroneous under N.D. R. Civ. P. 52(a) if it is induced by an erroneous view of the law, if no evidence supports the finding, or if, after reviewing all the evidence, this Court is left with a definite and firm conviction a mistake has been made. Gassmann, at ¶ 11. N.D. R. Civ. P. 52(a) provides, in pertinent part:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.
> . . . .
>
> Findings of fact, . . . whether based on oral or other evidence, must not be set aside unless clearly erroneous, ***and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.***

(emphasis added). The District Court is the determiner of credibility. See Manning v. Manning, 2006 ND 67, 711 N.W.2d 149. Implicit in Rule 52(a) is a recognition that "[t]he trial judge is uniquely qualified to determine the credibility of a witness with regard to the truthfulness of the various facts to which the witness testified." Hill v. Weber, 1999 ND 74, ¶ 12, 592 N.W.2d 585.

[¶41] Finally, it bears noting that the Appellants, as Trustees and fiduciaries, bore the burden to develop a record sufficient to prove their fees were received with sufficient consideration and their actions were otherwise proper. This burden is

solemnized by statute in North Dakota. N.D.C.C. § 59-18-01.1, entitled "Presumption against trustee", provides:

> A transaction between a trustee and the trust's beneficiary during the existence of the trust . . . by which the trustee obtains any advantage from the trust's beneficiary is presumed to be entered by the trust's beneficiary without sufficient consideration and under undue influence. This presumption is a rebuttable presumption.

It is settled North Dakota law that a presumption of undue influence must be applied to any transaction between a trustee and the trustee's beneficiary in which the trustee gains an advantage. In re Estate of Bartelson, 2015 ND 147, ¶ 16, 864 N.W.2d 441; Estate of Robinson, 2000 ND 90, ¶ 9, 609 N.W.2d 745; N.D.C.C. § 59–18–01.1. A District Court is required by N.D.C.C. § 59–18–01.1 to apply the presumption of undue influence once evidence of such transactions is provided. Bartelson, 2015 ND 147, ¶ 16. As fiduciaries, Appellants assumed the burden of developing a record sufficient to prove any benefits they received from the Trust were not received without sufficient consideration or under undue influence. Id. (citing Mehus v. Mehus, 278 N.W.2d 625, 634 (N.D.1979) ("If [a fiduciary] is to receive the benefits from a good faith transaction with [the] principal or beneficiary, [the fiduciary] must also assume the burden of developing a record sufficient to satisfy the requirements of law). Stated more explicitly, there is always a presumption that self-dealing is improper, and the burden is always on the fiduciary to show otherwise. See Burlington N. & Santa Fe Ry. Co. v. Burlington Res. Oil & Gas Co., 1999 ND 39, ¶ 13, 590 N.W.2d 433. This Court has repeatedly warned that "[i]f [the fiduciary] fails to meet that burden, . . . [the fiduciary] suffers the risk

of losing the benefits of the transaction." Bartelson, 2015 ND 147, ¶ 16 (citing Mehus, 278 N.W.2d at 634).

[¶42] This presumption comes as no surprise to any qualified fiduciary because the prohibition against self-dealing lies at the heart of the fiduciary relationship. See Matter of Estate of Thomas, 532 N.W.2d 676, 687 (N.D.1995). In *Thomas,* at 687 (quoting Birnbaum v. Birnbaum*,* 117 A.D.2d 409, 503 N.Y.S.2d 451, 456 (N.Y.Sup.Ct.1986), this Court explained:

> One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully. When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his personal disadvantage.

This Court has made clear that the presumption against self-dealing applies even where, as here, self-dealing is permitted. A trustee must still act with the highest good faith toward the beneficiary and not obtain any advantage over the beneficiary by the slightest concealment, and a trustee must not take part in any transaction adverse to the beneficiary without obtaining the beneficiary's permission after full disclosure of all facts which might affect the beneficiary's own decision. Burlington N. & Santa Fe Ry. Co., 1999 ND 39, ¶ 13.

[¶43] Under N.D. R. Evid. 301, a presumption substitutes for evidence of the presumed fact until the trier of fact finds from credible evidence that the presumed fact does not exist. Bartelson, 2015 ND 147, ¶ 19. Appellants therefore do not challenge the District Court's factual findings because they cannot. They failed to put on any credible evidence to rebut the presumption—and the overwhelming

evidence—that their fees after the Court's 2013 Order were unreasonable and unfair to their fellow beneficiaries, and that they violated their fiduciary duties.

C. The District Court Correctly Found Appellants Breached the Trust and Their Fiduciary Duties By Taking Over One Million Dollars Compensation Over Six Years While Performing Very Little Work Other Than Writing Checks And Checking Numbers.

[¶44] Actions against a trustee for breach of trust are authorized by our Trust Code, under Chapter 59–18. Dixon v. Dixon, 2018 ND 25, ¶ 7, 905 N.W.2d 748. "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its purposes . . . ." N.D.C.C. § 59-16-01. "A trustee shall administer the trust solely in the interests of the beneficiaries." N.D.C.C. § 59-16-02(1). This is the "duty of loyalty", which is "[p]erhaps the most fundamental duty of a trustee . . . . The trustee must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons. The application of the duty of loyalty reflects the concern that a conflict of interest may prevent the trustee from exercising independent and disinterested judgment on behalf of the trust." Bogert's The Law of Trusts and Trustees § 543. While Trustees' compensation is not precluded by the duty of loyalty, it must be 1) "fair to the beneficiaries"; and 2) "reasonable". N.D.C.C. § 59-16-02(8). A corollary is the duty of impartiality. "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." N.D.C.C. § 59-16-03.

[¶45] A trustee must also administer the trust "as a prudent person would by considering the purposes, terms, distributional requirements, and other

circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." N.D.C.C. § 59-16-04. Thus "[i]n administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee." N.D.C.C. § 59-16-05. A trustee is also required to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." "Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust." N.D.C.C. § 59-16-13(2)(a). "A trustee shall notify the qualified beneficiaries of any change in the method or rate of the trustee's compensation." N.D.C.C. § 59-16-13(2)(e).

[¶46] Pursuant to North Dakota law, the general powers of a trustee are "subject to the fiduciary duties prescribed by" the Trust Code. N.D.C.C. § 59-16-15. A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. N.D.C.C. § 59-18-01. Co-trustees are also duty-bound to exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach of trust.

[¶47] Then there is the Trust at issue, which clearly and unambiguously required that Trustee compensation be "reasonable" and consistent with Rose's intention that each of her grandchildren "shall receive no more or no less share of income generated". As it stood, Appellants received nearly $1.1 million dollars more than their fellow grandchildren during 2014-19.

[¶48] Of course, the District Court's 2013 Order did not, and could not, alter the terms of the Trust or Appellants' obligations under the law; to the contrary, it merely reminded them of their obligations. Unfortunately, Appellants chose to view that Order as a blank check, when it was anything but. See infra.

D. The District Court Correctly Made Appellants Reimburse the Trust.

[¶49] N.D.C.C. § 59-18-01, entitled "Remedies for breach of trust", provides in pertinent part:

> [. . .] To remedy a breach of trust that has occurred or may occur, the court may . . . compel the trustee to redress a breach of trust by paying money, restoring property, or other means; . . . reduce or deny compensation to the trustee; . . . or order any other appropriate relief.

N.D.C.C. § 59-18-02, entitled "Damages for breach of trust", provides in pertinent part that "A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred or the profit the trustee made by reason of the breach." The comments to this provision of the Uniform Trust Codes provide that "the beneficiaries may ... hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach." Unif. Trust Code § 1002. Again, this Court has made clear that "[i]f [the fiduciary] fails to meet that burden, . . . [the fiduciary] suffers the risk of losing the benefits of the

transaction." Bartelson, ¶ 16 (citing Mehus, 634). Thus, there can be no mistaking that liability for breach of trust is personal, and the trustee must pay any damages from his own funds. Deborah Dereede Living Trust dated December 18, 2013 v. Karp, 831 S.E.2d 435 (S.C. Ct. App. 2019).

[¶50] As set forth above, the Court also has the authority to reduce or deny a trustee compensation under N.D.C.C. § 59-18-01. According to the comments to this provision, the Court may wish to consider whether the breach of trust was intentional; the nature of the breach and the extent of the loss; whether the trustee has restored the loss; and the value of the trustee's services to the trust. Unif. Trust Code § 1001 (citations omitted). Courts deny compensation where, *inter alia*, there has been an important breach of trust, especially if it is of a willful character; where the trustee failed to use ordinary care in his administration; was guilty of gross negligence; failed to obey a court order regarding administration; was guilty of disloyalty to the beneficiaries in that he acted for his own selfish interest, or disobeyed statutory requirements as to methods of administration. Bogert's The Law of Trusts and Trustees § 980 (citing cases). It is clear under the case law that a surcharge proceeding can be pursued when a fiduciary pays excessive fees to himself. Kozinski v. Stabenow, 152 So. 3d 650, 652–53 (Fla. Ct. App. 2014). See Babb v. Graham, 660 S.E.2d 626 (N.C. Ct. App. 2008)(award of trustee commissions paid to removed trustee was warranted in action by beneficiaries and new trustee for breach of fiduciary duty and fraud against former trustee to restore the trust to the same position it would have been in had no breach of fiduciary duty occurred and awards fit the nature and gravity of the breach and the consequences

to the beneficiaries and trustee). A breach of duty to act in good faith and for the best interests of a beneficiary in diligently guarding and advancing his interests carries with it a forfeiture of all compensation which otherwise might be due. Bolander v. Bolander, 703 N.W.2d 529 (Minn. Ct. App. 2005). See, e.g., In re Maue, 611 B.R. 367 (Bankr. W.D. Wash. 2019)(as result of debtor's bad faith fiduciary breaches, in his capacity as trustee of family trusts, trustee was not entitled to any compensation from trusts).

[¶51] These statutes and authorities squarely apply here. The District Court's 2013 Order clearly addressed their ***current compensation***. Appellants admitted that the Trust's circumstances changed dramatically with the increase in income, resulting in exorbitant fees to them. Yet they also admitted their minimal "duties" never changed. Not only were Appellants fiduciarily-bound to reassess their fees at that time, but the District Court explicitly ordered them to. Instead, they thumbed their noses at the law, and those aspects of the District Court's Order, and continued to revel in their windfall. Against this backdrop, the District Court correctly enlisted the statutorily authorized remedy to require them to reimburse the Trust for their excessive fees. Notably, and ironically, as beneficiaries of the Trust themselves, a portion of that reimbursement goes to Appellants.

E. The Exculpatory Clause Does Not Exculpate Trustees From Liability For Taking Unreasonable Compensation in Violation of Their Fiduciary Duties.

[¶52] The Trust's exculpatory clause clearly and unambiguously provides as follows:

> [. . .] The Trustee shall not be liable for any ***mistake or error of judgment*** in the administration of the Trust herein created, ***except for willful***

> ***misconduct, so long as she continues to exercise her duties and powers in a fiduciary capacity primarily in the interest of the beneficiaries hereunder.*** **. . .**

As the emphasized language makes clear, a breach of fiduciary duties to the detriment of the beneficiaries does not fall under the ambit of the exculpatory clause's protection. That is precisely what the District Court found Appellants' to have committed via their excessive compensation for minimal work, and that finding is unchallenged by Appellants. Nor does the exculpatory clause temper or preempt the clear and unambiguous limitation of "reasonable" Trustee compensation which appears in the Trust.

[¶53] Moreover, the law is clear that the terms of a Trust can never prevail over the duty of a trustee to act in good faith and in accordance with the purposes of the trust. N.D.C.C. § 59-09-05(2)(b); Unif. Trust Code § 1008. See McNeil v. McNeil, 798 A.2d 503 (Del. 2002) (similar exculpatory clause inapplicable to failure to inform and to lack of impartiality since duty of loyalty and duty to inform are separate and distinct duties from duty of care). An exculpatory clause cannot apply to the antecedent, fundamental duty of loyalty which is "inherent in the trust relationship itself". Bogert's The Law of Trusts and Trustees § 542. A term of a Trust relieving a trustee of liability for breach of trust is also unenforceable to the extent that the term relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust. Section 59-18-08. Further, in James Vault & Precast Co. v. B&B Hot Oil Serv., Inc., 2019 ND 143, ¶ 34, 927 N.W.2d 452, this Court declared it is the public policy of this State, as codified by N.D.C.C. § 9-08-02, that "a contractual provision purporting to

exempt anyone from responsibility for a willful or negligent violation of statutory or regulatory law is against the policy of law and not enforceable." Exculpatory clauses are strictly construed against those attempting to enforce them.

[¶54] The consequence of the foregoing is that Appellants cannot seek refuge behind the exculpatory clause for their unlawful conduct. Their duties are solemnized by the Trust and statute. While the Trust may exculpate ordinary negligence or "mistakes", it does not relieve them of their fiduciary duties of loyalty, or to charge reasonable compensation, or communicate with the beneficiaries about said compensation. These are not subspecies of the duty of care, but separate fiduciary and statutory duties which the Court found were breached and which Appellants do not dispute were breached.

[¶55] Further, the unlawful actions of the Appellants were deliberate, and therefore not excused by the clause at issue. Bogert, § 542; Rafert v. Meyer, 859 N.W.2d 332, 337 (Neb. 2015). To that end, Appellants cannot claim to have relied in good faith upon part of the District Court's 2013 Order, while ignoring the rest. Appellants completely disregarded their fiduciary duties to their fellow beneficiaries, as well as the District Court's admonitions and directives as to their future conduct. They had no answer whatsoever for their conduct, other than to parrot one portion of the District Court's 2013 Order. Yet they admittedly ignored the rest of that very 2013 Order. Appellants view their positions as Trustees to be "entitlements", when in fact they are, in the eyes of the law, sacred responsibilities. It is hoped with the District Court's ruling they will at long last understand the error

of their ways, as years of entreaties by Rocky and other beneficiaries have been unsuccessful.

F. The District Court Correctly Refused to Apply the Law of the Case Doctrine or Laches.

1. Appellants' "Law Of The Case Argument Is Frivolous"

[¶56] This Court has repeatedly—and recently—set out the applicability of the "law of the case doctrine" as follows:

> "The law of the case doctrine is based upon the theory of res judicata, and is grounded on judicial economy to prevent piecemeal and unnecessary appeals." *Glass*, at ¶ 5 (quoting *Jundt*, at ¶ 6).
>
> > [T]he law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and [a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or *which would have been resolved had they been properly presented in the first appeal.*
>
> *Montana-Dakota Utils. Co. v. Behm*, 2020 ND 234, ¶ 8, 951 N.W.2d 208 (quoting *Dale Expl., LLC v. Hiepler*, 2020 ND 140, ¶ 13, 945 N.W.2d 306).

Pennington v. Continental Res., Inc., 2021 ND 105, ¶ 9, 961 N.W.2d 264, reh'g denied (July 8, 2021). The law of the case doctrine applies only in a subsequent appeal in the same case. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, 729 N.W.2d 101. Because there has been no appeal in this case, it is inapplicable, and, frankly, an argument which never should have been made.

[¶57] Apparently, the argument Appellants intended to make is that the 2013 Order somehow precluded any subsequent challenge to their compensation ever again, via the doctrines of "res judicata" or "collateral estoppel". While a lengthy discussion could be had about all the reasons this is incorrect, that is not

necessary. Appellants themselves admitted that the circumstances changed after the Trust's income increased substantially in and after 2014, and the District Court made clear it was those circumstances which were at issue. To that end, the United States Supreme Court has held that claim preclusion "does not bar claims that are predicated on events that postdate the filing of the initial complaint." Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 140 S. Ct. 1589, 1596 (2020) (citing Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292, 2305 (2016); Lawlor v. National Screen Service Corp., 349 U.S. 322, 327–328 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case"). As the Supreme Court states in Lucky Brand, "[t]his is for good reason: Events that occur after the plaintiff files suit often give rise to new '[m]aterial operative facts' that 'in themselves, or taken in conjunction with the antecedent facts,' create a new claim to relief. 140 S. Ct. at 1596 (citing Restatement (Second) § 24, Comment *f*, at 203; 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Federal Practice § 131.22[1], p. 131–55, n. 1 (3d ed. 2019) (citing cases where "[n]ew facts create[d a] new claim")). Indeed, the notion espoused by Appellants is anathema to the right to judicial intervention in Trust matters codified in N.D.C.C. § 59-10.

2. Appellants' Desperate Invocation of Laches is Meritless

[¶58] Appellants' attempted resort to the "doctrine of laches" fares no better. It is hornbook law that laches is an extraordinary remedy that should not, under

ordinary circumstances, be employed to bar an action short of the applicable statute of limitations. In effect, delay less than the limitations period in bringing an action is not unreasonable delay. Thus, when a limitation on the period for bringing suit has been set by statute, laches will generally not be invoked to shorten the statutory period. 27A Am. Jur. 2d Equity § 163. Appellants do not argue the statute of limitations ran in this case, because they cannot.

[¶59] Moreover, laches does not arise from a mere delay or lapse of time alone, but is a delay in enforcing one's rights which works a disadvantage to another. Siana Oil & Gas Co., L.L.C. v. Dublin Co., 2018 ND 164, ¶ 24, 915 N.W.2d 134 (citing Sall v. Sall, 2011 ND 202, ¶ 14, 804 N.W.2d 378). The Court is faced with the opposite here. Year after year, Rocky implored Appellants to reassess their compensation as Trust revenues soared. Year after year, Appellants ignored him. They have now been adjudicated to have breached their fiduciary duties. They do not challenge this finding. And they are being made to return to the Trust, money they never should have taken in the first place. It is Appellants who have disadvantaged the Trust, for years.

CONCLUSION

[¶60] Appellees respectfully request the Appellants' appeal be dismissed, or the District Court's Judgment be affirmed.

ORAL ARGUMENT REQUESTED

[¶61] Pursuant to N.D. R. App. 28(h), oral argument will be helpful to answer any questions the Court may have, particularly as pertains to the appealability issue, which the Court directed the parties to address in their briefs.

Dated this 27th day of January, 2022.

/s/ Michael T. Andrews

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CERTIFICATION OF COMPLIANCE

[¶62] The undersigned hereby certifies that this document complies with N.D. Rules of Appellate Procedure 32(e); this Brief contains 38 pages, inclusive of the Certification of Compliance.

Dated this 27th day of January, 2022.

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DECLARATION OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] The undersigned, being first sworn, says upon her oath that on the 27th day of January, 2022, she delivered via the Supreme Court E-filing Portal, a true and correct copy of each of the following document(s):

Brief of Petitioners/Appellees – Oral Argument Requested

securely, via e-mail, to the following:

David Smith
Tyler Malm
Smith Porsborg Schweigert Armstrong
Moldenhauer & Smith
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[¶2] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on this 27th day of January, 2022, at Cass County, Fargo, North Dakota.

/s/ Liza A. Gion
Liza A. Gion