20110050

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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
DATED DECEMBER 10, 2010
THE HONORABLE DANIEL NARUM

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

Issue 1: Did the trial court err in interpreting the contracts between the parties to find a valid arbitration agreement existed?

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¶1 **Statement of the Case**

¶2 This is an appeal from a judgment entered against Loren David (David) awarding damages, interest, attorney's fees, and costs to James Valley Grain, LLC (JVG) on December 15, 2010. Appellant's Appendix (Appx.) P152. The case was commenced by JVG in Sargent County in July of 2008. Appx. P4-10. The Complaint alleged David entered into two soybean contracts with JVG in July of 2007 wherein David was to deliver soybeans to JVG in July of 2008. Id. JVG alleged David cancelled the contracts in April of 2008 and sought damages under the theories of alleged anticipatory repudiation of contract, breach of contract, and promissory estoppel seeking damages in excess of $483,200.00. Id. The Complaint did not allege the contracts were subject to an arbitration agreement. Id.

¶3 David timely filed his Answer admitting that he entered into two soybean contracts with JVG in July 2007, but denied the contracts were cancelled in April of 2008 and asserted that notice of cancellation of the soybean contracts was sent on September 1, 2007. Appx. P20-28. David contested the amount of damages sought by JVG, and alleged several affirmative defenses. Id.

¶4 On or about October 2, 2008, JVG filed a Motion to Compel Arbitration and Stay District Court Proceedings. Appx. P29-25. In its memorandum in support of the motion, JVG argued it satisfied the elements required to compel arbitration. Id. It argued the contracts incorporated by reference the National Grain and Feed Association Grain Trade Rules (NGFA Rules) by the language that appeared in the contracts, "Trade Rules: NGFA." Id. The NGFA Rules were not submitted as an exhibit to JVG's

memorandum. Id. David opposed the motion asserting no valid arbitration agreement existed between the parties, the purported arbitration agreement was unconscionable, and the right to arbitrate was waived. No oral arguments were heard on the motion.

¶5 The Honorable Daniel Narum issued his Memorandum Opinion and Order Compelling Arbitration on December 17, 2008, finding the NGFA Rules applied the contracts, the contracts were not unconscionable, and the parties did not waive their right to arbitrate the case. Appx. P43-49. The parties were ordered to arbitrate the case based on the contracts purported reference to the NGFA Rules, "Trade rules: NGFA." Id. Each party submitted briefs to the NGFA arbitration panel in support of their arguments. The arbitration panel unanimously issued its award on June 22, 2010. Appx. P162-167. The panel awarded damages for the difference in market price of the contract futures value and the cancellation futures value of $458,200. Id. The panel awarded a $0.25 per bushel cancellation penalty for 100,000 bushels for a total of $25,000, even though there was no cancellation fee provision in the contract. Id. The total amount awarded against David was $483,200. Id. In addition, the panel awarded interest at the rate of 3.25 percent from April 14, 2008 until paid, attorney's fees and arbitration filing fees even through there was no statutory basis for an award of attorney's fees no contractual provision, and no provision in the NGFA Rules for attorney's fees. Id.

¶6 JVG moved to confirm the arbitration award pursuant to N.D.C.C. § 32-29.3-22 on or about August 31, 2010. Appx. P158-161. Following this motion, David retained new counsel to represent him in this matter. All parties agreed to grant David an

additional 7 days to respond to the motion. Appx. P50. David opposed the motion arguing no agreement to arbitrate existed in the contracts and there was no basis for the award of attorney's fees. Appx. P51-68. JVG responded to David's brief stating a motion to vacate would have to be made by a separate motion to vacate the arbitration award instead of opposing the motion to confirm the arbitration award. Appx. P180-182. The parties appeared at a hearing in front of the Honorable Daniel Narum on October 18, 2010.

¶7 Judge Narum issued a written opinion on December 15, 2010, concluding David failed to move the court to vacate or modify the award as required by the statute. Appx. P144-149. He also found that David did not establish a statutory basis to vacate or modify the award, and ordered judgment be entered in the amount of $593,292. Id. Judgment was entered on December 15, 2010. Appx. P152. Notice of Entry of Judgment was served by JVG on December 21, 2010. Appx. P153. David timely served the Notice of Appeal on February 16, 2011, which was docketed on February 17, 2011. Appx. P156.

¶8 **Statement of Facts**

¶9 David entered into two contracts for soybeans with JVG during July of 2007. The first contract, Contract No. 222-HT0414241, was signed on or about July 2, 2007, wherein David agreed to deliver to JVG 30,000 bushels of soybeans in July of 2008 at the price of $9.16 per bushel. Appx. P69-70. David entered into a second contract, Contract No. 222-HT04246, on or about July 9, 2007, wherein David agreed to deliver 70,000 bushels of Grain at the price of $9.20 per bushel (collectively referred to as "The

Contracts"). Appx. P71-72. Both of The Contracts were two-sided documents prepared by JVG and sent to David for his signature.[1] Appx. P69, 71.

¶10 The back of The Contracts contained additional provisions entitled, "Statement of Credit Terms and Disclosure of Finance Charges," and "Statement of Grain Terms." Appx. P70, 72. These additional terms on the second page of The Contracts specifically referenced legal action in two places. Under the Statement of Credit Terms and Disclosure of Finance Charges the applicable section states:

> **SECURITY INTEREST:**
> James Valley Grain, L.L.C. may acquire a security interest in property owned by the patron pursuant to:
> 1) Statutes and provisions of the Uniform Commercial Code which grants such interest by written agreement by seller (JVG) and the patron.
> 2) Statutory liens such as the North Dakota Ag Supplier's Lien, mechanic's lien, and similar liens.
> 3) Judgment liens if legal action results in a court judgment in the LLC's favor.
> Id.

The "Statement of Grain Terms" section, the contract specifically references the Uniform Commercial Code when stating the rights and remedies of the buyer in the event the seller failed to deliver:

> If Buyer is able to receive grain, and if delivery of the full quantity of grain covered by this contract is then not made on or before the Expiration Date, Seller shall be deemed in breach of this contract and Buyer shall have all rights and remedies provided by law, including but not limited to the rights and remedies set forth in Article 2, Part 7 of
>
> the Uniform Commercial Code as adopted in Seller's

[1] The Complaint attached only the front page of each contract. The Memorandum in Support of Motion to Compel Arbitration and Stay District Court Proceedings attached the complete contracts as exhibits to Mr. Strege's Affidavit in Support of this Motion.

> state…
> Id.

¶11 The front side of The Contracts contained a cryptic phrase "Trade rules: NGFA" with no further explanation. Appx. P69, 71. JVG argued the phrase purportedly referenced the National Grain and Feed Association Grain Trade Rules. Appx. P42. JVG is a member of the NGFA, David is not a member of the NGFA. Appx. P30. The Contracts contained no indication, express or implicit, that the parties would be mandated to arbitrate disputes arising under the contract. Appx. P69-72. The Contracts did not contain a provision for an award of attorney's fees, or a provision to collect an additional contract cancellation fee in the event of cancellation. Appx. P69-72. The NGFA Rules were not included in The Contracts or made available to David at the time of contracting. Rule 29 of the NGFA Rules reads:

> 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 NGFA 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.
> Appx. P77.

¶12 The Contracts did not state that JVG was a member of the NGFA or that the NGFA required arbitration. Appx. P69-72. There was no arbitration provision contained in the four corners of The Contracts. Id.

¶13 David cancelled both The Contracts with JVG, but JVG denied receiving notice of the cancellation. David cancelled verbally by telephone on August 9, 2007, and then

in writing in a letter dated September 1, 2007, sent certified mail return receipt. Appx. P85, 87, 88, 95. Ken Lyon, a friend of David's, witnessed David's telephone conversation with JVG on August 9, 2007. Appx. P95.

¶14 David confirmed the cancellation in writing in a letter to JVG dated September 1, 2007. Appx. P87-88. Casey David, David's son, and Ken Lyons witnessed David write the letter to JVG cancelling The Contracts and watched him give the letters to Crystal David, David's daughter, to mail certified. Appx. P95-97, 101-103. David then gave the letter to his daughter to mail certified along with a cancellation letter that David wrote on behalf of Casey. Appx. P85, 107-108. Crystal also witnessed David writing the letters to JVG, and sent both David's and Casey's letters together in one envelope certified mail, return receipt. Appx. P107-108.

¶15 JVG acknowledged receipt of Casey's letter, yet denied receiving David's letter even with the affidavits of David and three other witnesses including Crystal, who personally mailed both letters. Appx. P118, 128. JVG failed to present affidavits or other evidence of the person that signed for the certified letter, Charlotte Carlson, or testimony from the office personnel that opened the letter to rebut the evidence presented that both David's letter and Casey's letter were mailed together in the same envelope and received by JVG. Appx. P112, 117-133.

¶16 David had done business with JVG on previous occasions and had previously cancelled contracts with JVG. Appx. P84, 85. David's son, Casey, had also previously done business and cancelled contracts in the past with JVG. Appx. P117-118. Wendy Frohling submitted an affidavit stating she was the Assistant Manager at JVG and stated

that David had previously cancelled a corn contract with JVG on July 23, 2007. Appx. P118. She stated that subsequent to David notifying JVG of the cancellation, he sent a letter dated August 19, 2007, stating that he had not yet received confirmation of the cancellation of the corn contract. Appx. P119. She goes on to state that in contrast to the corn contract that was cancelled by David, she did not receive any communication after August 19, 2007, regarding the cancellation of any other contracts until April 14, 2008. Appx. P119. Ms. Frohling sent a letter dated October 3, 2007, to David's son, Casey, in response to Casey's letter dated September 1, 2007. Appx. P118, 128. In the letter, Ms. Frohling apologizes for taking so long to respond to Casey's letters, "Sorry it has taken me so long to respond to your letters. I have had back surgery and it didn't go so well." Id. Ms. Frohling was out of the office for an extended period of time during the time when JVG received David's letter. Id.

¶17 JVG claimed it did not receive notice David intended to cancel his soybean contracts until April 14, 2008. Appx. P119-120, 132. Calvin Diehl, former manager of JVG, submitted an affidavit stating that in April 2008, he instructed the JVG staff to contact producers with delivery obligations in 2008. Appx. P132. David was contacted as a producer. Id. On April 9, 2008, David sent a letter to the attention of Kathy at JVG instructing her to speak with Wendy regarding the cancellation of the soybean contracts. Appx. P121. David enclosed the letter he had previously sent dated September 1, 2007. Appx. P122. On April 14, 2008, JVG sent David confirmation it cancelled The Contracts and invoiced David in the amount of $483,200. Appx. P123-125. Mr. Diehl stated that after he found out David claimed he sent a cancellation letter to JVG in

September; he discussed the matter with the office staff and determined that no member of the staff knew that David wished to cancel his contracts prior to April 2008. Mr. Diehl did not state that he spoke with any former employees of JVG. Appx. P131-133. Charlotte Carlson, resigned from JVG in December of 2008.

¶18 The undisputed facts show that The Contracts did not contain an arbitration provision, and made specific references to the Uniform Commercial Code and other remedies available at law. Further, the facts also show David had a witness to his phone conversation with Charlotte Carlson on August 9, 2007, when he cancelled The Contracts and had several witnesses to him writing both letters to the attention of Wendy at JVG, one on his behalf, and one on his son's behalf on September 1, 2007. David's daughter stated that she mailed both letters in the same envelope certified mail, return receipt. The envelope was signed for by Ms. Carlson at JVG. JVG did not present evidence by affidavit or otherwise to rebut these facts.

¶19 **Argument**

¶20 **Issue 1: Did the trial court err in interpreting the contracts between the parties to find a valid arbitration agreement existed?**

Standard of Review

¶21 An appeal may be taken from a final judgment entered pursuant to the Uniform Arbitration Act. N.D.C.C. § 32-29.3-28(1)(f). Arbitration is a matter of contract and a party is contractually bound to arbitrate only those disputes which they have agreed to arbitrate. West Fargo Pub. Sch. Dist. v. West Fargo Educ. Ass'n, 259 N.W.2d 612, 618 (N.D. 1977). Interpretation of a contract is a question of law, and on appeal this Court

independently examines and construes the contract to determine if the district court erred in its interpretation. Ir. Oil & Gas, Inc. v. Riemer, 2011 ND 22 ¶11, 794 N.W. 2d 715,.

¶22 The district court erred in interpreting The Contracts to find a valid arbitration agreement existed. The Contracts did not contain an arbitration clause, only a reference to the NGFA Rules: "Trade rules: NGFA." When an arbitration clause is at issue, "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." Schwarz v. Gierke, 2010 ND 166 ¶11, 788 N.W. 2d 302. There is a strong state and federal public policy favoring the arbitration process, and this Court resolves any doubts concerning the scope of arbitrable issues in favor of arbitration when there is a broad arbitration clause and no exclusion clause. See Gratech Co., Ltd. v. Wold Eng'g, P.C., 2003 ND 200, P14, 672 N.W.2d 672; State v. Stremick Constr. Co., 370 N.W.2d 730, 732 (N.D. 1985). Because there was no arbitration clause in The Contracts, this Court should not resolve issues in favor of arbitration. Cf. Schwartz v. Gierke, 2010 ND 166 ¶11, 788 N.W.2d 302, 306. Instead, the arbitration provision was contained in a separate set of NGFA Rules that were not contained in The Contracts or provided to David with The Contracts. This Court should independently construe The Contract to determine if the district court erred in its interpretation.

¶23 **A. The Court should not look outside the four corners of the contracts to the NGFA Rules because the contracts are unambiguous.**

¶24 Because The Contracts are unambiguous, the Court should not look to the NGFA Rules for interpretation. The construction of a written contract to determine its legal effect is a question of law for the court to decide. Sorlie v. Ness, 323 N.W.2d 841, 844 (N.D. 1982)(citing Metcalf v. Security International Ins. Co., 261 N.W.2d 795, 799 (N.D. 1978); Ohio Farmers Ins. Co. v. Dakota Agency Inc., 551 N.W.2d 564, 565 (N.D. 1996). If the parties' intentions can be ascertained from the writing alone, without reference to extrinsic evidence, then the interpretation of the contract is entirely a question of law, and this Court will independently examine and construe the contract to determine whether or not the district court erred in its interpretation of the contract. Id. (citing Metcalf, 261 N.W. 2d at 799; Stetson v. Blue Cross of North Dakota, 261 N.W.2d 894, 896 (N.D. 1978)); N.D.C.C. § 9-07-04. If executed documents are unambiguous, parole evidence is not admissible to contradict the terms of the written agreement. Pamida, Inc. v. Meide, 526 N.W.2d 487, 490 (N.D. 1995). This Court should find as a matter of law that no arbitration requirement existed between JVG and David.

¶25 The Contracts contained several explicit and unambiguous references to the Uniform Commercial Code and other remedies provided under North Dakota statutory law showing the parties' intention under the contract was to litigate a breach under traditional legal remedies. Appx. P69-72. The section of The Contracts, "Statement of Grain Terms" specifically addressed remedies available in the event of default by the seller, without any reference to arbitration as an option for remedy. Appx. P70, 72. In the event of the seller's non-delivery, it stated:

> If Buyer is able to receive grain, and if delivery of the full quantity of grain covered by this contract is then not made on or before the Expiration Date, Seller shall be deemed in breach of this contract and Buyer shall have all rights and remedies provided by law, including but not limited to the rights and remedies set forth in Article 2, Part 7 of the Uniform Commercial Code as adopted in Seller's state…

¶26 This language is clear and explicit. The Contracts use of the word, "shall" when describing the rights of the buyer if the seller failed to deliver is mandatory language. See Baker v. Fargo Bldg. & Loan Assn., 252 N.W. 42, 47 (N.D. 1933)(finding the word shall was clear, mandatory language). In the event that the seller could not deliver the grain and the buyer was able to receive grain, The Contracts unambiguously state that the buyer shall have all rights and remedies provided by law, including but not limited to Article 2, Part 7 of the Uniform Commercial Code as adopted in North Dakota. Appx. P70, 72; see N.D.C.C. § 41-02, Part 7. This language limits the remedies the buyer has to remedies to legal remedies and does not provide arbitration as an available option for remedy. See N.D.C.C. § 41-02-98.

¶27 The Contracts make several other references to remedies available to the parties. Appx. P70, 72. None of these remedies reference arbitration. Id. The section entitled "Suspension of Credit Privilege" addresses past due accounts, it states, "[L]egal action may be taken to collect past due accounts." Id. It goes onto state that the suspension of credit can be waived if the patron can provide adequate collateral or an assignment to secure the past due account. Id. The very next section, "Security Interest," describes how JVG could acquire a security interest in the property owned by the patron. See generally, N.D.C.C. Chapter 41-09. Under the "Statement of Credit Terms and

Disclosure of Finance Charges" the applicable section states:

> **SECURITY INTEREST:**
> James Valley Grain, L.L.C. may acquire a security interest in property owned by the patron pursuant to:
> 1) Statutes and provisions of the Uniform Commercial Code which grants such interest by written agreement by seller (JVG) and the patron.
> 2) Statutory liens such as the North Dakota Ag Supplier's Lien, mechanic's lien, and similar liens.
> 3) Judgment liens if legal action results in a court judgment in the LLC's favor.
>
> Appx. P70, 72.

.

¶28 Each of these provisions address liens created under statutory liens, liens that arise under operation of law, or judicial liens. The first section addresses liens created under the Uniform Commercial Code which grants an interest by written agreement by the seller and the patron. See generally, N.D.C.C. Chapter 41-09. The second section refers to other legal remedies available through statutory liens including the Ag Supplier's Lien found in Chapter 35-31 of the North Dakota Century Code, mechanic's liens found in Chapter 35-27 of the North Dakota Century Code. These liens all provide remedies for foreclosure of the lien which require judicial action, and not arbitration. See N.D.C.C. §§ 35-01-29; 32-20-01.

¶29 Assignment is another legal remedy that The Contracts address, which is an established legal principal under contract law. Appx. P70, 72. A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such. N.D.C.C. § 9-11-01. This would allow a patron to assign his or her interest in property, such as accounts receivable or rent, to the patron as additional security for the credit account.

¶30 The Contracts also outline certain express warranties, stating: "Grain delivered under this contract must be free of Karnal Bunt (Tilletia Indica) and will be subject to rejection…The grain must be (A) merchantable, (B) not pose any food safety or quarantine risk to the buyer, and (C) not be shipped from any areas quarantined by the United States…" Appx. P70, 72. Express warranties are created by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain and creates an express warranty that the goods shall conform to the affirmation or promise. N.D.C.C. § 41-02-30. Merchantable is defined in the Uniform Commercial Code. N.D.C.C. § 41-02-31(2). Warranties are part of the Sales Chapter of the Uniform Commercial Code as enacted as Chapter 2 of Title 41 of the implied warranties section of the North Dakota Century Code.

¶31 These clauses show the unambiguous intent of the parties at the time of contracting was to have The Contracts governed traditional legal remedies. Appx. P70, 72. The Contracts make several references to the Uniform Commercial Code, including articles 2 and 9, ag supplier's liens, and assignment, which unambiguously show the remedies the parties intended in the event of default. Id.

¶32 Further, JVG did not attach the NGFA Trade Rules to its Memorandum in Support of Motion to Compel Arbitration and Stay District Court Proceedings. Appx. P29-42. The district court could not look outside The Contracts to the NGFA Trade Rules to incorporate the arbitration provision because the NGFA Rules were not part of the record before it. Because the language contained in the four corners of The Contracts is not ambiguous, this Court should not consider extrinsic evidence which

contradicts the unambiguous intention of the parties was to apply the remedies available under The Contracts.

¶33 **B. The particular clause contained in the contracts, "Trade rules: NGFA," is subordinate to the general intent of the contracts.**

¶34 The particular clause contained in The Contracts, "Trade rules: NGFA," should be subordinate to the general intent of the agreements, which made several references to the Uniform Commercial Code and other remedies under statutory authority. Appx. P69-72. 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. § 9-07-15. The particular statement: "Trade rules: NGFA" is subordinate to and repugnant of the general intention of the contract, which shows the clear, general intent of the parties at the time of contracting was not to be governed by the NGFA requirement of arbitration but the broad rights and remedies delineated in The Contracts as discussed in the previous section. The Contracts have several explicit and unambiguous references to the Uniform Commercial Code and other statutory remedies showing its general intent to have broad rights and remedies not limited to the repugnant and vague reference to the NGFA, which mandates arbitration as the only remedy. Appx. P69-72.

¶35 **C. The Contract should be construed against JVG.**

¶36 Because JVG prepared the standard form contracts and sent them to David for his signature, The Contracts should be construed against JVG. A contract is construed

most strongly against the party who prepared it, and who presumably looked out for his best interests in the process. Farmers Union Grain Term. Ass'n. v. Nelson, 223 N.W.2d 494, 497(N.D. 1974) (citations omitted); N.D.C.C. § 9-07-19. An adhesion contract should be examined with special scrutiny by the courts to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting. Id.

¶37 In the case, Farmers Union Grain Terminal Ass'n v. Nelson, Mr. Nelson entered into two contracts with Farmers Union Grain Terminal Association (Farmers Union) to deliver grain on March 30, 1973, to a specific elevator. Id. at 496. Each of the grain purchase contracts contained a clause addressing damages:

> In case of default in the delivery of said grain, then and in that event, I agree to pay to Farmers Union Grain Terminal Association, as liquidated damages, the difference between the contract price herein and the market price of grain of like grade at the close of the market at the Minneapolis Grain Exchange on the 30th day of March, 1973, after making due deductions for freight from the above station to Minneapolis, Minnesota.
> Id.

¶38 Mr. Nelson delivered a portion of the grain under the contract, but the elevator could not accept the remaining deliveries. Id. Nelson informed the elevator he would not deliver the remaining grain under the contract on June 13, 1973. Id. He returned two advances he had received plus interest and the difference between the contract price and the market price on March 30, 1973. Id. Farmers Union refused the tender and sued for damages based upon the June 13, 1973 market price. Id.

¶39 Farmers Union argued the agreement did not specifically provide the damage provision was the exclusive remedy, and even if the contract provision was exclusive it failed of its essential purpose and was ineffective under the N.D.C.C. § 41-02-98. Id. Section 41-02-98 provides in part:

> a. The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> b. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
> N.D.C.C. § 41-02-98(1).

¶40 The trial court instructed the jury that it should not use the contract clause to determine damages based on this argument. Farmers Union Grain Terminal Ass'n, 223 N.W. 2d at 496. Notwithstanding the instructions, the jury awarded damages for Farmers Union based on the market prices of March 30, 1973, in the amount of $6,320.34. Id. The court granted Farmers Union motion for judgment notwithstanding the verdict and increased the award to Farmers Union to $28,904.55, based on the market price on June 13, 1973. Id.

¶41 On appeal, the Court found the contract was an adhesion contract and construed it against Farmers Union. Id. at 497. The Court also found the damages provision was not the subject of bargaining between the parties. Id. The Court stated the clause addressing damages was designed to provide an agreed method of computing loss in the event of breach under Sections 41-02-97, 41-02-98, N.D.C.C. Id. at 498. Comment 2

to N.D.C.C. § 41-02-98, provides a presumption that clauses prescribing remedies are cumulative rather than exclusive, and if the parties intend the term to be the sole remedy under the contract, it must be clearly expressed. The Court held that Mr. Nelson was entitled to rely on the measure of damages Farmers Union established under its form agreement, stating:

> Taking the construction most favorable to the seller, we do not find that this clause had "failed of its essential purpose." While there had been a substantial increase in market price between March 30 and June 13… that fact alone cannot be said to have caused the clause to have failed in its essential purpose.

¶42 In this case, like Farmers Union, JVG drafted The Contracts and the terms were not negotiated. Appx. P69-72. Here, The Contracts specifically included a provision that addressed the failure of delivery by the seller, which stated that the buyer would have all rights and remedies provided by law, including but not limited to those set forth in Article 2, Part 7 of the Uniform Commercial Code as adopted in seller's state. Appx. P70, 72. This Court, like the Court in Farmers Union, should find the clause addressing damages was designed to provide an agreed method of determining the remedies in the event of breach between JVG and its sellers. Here, the remedies section of the contracts did not limit the remedies available to arbitration, or even mention that arbitration is an available remedy to the buyer. Appx. P70, 72. David should be able to rely on the remedies stated in The Contracts. Under The Contracts, David would not expect that the buyer's remedy would be under arbitration, he would expect the contracts to be litigated under the provisions of the Uniform Commercial Code remedies provisions. N.D.C.C. Chapter 41-02, Part 7. The Contracts should be construed against JVG and

require the remedies provision in The Contracts apply, instead of the arbitration provision found in the NGFA Rules.

¶43 **D. Requiring David to arbitrate under the contracts is unconscionable.**

¶44 If this Court finds The Contracts are ambiguous and looks to the arbitration clause in the NGFA Rules or finds The Contracts did sufficiently incorporate the NGFA Rules, it should find it unconscionable and unenforceable. Unconscionability is a doctrine which allows courts to deny enforcement of a contract because of procedural abuses arising out of the contract's formation and substantive abuses relating to the terms of the contract. Strand v. U.S. Bank Nat'l Assoc. ND, 2005 ND 68, ¶4, 693 N.W.2d 918, 921 (citing Weber v. Weber, 1999 ND 11, ¶11, 589 N.W.2d 358). The North Dakota Supreme Court has summarized the determination to be made by the trial court in assessing whether contractual provisions are unconscionable:

> The court is to look at the contract from the perspective of the time it was entered into, without the benefit of hindsight. The determination to be made is whether, under the circumstances presented in the particular commercial setting, the terms of the agreement are so one-sided as to be unconscionable. The principle underlying the Code's unconscionability provisions is the prevention of oppression and unfair surprise.
> Id. (quoting Construction Assocs., Inc. v. Fargo Water Equip. Co., 446 N.W.2d 237, 241 (N.D. 1989)).

In assessing unconscionability, the court employs "a two-pronged framework: procedural unconscionability, which encompasses factors relating 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." Id. at ¶7. (quoting Construction Assocs., Inc., 446 N.W.2d at 241).

¶45 The facts in this case are similar to the facts in the case of Timmerman v. The Grain Exchange LLC et al, where the court found the arbitration clause procedurally unconscionable and defendants failed to prove the arbitration provision of the NGFA Rules was incorporated into The Contracts through the usage of trade. 394 Ill. App 3d 189, 915 N.E.2d 113, 116 (Ct. App. Ill. 2009). In the Timmerman case, three cases were consolidated where farmers entered into contracts with The Grain Exchange LLC and Consolidated Grain & Barge Company (collectively Grain Exchange) for delivery of specified amounts of grain at set prices on set future dates. Id. The farmers and Grain Exchange had a long history of doing business together. Id. Most orders were done verbally, and the Grain Exchange followed up by sending the contract to the farmers to sign and return. Id.

¶46 Each of the contracts was one page drafted by The Grain Exchange. Id. The new form contracts contained the language: "Unless otherwise agreed to, this contract is subject to the Rules of the National Grain and Feed Association [] and, to the extent not in conflict with aforesaid rules, by the Uniform Commercial Code." Id. at 117. The old form contracts contained no such language and no reference either to the National Grain and Feed Association Rules or to arbitration. Id. The NGFA Rules were not contained in the contracts, no specific reference to arbitration was included in the contracts, copies of the NGFA Rules were not provided to the farmers, and the farmers were not informed that the rules required arbitration of any disputes. Id. at 116. None of the farmers were members of the NGFA, and the Grain Elevator was. Id. at 117.

¶47 The court found that based on the totality of the circumstances surrounding the execution of the contracts, the alleged arbitration provisions were procedurally unconscionable and unenforceable. Id. at 118. The court found that both forms of the contracts executed did not contain a valid arbitration clause. Id. Farmers Union argued that a contract can incorporate by reference an arbitration provision contained in another document if the contract shows that intent. Id. at 119 (citing Turner Construction Co. v. Midwest Curtainwalls Inc., 543 N.E.2d 249 (1989)). However, the court was not persuaded and found the contracts did not clearly manifest an intent to incorporate by reference the arbitration provision contained in the NGFA Rules. Id. The court found that the attempt to incorporate by reference the arbitration provision of the NGFA Rules was procedurally unconscionable where the NGFA Rules were not included in the contracts and had not been provided to or made available to the plaintiffs prior to the execution of the contracts, the contracts did not mention arbitration, and there was no indication the arbitration provision was negotiated between the parties. Id. at 120; (citing Razor, 222 Ill. 2d 75, 854 N.E.2d 607, 622-23 (2006); Frank's Maintenance & Engineering Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 410 (111 App. 1980)); see also Miller v. South Bend Special Sch. Dist., 124 N.W.2d 475, 479 (N.D. 1963)(holding a public district school failed to incorporate, by reference or otherwise, rules adopted by the district and failed to sustain the burden of proving the teacher knew of the rules at the time of execution of the contract, the teacher was not bound to rules not in the contract). The Timmerman Court also addressed the fact that the farmers were not inexperienced consumers but they were experienced grain merchants, the court stated

"[T]he mere fact that the plaintiffs are businessmen does not justify the use of unfair surprise to the detriment of one of the parties." Id. at 121.

¶48 The facts in this case parallel the Timmerman case. David placed orders verbally and JVG followed up sending a boilerplate contract for David to sign and return, and David did not negotiate the terms. Appx. P69-72, 131. The word "arbitration" did not appear anywhere in The Contracts. Like the farmers in Timmerman, David was not a member of the NGFA.

¶49 This court, like the Timmerman court, should find procedural unconscionability because the David did not have a reasonable opportunity to understand the term "Trade rules: NGFA." Like Timmerman, the NGFA Rules were not set forth in The Contracts, had not been provided with The Contracts to David or made available to David, JVG did not inform David that the NGFA Rules required arbitration, and no reference to arbitration was made in The Contracts. Timmerman, 915 N.E.2d at 117. Similarly, David made no representation that he had examined the NGFA Rules or understood them when he signed The Contracts. Id. at 120. David could only learn of the arbitration provision if he did independent research in order to find and read the NGFA Rules and the rules themselves did not draw attention to the arbitration provision, which was located at rule 29 in single-spaced fine print with no other differentiation from the other rules. Id. at 197; Appx. P77. This Court should find the arbitration clause of the NGFA Rules procedurally unconscionable, and JVG failed to prove the arbitration provision of the NGFA Rules was effectively incorporated through the usage of trade into the contracts.

¶50 Like the farmers in Timmerman, David is experienced at selling his crops through grain contracts. However, that fact that David is a businessman does not justify the use of unfair surprise to his detriment when the arbitration provision was not contained in The Contracts. David cannot fairly be said to have been aware he was agreeing to arbitration when he signed The Contracts. See id. at 121.

¶51 Another court has found that effectively incorporating the NGFA Rules by reference into a contract was enough to bind the parties to arbitration even where there was not a specific reference to arbitration in the contract. Hodge Brothers, Inc. v. The DeLong Co. Ind., 942 F. Supp. 412, 415 (W.D. Wisc. 1996). That contract, like The Contracts at issue in this case, did not make a specific reference that disputes under the contract would be subject to arbitration. However, the Hodge Brothers contract specifically incorporated the NGFA rules, stating: "the contract 'is made in accordance with the Trade rules of the National Grain & Feed Association governing transactions in grain except as modified herein and both parties agree to be bound thereby.'" Id. at 414. The court found the parties agreed to be bound by the trade rules and the trade rules made a clear reference to the arbitration rules. Id. at 417. This case is distinguishable from the Hodge Brothers case because The Contracts here did not use language that specifically incorporated the NGFA Rules or state that the transaction would be governed by the NGFA Rules, The Contracts only used the acronym "NGFA" and failed to even spell out the National Grain and Feed Association. It was reasonable for David to conclude, based on The Contracts, that disputes arising under The Contracts would be governed under the remedies stated in the agreements. This Court should

apply the Timmerman and Miller holding and find that attempting to incorporate the NGFA Rules by inserting the phrase, "Trade rules: NGFA" is procedurally unconscionable.

¶52 Next, The Contracts must be found to be substantively unconscionable. Substantive unconscionability focuses upon the harshness or one-sidedness of the contractual provision in question. Construction Assocs., Inc. v. Fargo Water Equip. Co., 446 N.W.2d 237, 241 (N.D. 1989). In Construction Assocs., the Court held contractual provisions which limited or excluded the substantive remedies otherwise available at law and left the plaintiff without an effective remedy were substantively unconscionable. Id. at 243-44; see also D.J. Coleman, Inc. v. Nufarm Ams., Inc., 693 F.Supp. 2d 1055, 1073 (D.N.D. 2010) (finding contract provision that limited the remedy for breach of express warranty to the purchase price or the replacement of the product was unconscionable). Here, all other remedies provided for under law were excluded under Rule 29 of the NGFA Rules, stating: "[t]he 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." Appx. P77. The NGFA Rules have their own rules of contract interpretation. The NGFA Rules specifically addressed non-performance and state the options that a party has with respect to the contract, the buyer has three options in the event of the other's breach: 1. agree with the seller or buyer upon an extension of the contract; or 2. buy-in for the account of the seller, or sell out account of the Buyer using due diligence, the defaulted potion of the contract; or 3.

cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day. Appx. P21. These remedies deny the parties other substantive remedies and defenses including the remedies provided in The Contracts, the North Dakota contract law, and the Uniform Commercial Code.

¶53 Here, there was no provision in The Contracts that references arbitration or stated specifically The Contracts were governed by the NGFA Rules. The provision that allegedly incorporates arbitration reads only, "Trade rules: NGFA," even though The Contracts contain an express provision for an event of default by the seller, "If Buyer is able to receive grain, and if delivery of the full quantity of grain covered by this contract is then not made on or before the Expiration Date, Seller shall be deemed in breach of this contract and Buyer shall have all rights and remedies provided by law, including but not limited to the rights and remedies set forth in Article 2, Part 7 of the Uniform Commercial Code as adopted in Seller's state…" Under this provision, it would be reasonable for David to conclude that he would expect to litigate the matter under the Uniform Commercial Code, and other remedies and defenses allowed to him under North Dakota law. Instead, without notice and only a cryptic reference to trade rules that were not part of The Contracts or made available to David, he was severely limited as to his substantive remedies. This court should find the arbitration provision of the NGFA Rules that were incorporated into the contract between JVG and David as both procedurally and substantively unconscionable.

¶54 Here, the district court, it its ruling requiring the parties to submit to arbitration, noted that David was "no stranger to commodity contracts and has been in litigation

dealing with commodity contracts and arbitration agreements prior to the current case," citing a previous case David was involved in regarding an arbitration provision contained in a contract. Appx. P44 (citing David v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 440 N.W.2d 269 (N.D. 1989)). In that case, David disputed he was required to arbitrate a case under the arbitration provision of a contract. That case, unlike this one, contained an explicit arbitration agreement. Id. at 270. That case is not on point with the facts present in this case, where the Contracts did not contain an express arbitration provision.

¶55 Next, the district court stated that David failed to ask about the contract or ask for access to the NGFA Rules and was held to the terms of The Contracts again citing David, 440 N.W.2d at 274. Appx. P45. This finding failed to address The Contracts specific references to the remedies available to the parties in the event of default. Appx. P69-72. It also improperly shifted the burden of proof to David instead of requiring JVG to prove David knew of the arbitration rule at the time he executed The Contracts. Appx. P20-28. See Miller, 124 N.W.2d at 479. David did not allege that he failed to read The Contracts, or that he was not bound by The Contracts. Ordering the parties to arbitrate under the NGFA Rules was both procedurally and substantively unconscionable. In interpreting The Contracts as a whole should be interpreted against the drafter and apply the general intent of The Contracts, which was to apply the rules and remedies of the state of North Dakota including the Uniform Commercial Code, over the particular and repugnant clause of "Trade Rules: NGFA." N.D.C.C. §§ 9-07-06, 9-07-15, 9-07-17.

¶56 **E. If the NGFA rules are found to apply, the remedies for failure to deliver grain is an express provision excluded from the arbitration requirement.**

¶57 If the NGFA Rules are found to apply to The Contracts this case should still be governed under its provisions regarding default and not arbitration. The Contracts specifically address the remedies available to the parties in the case where they buyer is able to receive grain, and delivery is not made. Appx. P70, 72. The Contracts state the Buyer shall have all rights and remedies provided by law including but not limited to those set forth in the Uniform Commercial Code Article 2, Part 7. Id. This is a specific exclusion to the NGFA Rules which mandate arbitration. See West Fargo Public School District No. 6 of Cass County v. West Fargo Education Association, 259 N.W.2d 612, 620 (N.D. 1977) (finding an express exclusion clause can exclude a grievance from a broad arbitration provision). If this Court holds the lower court did not err in finding the NGFA Rules applied, it should find that The Contracts specifically excluded the failure to deliver by grain products by seller from the NGFA provisions.

¶58 **F. David did not admit in his Answer the NGFA Rules applied to the contracts.**

¶59 In its Complaint at paragraph 7, JVG alleged, "Both the agreement for delivery of 30,000 bushels of soybeans and the agreement for delivery of 70,000 bushels of soybeans) collectively referred to in this Complaint as the Soybean Contracts) specify that the Rules of the National Gran and Feed Association apply to the Soybean Contracts." Appx. P5. David's Answer denied each and every allegation, thing and matter contained in the Complaint except as otherwise admitted, qualified, or explained.

Appx. P20. David responded to Paragraph 7 of the Complaint as part of one of the affirmative defenses he raised, stating "Paragraph 7 of the Plaintiff's complaint states that the Rules of the National Grain and Feed Association (NGFA) to the Soybean Contracts." Appx. P21-25. David goes on to state what Rule 28(A) of the NGFA Rules states:

> "Rule 28(A) of the NGFA Grain Trade Rules states: [i]f the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone and confirmed in wiring. The buyer shall then, at once elect either to: (1) agree with the Seller upon an extension of the contract; or (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.'"

¶60 The district court stated in its Order Compelling Arbitration that David sought to apply NGFA Trade Rule 27(a) to the contract but deny the arbitration clause of Rule 29 applied, "Apparently, Mr. David seeks to apply the sections of the NGFA Rules that are beneficial to him while ignoring the sections that are not favorable to his position." Appx. P46. David's response to paragraph 7 of the JVG's Complaint was provided as one of several affirmative defenses pled by David. Appx. P23. A party may state as many separate defenses as it has, regardless of consistency. N.D.R.Civ.P. 8(e)(3). David also pled as an affirmative defense the course of dealing between the parties under N.D.C.C. § 41-01-17(3), alleging his conduct in cancelling The Contracts with JVG was similar to previous cancellations between the parties. Additionally, as affirmative defenses, he pled the lawsuit was frivolous, and pled that JVG should be

estopped from denying it received his notice of cancellation in September under N.D.C.C. § 31-11-06. Appx. P24-25. Lastly, in his prayer for relief, David requested the complaint be dismissed with prejudice, that if it was not dismissed and JVG was found to be damaged, that damages be calculated under the prior dealings with the parties as of September 5, 2007, that David be awarded attorney's fees and costs, and for other and further relief as the Court deemed just, fair and equitable. Appx. P24-25. David did not admit the NGFA Rules applied to The Contracts, instead, he properly pled several affirmative defenses under the North Dakota Rules of Civil Procedure.

¶61 **Issue 2: Did the arbitration panel fail to properly apply the law and the NGFA Rules?**

Standard of Review

¶62 An arbitration award will not be vacated unless the award 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. Gratech Co. v. Wold Eng'g., P.C., 2007 ND 46, P10, 729 N.W.2d 326, 330; John T. Jones Constr. Co. v. City of Grand Forks, 2003 ND 109 , P9, 665 N.W.2d 698, 702. Constructive fraud is defined as the breach of a duty, without actual fraudulent intent, gains an advantage to the person in fault or anyone claiming under that person, by misleading another to another's prejudice of anyone claiming under the other. N.D.C.C. § 9-03-09(1). These extra-statutory standards are extremely narrow: an arbitration decision may only be said to be irrational where it fails to draw its essence from the agreement, and an arbitration decision only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law

and then proceed to ignore it. Hoffman v. Cargill Inc., 236 F.3d 458, 461-62 (8th Cir. 2001)(citing Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 749-50 (8th Cir. 1986)).

¶63 **A. The arbitration panel failed to apply the NGFA Rules and well established principals of the law when it found David failed to provide sufficient proof of sending the cancellation letter on September 1, 2007.**

¶64 The arbitration panel refused to consider material evidence of four witnesses that David's cancellation letter dated September 1, 2007, was given to Crystal for mailing and that Crystal personally mailed the two letters together. Appx. P84-111, 164-167. JVG presented no evidence to rebut the presumption that both letters were received by JVG. Appx. P117-137.

¶65 North Dakota law recognizes certain presumptions are satisfactory if uncontradicted. Two of those presumptions are as follows: a writing is dated truly; and that a letter duly directed and mailed was received in the regular course of the mail. N.D.C.C. §§ 31-11-03(23); 31-11-03(24); Wilson v. Divide County, 76 N.W.2d 896 (N.D. 1956)(holding that where there was evidence that a notice of expiration of a period of redemption was mailed to a landowner by registered mail and that the return registry receipt card was signed by the landowner by his wife as agent, it was established that the landowner received the notice); Monson v. Monson, 1998 ND App. 9, 583 N.W.2d 825, 827 (finding appellant failed to rebut the presumption that a letter is presumed to have been received in the regular course of mail when his attorney sent him a letter and notice of trial date). The Court in First Bank v. Neset, considered case

where Neset argued he did not have knowledge of First Bank's foreclosure action against him. First Bank v. Neset, 1997 ND 4, P17, 559 N.W.2d 211, 214. Neset stated in his affidavit that he did not receive a copy of the Summons and Complaint, but failed to deny receiving numerous other pleadings that were mailed to him and none of the mailings were returned by the postal service. Id. The Court found that Neset failed by his vague allegations to rebut the presumption that a letter duly directed and mailed was received in the regular course of the mail. Id. at 18.

¶66 In this case, like the case of First Bank v. Neset, JVG failed to rebut the presumption that a letter duly directed and mailed was received in the regular course of the mail. David, Ken Lyons, Casey David, and Crystal David testified through their affidavits that David wrote two letters to JVG dated September 1, 2007, one letter on his behalf and one on his son's behalf, and gave the letters to his daughter to mail. Appx. P84-111. His daughter mailed both letters in one envelope. Appx. P107-108. JVG acknowledged receipt of the certified letter on September 5, 2010. Appx. P112. Wendy Frohling, Assistant Manager of JVG stated in her affidavit that she received Casey David's letter dated September 1, 2007, but stated she received no communication from David to cancel The Contracts. Appx. P118. She carefully worded her affidavit to state that she, personally, did not receive communication, but does not comment on whether or not anyone else at JVG received communication or even whether she is the usual person that would open the mail. Appx. P117-120. Ms. Frohling did not sign the return receipt for the letter, Charlotte Carlson did. Appx. P112. Ms. Frohling acknowledged in a letter to Casey David that she had been out of

the office from a back surgery stating, “Sorry it has taken me so long to respond to your letters. I have had back surgery and it didn’t go so well.” Appx. 128. Her letter goes onto address Casey’s letter that was sent on September 1, 2007, the letter that was sent in the same envelope as David’s letter that JVG denied receiving. Id. Ms. Frohling failed to address her absence in her affidavit. Appx. P117-120.

¶67 Calvin Diehl, the manager at JVG, also submitted an affidavit that was similarly vague and carefully worded. Appx. P131-33. Mr. Diehl stated he spoke with JVG personnel to keep close track of cancellations, and that he had no indication that David wanted to cancel his soybean contracts. Id. Diehl went on to state that in April he discussed with the present staff of JVG to determine no member of the staff had knowledge prior to April that David cancelled the contracts. Id. Mr. Diehl failed to state that he spoke with all the employees, specifically Charlotte Carlson, who signed for the letter who worked for JVG at the time David sent the letter at and it was received by JVG on September 5, 2007, but resigned prior to April of 2008. Id.

¶68 JVG failed to present evidence to rebut that both letters were not received in the ordinary course of the mail. First Bank where the defendant stated he did not receive the summons and complaint but failed to deny receiving other pleadings, JVG failed to state that only one letter was received. It failed to present evidence of Charlotte Carlson, the woman who accepted delivery of the letter, that there were not two letters contained in the envelope. Appx. P112. JVG also failed to present testimony regarding its ordinary course of business of who accepts the mail and opens it to dispute that that the envelope did not contain both letters as testified to by David and Crystal David.

Appx. P117-133. Like First Bank, the carefully worded affidavits show that JVG received the certified mail and failed to state who opened the letter and the contents of the envelope. Id. JVG failed to rebut the presumption that both letters were received in the ordinary course of the mail.

¶69 Further, NGFA Grain Trade Rule 30(C) provides that when a rule refers to written communication, the sender is responsible for the correct transmission of the message. Appx. P77. Crystal David confirmed that she placed both letters in the envelope and that was sent certified mail return receipt to JVG and JVG signed to receive the letters. Appx. P107-108, 112. Even applying the NGFA Rules, David proved that his letter was sent and signed for by JVG.

¶70 The award of the arbitration panel was completely irrational. Whether this court looks to the laws of our state or the NGFA Rules, the arbitration ignored material evidence that the cancellation letter was sent by Crystal David and signed for by JVG when it concluded that JVG did not have notice of David's cancellation of The Contracts until April of 2008. Appx. P164-167. It failed to correctly apply well-established North Dakota law that a letter mailed was received in the regular course, and it failed to properly apply NGFA Rule 30. The arbitration panel's failure to follow this longstanding presumption of the law, and the NFGA Rule on written communication is a manifest disregard of the law that rendered the panel's decision completely irrational.

¶71 **B. The arbitration panel awarded attorney's fees without a basis in law or by the agreement of the parties.**

¶72 The awards of the attorney's fees and cancellation fees should not be confirmed by this Court. Appx. P166. 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. N.D.C.C. § 32-29.3-21(2). The amount of attorney's fees in civil actions must be left to the agreement, express or implied between the parties. N.D.C.C. § 28-26-01. The Contracts between JVG and David have no contractual provision that would allow for the winning party to recover an award of attorney's fees. Appx. P39, 41. The NGFA Arbitration Rules and NGFA Rules did not allow for the panel to award attorney's fees. Appx. P42, 138-140. The meritless award of attorney's fees by the arbitration panel should be found completely irrational and not be allowed by this Court.

¶73 **C. The arbitration panel awarded cancelation fees without a basis in law or by the agreement of the parties.**

¶74 The arbitration panel awarded JVG cancellation fees in the amount of $0.25 per bushel, totaling $25,000.00. Appx. P166. The cancellation fee awarded to JVG was not allowed under the contract between the parties. 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. N.D.C.C. § 32-29.3-21(1). 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. N.D.C.C. § 32-29.3-21(5). JVG made no claim for exemplary or punitive damages and The Contracts did not allow for a cancellation fee to be awarded in the event of a cancellation of The Contracts. Appx. P69-72. Neither the NGFA Arbitration Rules nor the NGFA Rules allowed for a cancellation fee to be awarded between the parties. Appx. P73-83, 138-140. Although JVG had charged a cancellation fee in the prior dealings amongst the parties, the fee was between $0.02-0.04 per bushel. Appx. P118, 142. Here, without a contractual provision, or NGFA Rule stating otherwise, the calculation fee should not have been awarded, or limited to the previous cancellation rates of $0.02-0.04 per bushel.

¶75 If this Court does find The Contracts compelled the parties to arbitrate, it should deny the award of attorney's fees and cancellation fee because there was no basis for these awards under statutory law or in The Contracts between the parties or the NGFA Rules or Arbitration Rules. Appx. 69, 83, 138-140.

¶76 Although the district court found that David did not file a motion to vacate or modify the arbitration award, David did file a Brief in Opposition to Confirming Arbitration Award. Appx. P51-142, 145. 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 sections 32-29.3-20 or 32-29.3-24 or is vacated pursuant to section 32-29.3-23. N.D.C.C. § 32-29.3-22. A motion to vacate an arbitration award must be filed within ninety days after the movant receives notice of

the award. N.D.C.C. § 32-29.3-23. The parties stipulated to David having additional time to respond to the Motion to Confirm the Arbitration Award. Appx. P50. The district court ordered David additional time to file its response. Appx. 143. The substance of David's argument advocated for the court to vacate the arbitration award. Appx. 54-68. Because the response was not titled "Cross-Motion to Vacate Arbitration Award" should not have prevent the substance of the response motion from being considered. To hold otherwise is to exalt form over substance.

¶77 **Conclusion**

¶78 The intent of David and JVG is contained within the four corners of The Contracts. The Contracts unambiguously address the remedies available to the parties in the event of default and parole evidence of the NGFA Rules is not admissible to contradict The Contracts. David respectfully asks this Court to find the district court erred in interpreting The Contracts to require arbitration, and reverse the Judgment of the district court and remand the case to be continued in district court.

¶79 If this Court finds the district court did not err in interpreting The Contracts to require arbitration, David respectfully asks this court to reverse the Judgment of the district court and remand the case back for the district court to find the arbitration panel issued an award with no basis in The Contracts between the parties or the NGFA Trade Rules or Arbitration Rules and was a manifest disregard for well-established North Dakota law and the NGFA Rules.

Dated this 18 April 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Defendant/Appellant 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 10,099.

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I hereby certify that a true and correct copy of the foregoing **APPELLANT'S BRIEF** (Corrected) was on the 20 April 2011, e-mailed to the following:

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