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STATE OF NORTH DAKOTA

Case No.: 20110050
District Court No. 41-08-C-00061
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Valley Grain, LLC
Plaintiff/Appellee

v.

Loren David
Defendant/Appellant

APPEAL FROM THE JUDGMENT OF THE SARGENT COUNTY DISTRICT COURT CONFIRMING AN ARBITRATION AWARD, DATED DECEMBER 10, 2010
THE HONORABLE DANIEL NARUM

BRIEF OF THE APPELLEE

LINDQUIST & VENNUM P.L.L.P. Laurance R. Waldoch (MN Bar # 113797) (admitted pro hac vice) Adam C. Ballinger (MN Bar# 0389058) (admitted pro hac vice) 4200 IDS Center 80 South Eighth Street Minneapolis, MN 55402-2274 Phone: (612) 371-3211 Fax: (612) 371-3207	**SMITH, STREGE & FREDRICKSEN, LTD.** Fred Strege (N.D. #03445) 321 Dakota Avenue, Box 38 Wahpeton, ND 58074-0038 Phone: (701) 642-2668 Fax: (701) 642-4729

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STATEMENT OF THE ISSUES

I. On June 22, 2010, the National Grain and Feed Association issued an arbitration award to appellee/plaintiff James Valley Grain ("James Valley") against appellant/defendant Loren David. Pursuant to the North Dakota Uniform Arbitration Act, David had 90 days to move the district court to vacate, modify, or correct the award, but never made such motion. Unless a motion to vacate, confirm, or modify is made, N.D.C.C. § 32-29.3-22 mandates confirmation of an arbitration award upon motion by the prevailing party. In light of David's failure to file such motion, did the district court err in confirming James Valley's arbitration award?

II. David entered into two July 2007 contracts with James Valley to deliver 100,000 bushels of soybeans in July 2008, both of which incorporated by reference the NGFA trade rules into the agreements. The NGFA trade rules require arbitration of disputes arising under the agreements. The NGFA arbitration panel found David breached his agreement with James Valley by cancelling his delivery obligation on April 14, 2008, and awarded James Valley $486,516.00 plus attorney's fees and interest. Did the District Court err in confirming the arbitration award where the parties agreed to arbitrate and the arbitration award was not completely irrational?

¶ 1 **STATEMENT OF THE CASE**

¶ 2 The only issue this Court must determine is whether David moved to vacate, modify, or correct the arbitration award. If the Court finds that David did not make such a motion, then it is not necessary to reach any of the issues David raises in his appeal – which are merely attempts to re-litigate the arbitration.

¶ 3 This appeal arises from the confirmation of an award issued by an arbitration panel of the National Grain and Feed Association in favor of James Valley and against David for breach of contract. David entered into two forward grain contracts with James Valley, promising to deliver 100,000 bushels of soybeans. David later refused to deliver the soybeans to James Valley, thereby breaching those agreements.

¶ 4 On James Valley's motion, the district court compelled David to arbitrate the dispute on December 17, 2008. David fully participated in the arbitration, which resulted in an arbitration award in favor of James Valley, issued June 22, 2010. Pursuant to the North Dakota Uniform Arbitration Act, a party must file a motion to vacate, modify, or correct an arbitration award within 90 days after receiving notice of the award. N.D.C.C. §§ 32-29.3-23(2), 32-29.3-24. David did not file a motion to vacate, modify, or correct the award. Upon motion by James Valley to confirm the award, the district court entered judgment in the amount of $593,292.00. David now appeals the district court's order confirming the arbitration award. Because David failed to bring a motion to vacate within the

jurisdictional time period, he is barred from defending against the award on the merits and the district court's judgment should be affirmed.

¶ 5 **STATEMENT OF THE FACTS**

¶ 6 James Valley, a limited liability company organized under the laws of North Dakota, operates a terminal grain elevator in Oakes, North Dakota. (P43.)[1] It is a member of the National Grain and Feed Association ("NGFA"). David, a resident of Lidgerwood, North Dakota, is engaged in a substantial and sophisticated farming business. (P43, 46). This case arises out of David's cancellation of two grain delivery contracts he entered into with James Valley and James Valley's subsequent efforts to collect damages for David's breach of contract. (P144-145.)

¶ 7 In July 2007, David entered into two separate grain delivery contracts with James Valley, both for delivery one year later in July 2008 ("the Contracts"). (P113.) Each of the Contracts conspicuously contained, on the first page in standard-size font, the following term: "Trade Rules: NGFA." (P.38, P40.) In the first contract, David promised to deliver 30,000 bushels of soybeans at a price of futures $9.16 per bushel. (P38-39; P113.) The second contract promised 70,000 bushels of soybeans at a futures price of $9.20 per bushel. (P40-41; P113.) Subsequently, the market price for soybeans rose significantly above the price David had agreed to accept from James Valley. (P115.)

[1] Citations to the record made herein refer to Appellant's Appendix. James Valley has not submitted a separate appendix.

¶ 8 After James Valley contacted David in early April 2008 about the upcoming delivery, David notified James Valley by letter dated April 9, 2008 he did not intend to deliver any of the soybeans. (P113.) David claimed that he had cancelled the Contracts in an alleged letter to James Valley dated September 1, 2007. (P113.) James Valley never received the alleged earlier cancellation notice. (P114.) Upon receipt of David's letter on April 14, 2008, James Valley promptly cancelled the Contracts. (P113.) The futures price per bushel of soybeans on April 14, 2008 was $13.77, resulting in a total market difference of $458,200 for the two contracts due to James Valley. (P115.)

¶ 9 Pursuant to its rights under the Contracts to recover damages for David's cancellation, James Valley filed a complaint on August 5, 2008 in Sargent County, North Dakota district court against David for breach of contract, anticipatory repudiation of contract, and promissory estoppel. (P4-10.) James Valley then made a demand upon David to arbitrate the entire dispute pursuant to the Grain Trade Rules of the National Grain and Feed Association ("NGFA"). (P42.) After David refused to arbitrate, James Valley moved to compel arbitration. (P29-35.) On December 17, 2008, the district court (the Honorable Daniel D. Narum, presiding) granted James Valley's motion and issued an order compelling David to arbitrate the dispute with James Valley. (P49.) The order compelling arbitration disposed of all claims, stating "[t]he parties are hereby ordered to arbitrate the contract dispute." (P49.)

¶ 10 Based on the district court's order, James Valley filed a demand for arbitration before the NGFA in the case captioned *James Valley Grain, LLC, Oakes, N.D. v. Loren David, Lidgerwood, N.D.*, Arbitration Case No. 2390 ("the Arbitration"). (P150.) David appeared in, and defended against James Valley's claims in the Arbitration. (P151.) Various issues were fully briefed and submitted to the arbitration panel by both James Valley and David during the Arbitration. (P151.)

¶ 11 On June 22, 2010, a three-person arbitration panel of the NGFA unanimously executed and entered an award (the "Award") in favor of James Valley. (P115-116.) The panel awarded damages of $486,516.00 plus attorney's fees and interest of 3.25% from April 14, 2008 until the amount is paid.[2] (P115-116.) Notice of the Award was received by both parties on June 22, 2010. (P113.) Pursuant to the North Dakota Uniform Arbitration Act, the parties then had 90 days in which to move a court to vacate, correct, or modify the Award. N.D.C.C. § 32-29.3-23, 32-29.3-24. The limitations period expired on September 20, 2010. *Id.*

¶ 12 On August 31, 2010, James Valley moved to confirm the Award in Sargent County district court. (P158-161.) On September 21, 2010, one day after the 90-day limitations period had expired to move to vacate, modify, or correct the

[2] This amount includes the market difference James Valley incurred of $458,2000, the cancellation fee of $25,000, and the arbitration filing fees of $3,316. (P115.) The arbitration panel also awarded attorney's fees, the amount of which was determined by the district court to be $68,825.00 based on upon time records and affidavits submitted by counsel for James Valley. (P115, P151.)

Award, David requested an extension of time to respond to James Valley's motion to confirm. (P50.) The parties entered a stipulation extending this time, which the district court approved by order dated October 5, 2010. (P143.) The stipulation and order were expressly limited to James Valley's motion to confirm, and did not purport to extend David's statutory limitations period to move the district court to vacate the Award. (P50; P143.) Pursuant to the stipulated extension of time, David filed his response to James Valley's confirmation motion on October 4, 2010. (P51.) The district court heard oral argument on the motion on October 28, 2010. (P144.)

¶ 13 By order dated December 10, 2010, the district court granted James Valley's motion to confirm the Award. (P151.) The district court found David failed to file a motion to vacate within the 90-day limitations period or anytime thereafter, and he was therefore barred from challenging the Award on the merits. (P147.) It further found that there were no grounds upon which to vacate the Award on the merits. (P147.) Judgment was entered December 15, 2010 in the amount of $593,292.00, and this appeal follows. (P152.)

¶ 14 **SUMMARY OF ARGUMENT**

¶ 15 The district court did not err in confirming the NGFA arbitration award because David failed to file a motion to vacate, modify, or correct the Award. He was therefore barred from challenging the award at the confirmation hearing. Pursuant to N.D.C.C. § 32-29.3-22, the court "shall" confirm an award unless it has been challenged by a timely motion to vacate, modify, or correct the award.

David's failure to file such motion bars him from presenting a defense against the award, including its arbitrability.

¶ 16 Even had David brought a timely motion to vacate, modify, or correct the Award, the district court did not err in finding such motion should be denied and the Award should be confirmed. There are no grounds upon which the arbitrator's decision, reviewed under the "completely irrational standard," may be vacated, modified, or corrected. David ignores the standard of review this Court employs when reviewing an arbitration award on the merits by identifying as one of his two issues on appeal the following: "Did the arbitration panel fail to properly apply the law and the NGFA rules." (Appellant's Br. at 28.) North Dakota law does not authorize the Court to review this issue. "Under the completely irrational standard, an arbitrator's mistake in determining the facts or interpreting the law is not a sufficient ground for overturning the award." *Gratech Co., Ltd. v. N. Dakota Dept. of Transp.*, 2004 ND 61, ¶11, 676 N.W.2d 781, 782. David's arguments that the Award should be vacated is eroded by the very standard of review applied by this Court, are meritless, and do not come even close to satisfying the high standard that must be met to challenge an arbitration award. In any event, the Award is supported by both the law and the facts, and the district court did not err in confirming it.

¶ 17 **STANDARD OF REVIEW**

¶ 18 David appeals the district court's confirmation of James Valley's arbitration award. Notably, David has not appealed the district court's December

17, 2008 order compelling arbitration.[3] Pursuant to the Uniform Arbitration Act, a court must confirm an arbitration award unless a motion to vacate, modify, or correct the award has been brought within the time limits imposed by N.D.C.C. §§ 32-29.3-20, 32-29.3-23, or 32-29.3-24. N.D.C.C. § 32-29.3-22. No motion to vacate was ever filed here, and the Court therefore lacks authority under the Arbitration Act to review the issues on the merits. *John T. Jones Const. Co. v. City of Grand Forks*, 2003 ND 109 ¶ 17, 665 N.W.2d 698, 705 (N.D. 2003).

¶ 19 The Uniform Arbitration Act significantly limits a court's authority to review an arbitration award, and a court may only vacate, modify, or correct an award based on one of the grounds set forth in N.D.C.C. §§ 32-29.3-23 or 32-29.3-24. *Id.* Even were this arbitration award subject to review, it can only be vacated "if it is completely irrational, in that the decision is either mistaken on its face or so mistaken as to result in real injustice or constructive fraud." *Id.* The Court refers to this as the "completely irrational standard." *Id.*

¶ 20 **ARGUMENT**

¶ 21 **I. The District Court Did Not Err in Confirming James Valley's Arbitration Award Because David Failed to File a Motion to Vacate the Award.**

¶ 22 **A. Because David failed to file a motion to vacate, he is foreclosed from challenging the award on the merits.**

¶ 23 The Uniform Arbitration Act mandates confirmation of an arbitration award unless a motion to vacate, modify, or correct the award is made

[3] The district court's determination that the parties agreed to arbitrate would be subject to de novo review. *Lenthe Invs., Inc. v. Service Oil, Inc.*, 2001 ND 187, ¶ 14, 636 N.W.2d 189.

within 90 days after the movant receives notice of the award. N.D.C.C. §§ 32-29.3-23(2); 32-29.3-24(1).

¶ 24 N.D.C.C. § 32-29.3-23(1) states a motion to vacate (if made) may be granted only where:

> a. The award was procured by corruption, fraud, or other undue means;
>
> b. There was:
>
> (1) Evident partiality by an arbitrator appointed as a neutral arbitrator;
>
> (2) Corruption by an arbitrator; or
>
> (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> c. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 32-29.3-15, so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> d. An arbitrator exceeded the arbitrator's powers;
>
> e. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection 3 of section 32-29.3-15 not later than the beginning of the arbitration hearing; or
>
> f. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 32-29.3-09 so as to prejudice substantially the rights of a party to the arbitration proceeding.

¶ 25 Before a district court may entertain a motion to vacate, a motion must be made "by a party to an arbitration proceeding," N.D.C.C. § 32-29.3-

23(1). A motion to vacate "must be filed within ninety days after the movant receives notice of the award." N.D.C.C. § 32-29.3-23(2). It is undisputed that David failed to file a motion to vacate. (P145.) Indeed, the district court held that "David has not filed a motion to vacate or to modify the arbitration award." (P145.) Instead, David argued in his brief responding to James Valley's motion to confirm that the Award ought to be vacated or modified. (P51-68.) In its order confirming the Award, the district court held, "David is not entitled to any relief because he has failed to move the court to vacate or modify the arbitration award as required by statute, within the ninety day time period or anytime thereafter." (P147.)

¶ 26 It is well settled that "[a] court must confirm an arbitration award upon application of any party to the award unless a party has filed a motion to vacate . . . within 90 days after delivery of a copy of the award." *MBNA America Bank, N.A. v. Hart*, 2006 ND 33, ¶ 9, 710 N.W.2d 125, 128 (N.D. 2006) (emphasis added). The "relatively short period allowed by statute for challenging an award implements the purpose of the [Uniform Arbitration] Act 'to uphold arbitration awards whenever possible and to prevent arbitration becoming another layer in the litigation process.'" *Id.* at ¶ 9 (quoting *Springfield Teachers Ass'n v. Springfield Sch. Dirs.*, 705 A.2d 541, 546 (Vt. 1997)); *see also Kutch v. State Farm Mut. Auto Ins. Co.*, 960 P.2d 93, 97 (Colo. 1998) ("Uniform Arbitration Act is specifically designed to limit–rather than enlarge the role of the judiciary and to curb delay"). Consequently, "the failure to timely object or seek review to vacate,

modify, or correct an arbitration award bars a defense on the merits in a confirmation hearing." *MBNA America Bank*, 2006 ND 33 at ¶ 9. "Absent a timely motion to vacate . . . a court has no choice but to confirm the award as rendered." *Id*. (emphasis added).

¶ 27 A motion to vacate may be made on the grounds that "[t]here was no agreement to arbitrate." N.D.C.C. § 32-29.3-23(e). Because David did not move the district court to review whether there was an agreement to arbitrate, that issue is not appealable. *See* N.D.C.C. § 32-29.3-23(1)(f); *MBNA America Bank*, 2006 ND 33 ¶ 9. The only motion which was before the district court was James Valley's motion for a confirmation order. (P144-145.)

¶ 28 There is no dispute David received notice of the arbitration award on June 22, 2010. (Appellant's Br. at 2.) Thus, the date on which the 90-day limitations period to file a motion to vacate ran was September 20, 2010. N.D.C.C. § 32-29.3-23(2). It is undisputed David never filed a motion to vacate, let alone a timely one. Although he spends much time in his appeal brief attempting to re-litigate the arbitration proceeding on the merits and the order compelling arbitration, the Court is without power to entertain any of David's arguments. N.D.C.C. § 32-29.3-23; *MBNA America Bank*, 2006 ND 33 at ¶ 10. Because David failed to file a timely motion to vacate, he is barred from challenging the arbitration award and the district court had no discretion but to confirm it. *MBNA America Bank*, 2006 ND 33 at ¶ 9. The district court's order and judgment should be affirmed on this basis alone.

¶ 29 **B. David's response memorandum to James Valley's motion to confirm cannot be construed as a motion to vacate and, even if it was so construed, it was not timely.**

¶ 30 David contends his response brief to James Valley's motion to confirm saves his procedural default of not challenging the Award in a motion to vacate. (Appellant's Br. at 34-35.) David offers no legal support for this proposition. *Id.* Indeed, the Court has stated a party's failure to challenge an arbitration award by motion "bars a defense on the merits in a confirmation proceeding." *MBNA America Bank,* 2006 ND 33 ¶ 9. Nothing in the law permits a court to construe a party's response to a motion to confirm as a motion to vacate. *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir. 1989) ("[T]he failure of a party to move to vacate an arbitral award within the three-month limitations period … bars him from raising the alleged invalidity of the award as a defense in opposition to a motion … to confirm the award.") (collecting cases).

¶ 31 Even if David's response to James Valley's motion to confirm could be construed as a motion to vacate, it was not timely and therefore cannot resurrect David's ability to challenge the Award on the merits. *See* N.D.C.C. § 32-29.3-23(2); *MBNA America Bank*, 2006 ND 33 ¶ 9. "The filing of a petition to confirm before the end of the ninety-day period does not extend the ninety-day statutory period within which a request for vacation of the award must be filed." *Schroud v. Van C. Argiris & Co.*, 398 N.E.2d 103, 105 (Ill. Ct. App. 1979). David did not file

his response brief until October 4, 2010, fourteen days *after* the limitations period to move to vacate passed on September 20, 2010. (P51.)

¶ 32 Similarly, David's argument that the parties and the court agreed to extend the time to submit a response brief cannot resurrect his right to challenge the Award. First, the stipulation and extension order do not purport to extend the ninety-day limitations period; they expressly limit David's extension of time to his right to respond to James Valley's confirmation motion. (P50, P143.) Further, neither the parties, nor the district court have authority to extend the ninety-day statutory time period. *Schroud*, 398 N.E.2d at 105 ("we find nothing in [the Uniform Arbitration Act] to indicate that the ninety day period in which to attack the award can be extended by the court"). Even if the parties had the ability to extend the ninety-day period, it had already expired before the parties agreed to an extension of time to respond to the motion to confirm, and long before the district court approved the stipulation. (P50, P143.) The parties and the district court could not have recreated a right which had already expired.

¶ 33 **II. The District Court Did Not Err in Confirming the Arbitration Award on the Merits.**

¶ 34 Even if the Court finds it has jurisdiction to review the Award on the merits, the district court's judgment should be affirmed because it correctly found no grounds existed to vacate the Award. (P147-149.) The parties agreed to arbitrate the dispute by incorporating the NGFA trade rules into their agreement, and NGFA arbitration panel carefully examined and considered the evidence,

decided the facts and the law, and rendered a just decision on the merits. (P49, P147.)

¶ 35 **A. The statutory grounds for vacating an arbitration award are limited and a court's review of an award is very narrow.**

¶ 36 "The court's role is very limited when parties have agreed to submit all contractual disputes to arbitration." *MBNA America Bank*, 2006 ND 33, ¶7. "[A] court must confirm an arbitration award unless specific statutory grounds are urged for vacating, modifying, or correcting the award within the time limits imposed by the Uniform Arbitration Act." *Id*. (citing N.D.C.C. § 32.29-2-11, now codified as N.D.C.C. § 32-29.3-23). The grounds for reviewing an award are limited to those set forth in the N.D.C.C. § 32-29.3-23 (cited in full *supra*). *Id.*

¶ 37 Even where an argument is made based on the statutory grounds permitted by the UAA, the standard of review applying those grounds is also very narrow. "[A]rbitrators are the judges of both the law and the facts, and a court will vacate an arbitration award on its merits only if the award is completely irrational." *Gratech Co., Ltd. v. N. Dakota Dept. of Transp.*, 2004 ND 61, ¶11, 676 N.W.2d 781, 782. "Under the completely irrational standard, an arbitrator's mistake in determining the facts or interpreting the law is not a sufficient ground for overturning the award." *Id*. at ¶11. David argues there was no agreement to arbitrate and the arbitration panel failed to properly apply the law. Even if these grounds had been argued in a motion to vacate and were reviewable by the district

court, neither argument satisfies the high standard required to overturn an arbitration award.

¶ 38 **B. The district court correctly found James Valley and David entered into a valid agreement to arbitrate the contract dispute.**

¶ 39 A controversy arising out of a contract involving interstate commerce is subject to the Federal Arbitration Act and shall be ordered to arbitration where the contract contains an agreement to arbitrate. 9 U.S.C. § 2. Arbitration is strongly favored as a matter of public policy under both stated and federal law. *State v. Gratech Co., Ltd.*, 2003 ND 7, ¶12, 655 N.W.2d 417. "[W]here there is a broad arbitration clause and no exclusion clause, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *State ex rel. Stenehjem v. Phillip Morris, Inc.*, 2007 ND 90, ¶14, 732 N.W.2d 720. "[W]hen the parties have agreed to arbitrate any dispute or disagreement 'arising under the contract,' all disputes of whatever nature, including those sounding in tort, that are directly and closely related to the performance of the contract and are otherwise arbitrable, are subject to arbitration upon the demand of a party to the agreement." *Gratech Co., Ltd. v. Wold Engineering, P.C.*, 2003 ND 200, ¶18, 672 N.W.2d 672.

¶ 40 The Contracts each state on the first page "Trade rules: NGFA." (P69, P71.) A contract may incorporate by reference an arbitration clause from another document. *See Koch Hydrocarbon Co. v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1536 (8th Cir. 1993); *Hodge Brothers, Inc. v. The DeLong Co.*,

Inc., 942 F.Supp. 412, 415 (W.D. Wisc. 1996) (citing *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995) ("A contract . . . need not contain an explicit arbitration clause if it validly incorporates by reference an arbitration clause in another document.")). The NGFA Trade Rules[4] explicitly require arbitration of disputes arising under contracts, like this one, that reference the Rules. Rule 29 of the Grain Trade Rules of the NGFA states:

> Where a transaction is made subject to these rules in whole or in part, whether by express contractual reference or by reason of membership in this Association, then the sole remedy for resolution of any and all disagreements or disputes arising under or related to the transaction shall be through arbitration proceedings before the National Grain and Feed Association pursuant to the NGFA® Arbitration Rules; provided, however, that at least one party to the transaction must be a NGFA member entitled to arbitrate disputes under the NGFA Arbitration Rules. (emphasis added)

Section 3(c)(4) of the NGFA Arbitration rules further provides: "A general reference to NGFA rules shall be deemed to incorporate all rules of this association including the Trade Rules and Arbitration Rules." Because the Contracts signed by David expressly refer to and incorporate the NGFA Trade Rules, Grain Trade Rule 29 and Arbitration Rule 3(c)(4) are specifically incorporated into those contracts. It is undisputed the parties' dispute arose under the Contracts. (P11, P12.) The parties' dispute is therefore subject to a valid

[4] The NGFA Rules are available online at http://www.ngfa.org/trade-arbitration-rules.cfm, and are found on P73-83 and P138-140 of the Appendix.

agreement to arbitrate under NGFA Grain Trade Rule 29 and NGFA Arbitration Rules Section 3(c)(4).

¶ 41 **1. David affirmatively admitted the applicability and incorporation of the NGFA Grain Trade Rules into the contracts in his answer and affirmative defense.**

¶ 42 Before the issue of arbitrability arose, David did not dispute the applicability of the MGFA Trade Rules to this dispute. David's answer does not contest the applicability of the NGFA trade rules, but relies on them for his defense. James Valley alleged in paragraph 7 of its complaint that the two contracts at issue "specify that the Grain Trade Rules of the National Grain and Feed Association apply to the soybean contracts." (P5.) In his answer, David did not deny this allegation. (P20-26.) In fact, in his first affirmative defense, he restated James Valley's allegation without denial and relied upon NGFA Grain Trade Rule 28(A), which addresses the seller's right to cancel or modify the contract. (P21.) Although he now tries to frame this affirmative defense as an alternative argument and rely on his general denial of all allegations in the complaint to claim he did not concede the NGFA trade rules apply, this position is belied by the answer itself. (*See* P20-26.)

¶ 43 It was only after James Valley moved to compel arbitration under the trade rules that David raised an issue as to the contract's incorporation of those rules. (P43, P46.) As the district court correctly found, David cannot pick and choose which of the trade rules apply. (P46.) By not specifically denying application of the NGFA trade rules, and relying on those rules as grounds for his

affirmative defense, David waived his right to challenge their incorporation into the contract, including the arbitration clause. *See* N.D. R. Civ. P. 8(b).

¶ 44 **2. The parties intended to incorporate the NGFA Grain Trade Rules and it is not unconscionable to enforce those agreements.**

¶ 45 David's arguments that arbitration should not have been compelled further fail on the merits. "The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent." *Schwartz v. Gierke*, 2010 ND 166 ¶ 16, 788 N.W.2d 302, 307-308. Furthermore, the law presumes a party understands the terms of a contract he signs. *David v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 440 N.W.2d 269, 274 (N.D. 1989). "A contract must be construed as a whole to give effect to each provision, if reasonably practicable." *Kuperus v. Willson*, 2006 ND 12, ¶11, 709 N.W.2d 726. "An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the language in question." *Id.* at ¶ 11; *AgGrow Oils, L.L.C. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 242 F.3d 777, 781 (8th Cir. 2001). "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." N.D.C.C. § 9-07-12.

¶ 46 There is no ambiguity in the term "Trade rules: NGFA." This term is widely used throughout the grain industry, in which the district court correctly found David has substantial experience, being the operator of a substantial grain business. (P43, P46.) David has not set forth an alternative meaning for the contract term "Trade Rules: NGFA". The record is undisputed the parties

intended the term to refer to and incorporate the trade rules of the National Grain and Feed Association; their use of an acronym does not undermine this intent. (*See e.g.* P5, P21.) There is no record evidence demonstrating David did not understand the meaning of the term "Trade rules: NGFA." (P45.) Indeed, his answer establishes he knew exactly what the unambiguous term meant. (P21.) David's feigned attempt to complain he did not know what the term meant ignores the "circumstances under which [the contracts] were made and the matter to which they relate." N.D.C.C. § 9-07-12. Furthermore, there is no evidence David asked for a copy of the rules or had no ability to access them. (P46.) Rather, as the district court correctly found (P45), David's alleged failure to read the NGFA rules, which were explicitly incorporated in the contract, does not excuse him from being held to those terms. *David*, 330 N.W.2d at 274 ("failure to read a document before signing does not excuse ignorance of its contents unless the party shows he was prevented from reading it by fraud, artifice, or design by the other party").

¶ 47 Contrary to David's assertion, the incorporation of the NGFA trade rules does not violate the parol evidence rule by requiring the court to look outside the four corners of the contract. *See Koch,* 988 F.2d at 1536. "Documents that are incorporated by reference into a contract are to be read as though they are restated in the contract." *Blanchard Valley Farmers Coop., Inc. v. Carl Niese & Sons Farms, Inc.*, 758 N.E.2d 1238, 1244 (Ohio App. 3 Dist., 2001) (finding NGFA Trade Rules explicitly incorporated into a contract by reference to the rules); *see also Blanchard Valley Farmers Cooperative, Inc. v. Rossman*, 761 N.E.2d 1156,

1162 (Ohio App. 3 Dist., 2001) (same). "The parties' intent must be ascertained from the entire instrument, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract." *U.S. Bank, Nat. Ass'n v. Koenig*, 2002 ND 137, ¶ 8, 650 N.W.2d 820, 823. The Contracts themselves demonstrate the parties intended to incorporate the terms of the NGFA Trade Rules into their agreements. (P38-41.) Because the parties' contracts explicitly and unambiguously state they are subject to the NGFA Grain Trade Rules, those rules are terms found within the four corners of the contracts and reliance on them to compel arbitration does not violate the parole evidence rule.

¶ 48 Furthermore, there is no unconscionability in enforcing the parties' agreement to arbitrate pursuant to the NGFA Grain Trade Rules. In addressing unconscionability, the court is to employ "a two pronged framework: procedural unconscionability, which encompasses factors related to unfair surprise, oppression, and inequality of bargaining power, and substantive unconscionability, which focuses upon the harshness or one-sidedness of the contractual provision in question." *Strand v. U.S. Bank Nat'l Ass'n ND*, 2005 ND 68, ¶7, 693 N.W.2d 918, 922.

¶ 49 First, the district court did not err in rejecting David's argument on procedural unconscionability. (P47.) "[C]ourts have generally been more reluctant to find unconscionability in purely commercial settings. . . . [This reluctance] stems from the presumption that businessmen possess a greater degree of commercial understanding and substantially stronger economic bargaining

power than the ordinary consumer." *Construction Associates, Inc. v. Fargo Water Equipment Co.*, 446 N.W.2d 237, 242 (N.D. 1989). Procedural unconscionability seeks to prevent oppression and unfair surprise between parties with unequal bargaining power. *Id.* at 241. David is a sophisticated grain producer who has entered into many grain sale contracts during his career. (P47.) David did not offer any evidence that he did not recognize or understand the term incorporating the NGFA trade rules or lack access to a copy of the NGFA rules before agreeing to the term. (P45.) Nor did he provide any evidence sufficient to establish procedural unconscionability, such as lack of alternatives, lack of bargaining power, an inability to negotiate the terms of the agreements, or unfair surprise. (P47.) Rather, as the district court correctly found, as a seller of a substantial amount of soybeans, David had bargaining power, he is presumed to understand the terms of the contract, and he should not be surprised that the National Grain and Feed Association's Trade Rules would apply to a contract between him and a grain elevator, such as James Valley. (P47.)

¶ 50 David's significant reliance on *Timmerman v. The Grain Exchange LLC* to prove procedural unconscionability is misplaced. 915 N.E.2d 113 (Ill. Ct. App. 2009). First, it is a decision from the Illinois Court of Appeals applying Illinois law and is not binding on this Court. Second, federal courts have addressed the same issue and found no procedural unconscionability exists in applying the NGFA Trade Rules to a grain contract such as this. *See e.g. Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 325 (6th Cir. 1998); *Hodge*

Bros., 942 F. Supp. at 415. Indeed, it is precisely for grain delivery contract disputes such as these that the NGFA arbitration scheme is designed. Further, no evidence exists in the record to overturn the district court's specific factual findings addressing procedural unconscionability. (P44-47.) Finally, *Timmerman* ignores the policy under the FAA that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 695 (8th Cir. 1994) (quoting *Moses H. Cone Memorial Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

¶ 51 David's substantive unconscionability argument, as well as his arguments concerning subordination, adhesion, and exclusion, fail as well. (*See* Appellant's Br. at 14-18, 23-26.) Importantly, none of these arguments were raised to the district court in opposition to James Valley's motion to compel arbitration and David is therefore barred from making them to the Court for the first time on appeal.[5] *Wolt v. Wolt,* 2010 ND 26, ¶ 49, 778 N.W.2d 786 (issues presented on appeal must first be raised and addressed in the district court); *Rutherford v. BNSF Ry. Co.,* 2009 ND 88, ¶ 13, 765 N.W.2d 705, 710 ("It is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment.") Moreover, each of

[5] James Valley recognizes David attempted to raise these arguments in response to its motion to confirm the Award, but the district court was barred from considering those arguments at that stage of the litigation because David had not filed a motion to vacate the Award. *See supra* Argument Section I.

these arguments relies on the faulty premise that the legal remedies provided in the contract are only available from a court and not from an arbitration panel. *Id.* This contention, for which David cites no legal authority, fails to distinguish between procedural and substantive remedies. Arbitration of a dispute is a procedural remedy; the remedies outlined in the agreement, including application of the Uniform Commercial Code, are substantive. *See Strand*, 2005 ND 68 ¶ 16 (distinguishing between procedural right to bring class action and substantive remedies, and finding no substantive unconscionability where remedy precluded by arbitration was a procedural right). Compelling arbitration is not inconsistent with the remedies outlined in the contracts, but simply provides a different forum for adjudication of the dispute. Because the substantive remedies outlined in the contract are available to the parties in arbitration, there is no substantive unconscionability in ordering the dispute to arbitration. *See id.* at ¶24 (arbitration is an effective remedy, the availability of which precludes a finding of substantive unconscionability).

¶ 52 For all of these reasons, the district court correctly found the parties entered into a valid agreement to arbitrate, the dispute was subject to that agreement, and its order compelling the dispute to arbitration should be affirmed.

¶ 53 C. No grounds exist to vacate the arbitration award and the district court did not err in confirming the Award on the merits.

¶ 54 The Supreme Court will only vacate an arbitration award "if it is completely irrational, in that the decision is either mistaken on its face or so

mistaken as to result in real injustice or constructive fraud." *John T. Jones*, 2003 ND 109, ¶ 9. "An arbitrator's mistake as to fact or law is not a sufficient ground for overturning an arbitration award." *Id*.

> Obviously, the effect of applying the clearly irrational standard of review is to give to the arbitrators every benefit of every doubt. It affords them the widest latitude to exercise their authority and arrive at their decision without the customary restraints of traditional judicial review. It is but a reflection of the strong public policy favoring the arbitration process.

Id. (citing *Scherbenske Excavating, Inc. v. North Dakota State Highway Dep't*, 365 N.W.2d 485, 489 (N.D. 1985)).

¶ 55 Addressing David's substantive arguments despite his failure to move to vacate, the district court correctly found there were no grounds to vacate, modify, or correct the Award. (P149.) There is no basis to conclude that the arbitration panel did not consider all relevant evidence presented by both David and James Valley Grain. (*See* P113-114.) David submitted many affidavits, arguments, and exhibits during his participation in the arbitration proceedings, and the Award demonstrates the panel carefully considered each and every one of his submissions. (P113-115.) The panel's decision shows it considered all relevant evidence presented by David, but rejected it as not credible. (P113-115.) The decision of the arbitration panel makes it clear that the panel focused upon the issues David raises in this appeal as to whether he cancelled the Contracts as he claimed. (*Id.*) The Panel considered all evidence presented by David, doubted its credibility, and expressed its reasons for rejecting David's arguments. (*Id.*)

¶ 56 David further argues the Court should modify or correct the panel's award of a cancellation fee and attorney's fees, arguing the panel misapplied the law and misconstrued the facts. (Appellant's Br. at 32-35.) David is wrong. First, pursuant to N.D.C.C. § 32-29.3-24, David was required to contest the award of attorney's fees and the cancellation fee to the district court by moving for modification of the Award. He did not file a motion to modify the award, and is therefore barred from raising these issues to the Court. *MBNA America Bank*, 2006 ND 3 ¶ 9. Second, there is no evidence he contested James Valley's claim for attorney's fees and the cancellation fee before the arbitration panel or asserted it had no authority to include them in its award. Having failed to raise the issue below, he is precluded from making the argument on appeal. *Wolt*, 2010 ND 26, ¶ 49.

¶ 57 Finally, David's challenges fail on the merits. David asserts that the cancellation fees awarded fall within the category of punitive damages. (*Id.*) This is incorrect. The cancellation fees are compensatory damages James Valley was entitled to receive. They represent the transaction cost James Valley incurred when David breached the grain contracts and forced James Valley to cancel a corresponding market position it customarily enters into to manage the risk involved with dealing in commodities. When David refused to deliver the soybeans, James Valley was required to cancel this position and incurred costs. The cancellation fee is properly included as an amount of compensatory damages.

¶ 58 Likewise, the district court's confirmation of the attorney's fee award should be affirmed. The arbitration panel's award of attorney's fees is not completely irrational, because both David and James Valley requested attorney's fees in their pleadings to the Court. (P9, P26.) The parties' joint claim of entitlement to attorney's fees constitutes an agreement to award fees. *See Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 243 (1st Cir. 1995) (where both parties request attorney's fees, award of fees is within the scope of the agreement to arbitrate); *InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, 373 F.Supp.2d 340, 354 (S.D.N.Y. 2005) (same); *In re United States Offshore, Inc. and Seabulk Offshore Ltd.,* 753 F.Supp. 86, 92 (S.D. N.Y. 1990) ("If both parties sought attorney's fees . . . then both parties agreed *pro tanto* to submit that issue to arbitration, and the arbitrators had jurisdiction to consider that issue and to award them."). This agreement authorized the arbitrator to shift fees to James Valley. N.D.C.C. § 32-29.3-21(2).

¶ 59 Finally, North Dakota law does not authorize the Court to review the issue of whether "the arbitration panel fail[ed] to properly apply the law and the NGFA rules. (Appellant's Br. at 28.) "Under the completely irrational standard, an arbitrator's mistake in determining the facts or interpreting the law is not a sufficient ground for overturning the award." *Gratech Co., Ltd. v. N. Dakota Dept. of Transp.*, 2004 ND 61, ¶11, 676 N.W.2d 781, 782. James Valley has not responded in detail to David's attacks on the merits of the arbitration award for two reasons. First, David failed to move to vacate, modify, or correct the award

and those issues cannot be raised as affirmative defenses to motion to confirm. Second, assuming, for the sake of argument, that David was correct and the arbitrators failed to properly apply the law and the NGFA Rules, the Award should still be affirmed under the "completely irrational standard" of *Gratech Co., Ltd.* In sum, David cannot prevail even if the Court agrees with him.

¶ 60 While James Valley does not intend to respond to the detailed arguments in David's brief concerning the facts and arguments presented by the parties to the arbitration, the decision of the three member panel is fully supported by the evidence. The argument by David that he "cancelled" the contracts for 100,000 bushels of soybeans by putting a handwritten note in with an unrelated letter sent by his son with respect to a separate corn contract is neither plausible nor believable. (P113-115.) As set forth in the affidavits of James Valley Assistant Manager Wendy Frohling and Manager Calvin Diehl, even a hint that a customer wanted to cancel a 100,000 bushel soybean contract, which can vary in value by tens of thousands of dollars in a single day, would have been a huge event requiring immediate action by James Valley. (P117-137.) It is undisputed that David never contacted James Valley during the eight months following the purported cancellation, even though he claimed in the arbitration that he should have received a net payment of $131,300 when the "cancellation" was alleged to have occurred. (P115.) Accordingly, the decision of the arbitration panel was compelled by the overwhelming weight of the evidence.

¶ 61 David's arguments ask the Court to reconsider the panel's decisions as to the facts and the law, which it has no authority to do, but even if the arguments are considered on the merits, they fail to support a finding that the Award is completely irrational. Indeed, the unanimous decision of the three-member panel is thorough, well-reasoned, and entirely rational. (P113-116.) The district court's confirmation of the Award should be affirmed.

¶ 62 **CONCLUSION**

¶ 63 For the reasons set forth above, James Valley requests the Court affirm the district court's order confirming the Award and the judgment entered pursuant thereto.

Respectfully submitted,

DATED: May 18, 2011

LINDQUIST & VENNUM P.L.L.P.

By: _____

Laurance R. Waldoch (MN Bar # 113797)
Adam C. Ballinger (MN Bar# 0389058)
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2274
Phone: (612) 371-3211
Fax: (612) 371-3207

DATED: May 18, 2011

SMITH, STREGE & FREDRICKSEN, LTD.

By: _____

Fred Strege (N.D. #03445)
321 Dakota Avenue, Box 38
Wahpeton, ND 58074-0038
Phone: (701) 642-2668
Fax: (701) 642-4729

ATTORNEYS FOR APPELLEE
JAMES VALLEY GRAIN, LLC

ADDENDUM

EXCERPTS FROM THE
NORTH DAKOTA UNIFORM ARBITRATION ACT
CHAPTER 32-29.3

32-29.3-21. Remedies - Fees and expenses of arbitration proceedings.

1. An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

2. An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

3. As to all remedies other than those authorized by subsections 1 and 2, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under section 32-29.3-22 or for vacating an award under section 32-29.3-23.

4. An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

5. If an arbitrator awards punitive damages or other exemplary relief under subsection 1, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

32-29.3-22. Confirmation of award. After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 32-29.3-20 or 32-29.3-24 or is vacated pursuant to section 32-29.3-23.

32-29.3-23. Vacating award.

1. Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

    a. The award was procured by corruption, fraud, or other undue means;

b. There was:

(1) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(2) Corruption by an arbitrator; or

(3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

c. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 32-29.3-15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

d. An arbitrator exceeded the arbitrator's powers;

e. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection 3 of section 32-29.3-15 not later than the beginning of the arbitration hearing; or

f. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 32-29.3-09 so as to prejudice substantially the rights of a party to the arbitration proceeding.

2. A motion under this section must be filed within ninety days after the movant receives notice of the award pursuant to section 32-29.3-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 32-29.3-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

3. If the court vacates an award on a ground other than that set forth in subdivision e of subsection 1, it may order a rehearing. If the award is vacated on a ground stated in subdivision a or b of subsection 1, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subdivision c, d, or f of subsection 1, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in subsection 2 of section 32-29.3-19 for an award.

4. If the court denies a motion to vacate an award, the court shall confirm the award unless a motion to modify or correct the award is pending.

32-29.3-24. Modification or correction of award.

1. Upon motion made within ninety days after the movant receives notice of the award pursuant to section 32-29.3-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 32-29.3-20, the court shall modify or correct the award if:

    a. There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

    b. The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

    c. The award is imperfect in a matter of form not affecting the merits of the decision on the claim submitted.

2. If a motion made under subsection 1 is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

3. A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award.

32-29.3-25. Judgment on award - Attorney's fees and litigation expenses.

1. Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

2. A court may allow reasonable costs of the motion and subsequent judicial proceedings.

3. On application of a prevailing party to a contested judicial proceeding under section 32-29.3-22, 32-29.3-23, or 32-29.3-24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

32-29.3-28. Appeals.

1. An appeal may be taken from:

    a. An order denying a motion to compel arbitration;

    b. An order granting a motion to stay arbitration;

c. An order confirming or denying confirmation of an award;

d. An order modifying or correcting an award;

e. An order vacating an award without directing a rehearing; or

f. A final judgment entered pursuant to this chapter.

2. An appeal under this section must be taken as from an order or a judgment in a civil action.

3. Agreements to arbitrate between and among insurers and self-insured entities which explicitly renounce a right of appeal are fully enforceable in this state. This chapter does not alter those agreements to create a right of appeal.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Plaintiff/Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7158.

Dated this 18th day of May, 2011.

LINDQUIST & VENNUM P.L.L.P.

Laurance R. Waldoch (MN Bar # 113797)
(admitted pro hac vice)
Adam C. Ballinger (MN Bar# 0389058)
(admitted pro hac vice)
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2274
Phone: (612) 371-3211
Fax: (612) 371-3207