

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT NO. 20160135**

Cornerstone Bank, )  
)  
Petitioner, )  
)  
v. )  
)  
)  
The Honorable Lee A. Christofferson, Judge of )  
the District Court, Northeast Judicial District; )  
)  
Troy Schaff, Matthew Friederichs, and Matthew )  
Nelsen, James R. Bullis, Montgomery, Goff & )  
Bullis, P.C., Donald Dabbert, Synergy Real )  
Estate Investments, LLC, Mercantile Associates, )  
LLC, Mercantile Associates II, LLC, and )  
Mercantile Associates III, LLC, )  
)  
Respondents. )

On Appeal from the Order Granting the Plaintiff’s Motion to Compel  
Discovery from Cornerstone Bank dated April 12, 2016  
East Central Judicial District, Cass County, North Dakota  
Cass County Case No. 09-2013-CV-2739

The Honorable Lee A. Christofferson

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**BRIEF OF PETITIONER CORNERSTONE BANK**

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Todd E. Zimmerman #05459  
Aubrey J. Zuger #06281  
FREDRIKSON & BYRON, P.A.  
51 Broadway, Suite 400  
Fargo, ND 58102  
Telephone: (701) 237-8200

Brad A. Sinclair #04225  
Kaler Doeling, PLLP  
P.O. Box 9231  
Fargo, ND 58106-9231  
Telephone: (701) 232-8757

Attorneys for Petitioner Cornerstone  
Bank

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## **STATEMENT OF ISSUES**

[1] Whether the Supreme Court should issue a supervisory writ to the district court because the district court erroneously ordered Cornerstone to produce privileged documents without conducting an *in-camera* review.

## **STATEMENT OF THE CASE**

[2] Petitioner Cornerstone Bank (“Cornerstone”) petitions the Court for a supervisory writ directing the district court to reverse an order compelling production of attorney-client privileged and FDIC-privileged documents from Cornerstone.

## **STATEMENT OF FACTS**

### **I. RESPONDENTS ASSERT CLAIMS AGAINST CORNERSTONE AND OTHER DEFENDANTS REGARDING THE SYNERGY INVESTMENTS.**

[3] Respondents Troy Schaff, Matthew Friederichs, and Matthew Nelsen (“Respondents”) filed a Complaint in 2013, asserting claims with respect to a 2009 investment Respondents made in a company called Synergy Real Estate Investments, LLC (“Synergy”). Dkt. 2. Respondents asserted claims against the other Defendants (excluding Cornerstone Bank) related to the failed investment. Id.

[4] Respondents also asserted claims against Cornerstone, Synergy’s secured lender. Id. Although none of the Respondents ever requested that Cornerstone provide any information regarding Synergy’s finances, Respondents alleged that Cornerstone failed to fully advise them regarding Synergy’s financial condition. Id.

[5] From 2011 to 2015, Cornerstone explored options to ensure that its loan to Synergy was paid in full and that Respondents’ guarantees of the Synergy loans were extinguished. Dkt. 664. Respondents were represented by counsel, as well as forensic accounting experts, during the workout process, which was finally completed by the end

of 2015. Dkt. 601, 664. By then, the end result was that Cornerstone's loan was paid in full and Respondents' guarantees on Synergy's loans were extinguished. Dkt. 667-671. Despite that result, Respondents' Amended Complaint also alleged that Cornerstone acted improperly during this workout process of the Synergy loan.

**A. Attorney Brad Sinclair serves as in-house counsel for Cornerstone and performed business functions.**

[6] When Attorney Brad Sinclair was in private practice at the Serkland Law Firm, he represented Cornerstone. On or about November 15, 2010, Mr. Sinclair became in-house legal counsel and Senior Vice President of Administration for Cornerstone. Dkt. 601. In that role, he advised the board, handled legal matters, worked as a loan officer, and served as Cornerstone's business representative. Dkt. 636, 637, 640. Respondents acknowledge and concede that during this time, Mr. Sinclair provided legal advice to Cornerstone and drafted settlement agreements, as well as other legal documents. Dkt. 43. Indeed, Mr. Sinclair represented Cornerstone in at least nine court actions. Dkt. 664. Specific to this matter, Brad Sinclair did not assist with the Synergy investments matter until March 2012. Dkt. 601.

**B. Mr. Sinclair returns to private practice and is Cornerstone's counsel in this action.**

[7] In 2013, Mr. Sinclair returned to private practice and joined the Kaler Doeling Law Firm. App. 64-65. By that time, litigation was being overtly threatened by the Respondents and they had retained their current litigation counsel, Jacob Hendricks, with the Felhaber law firm. Dkt. 601. Prior to that date, Respondents had been represented by attorney David Hauff with the Anderson & Bottrell law firm. App. 63.

[8] Respondents commenced the current action on September 23, 2013. Dkt. 2. Mr. Sinclair thus represented Cornerstone as outside counsel in the months leading up

to this action. Dkt. 601. He has represented Cornerstone as outside counsel of record since this action was commenced in September, 2013. Id.

**C. Respondents broadly requested plainly privileged documents.**

[9] In this action, Respondents issued interrogatories and requests for production, seeking all documents that reflect communications regarding Synergy from January 1, 2011, to the present. Dkt. 642. Cornerstone answered those discovery requests and produced in excess of 11,000 pages of documents. Dkt. 664. Cornerstone produced numerous documents in which Mr. Sinclair participated, but was not providing legal advice or opinions. Dkt. 665-671.

[10] Specific to the workout process of the Synergy loans, Cornerstone produced letters, meeting minutes, emails, and other communications that were not protected by the attorney-client privilege. Dkt. 664. The documents produced reflect that Cornerstone considered many options to work out the Synergy loans.

[11] Respondents took fact depositions related to the allegations in the complaint. Dkt. 310-19, 348-52, 380-82, 639. They also requested and received documents from the other defendants. Additional fact depositions will be taken regarding Cornerstone's workout efforts. The facts of this case are well known.

[12] Cornerstone did not produce documents which were protected by the attorney-client privilege or FDIC-privilege during the time Mr. Sinclair was a Cornerstone employee. App. 63-118. Specifically, Cornerstone did not produce documents where Mr. Sinclair or other attorneys were providing legal advice or opinions. Id. Indeed some of those documents directly discuss legal strategies and obligations regarding the claims at issue in this lawsuit. Id.



[13] Cornerstone did not produce documents reflecting communications with Mr. Sinclair after he returned to private practice with the Kaler Doeling firm on July 1, 2013. Id. Those documents reflect nothing less than the communications of a company with its outside counsel during a time period when the company was threatened with litigation and then sued. No other party in this action has produced such documents or been asked to provide a privilege log detailing such documents. Dkt. 664.

[14] Although no other party has done so, Cornerstone prepared and provided a privilege log. App. 57-62, 63-118. That privilege log sets forth by category and bates number the privileged documents that were being withheld. Id.

**D. Respondents moved to compel Cornerstone to produce the documents identified on Cornerstone's privilege log.**

[15] Respondents moved to compel Cornerstone to produce documents that Cornerstone had withheld from production on the basis of privilege. Dkt. 635. Respondents demanded all of the documents on the privilege log including the hundreds of communications between Cornerstone and Mr. Sinclair before and after litigation had commenced. Id.

[16] Cornerstone provided Respondents and the district court with a supplemental privilege log detailing each of the documents withheld from production. App. 63-118. In total, 759 documents were withheld from production. Id. Fully 662 of those documents were generated and dated after Mr. Sinclair had returned to private practice and was representing Cornerstone in an obvious pre-litigation and then litigation setting. Id. Indeed, 588 of the documents were generated after litigation was actually commenced and Mr. Sinclair was serving as counsel of record for Cornerstone in this

action. Id. Simply stated, Respondents were demanding that Mr. Sinclair's litigation file be turned over as part of discovery.

[17] Only 97 out of the 759 documents withheld were dated and generated prior to Mr. Sinclair returning to private practice. In summary, the four categories of documents withheld by Cornerstone are as follows:

- 69 documents from before April 2013 when Respondents made express threats of litigation.
- 28 documents from April 1, 2013, through July 1, 2013, when Brad Sinclair returned to private practice.
- 74 documents from July 1, 2013, through September 23, 2013, when litigation is commenced.
- 588 documents from and after September 23, 2013, when litigation is commenced.

App. 63-118.

[18] Thus, Respondents sought Mr. Sinclair's communications while he was in-house attorney at Cornerstone, as well as when he represented Cornerstone as its counsel of record. Respondents even requested the communications between Mr. Sinclair and Cornerstone regarding this pending litigation.

[19] Cornerstone resisted the motion by claiming that the documents requested by Respondents relate to Cornerstone's attorney providing (1) legal advice to Cornerstone; and/or (2) preparing and providing privileged information to the FDIC.

**E. The Court ordered Cornerstone to produce privileged documents.**

[20] A hearing on Respondents' motion to compel was held on April 8, 2016. At the hearing, Respondents conceded that they were no longer seeking the documents on

the privilege log from the time period of July 1 to the present – the time period after Attorney Sinclair returned to private practice. App. 127.

[21] Twice during the hearing, Respondents requested that the district court appoint a special master to review the documents or conduct an *in-camera* review. App. 130-31. Cornerstone’s attorney also requested that the court conduct an *in-camera* review of the documents, as follows:

[Counsel for Cornerstone]: If there is to be an in-camera review, it seems to me the appropriate thing would be to have those 28 and 69 documents reviewed in-camera. And if Your Honor does not believe they’re privileged, then they would be turned over and that would end the dispute, I believe.

App. 132.

[22] The Court responded to Cornerstone’s request for an in-camera review, as follows:

[The Court]: What am I going to know about all of this looking at them? If you both can make a solid argument for one way or the other, then how am I to be so decisive and know which side is which? I’m not going there.

...

The Court finds merit in the motion. A and B will be turned over – 69 documents in A, 28 in B will be turned over to the plaintiffs as soon as possible.

The other ones will need a request or a motion from the Court – to the Court that you want those based on what you’ve found in A and B.

...

Because I don’t find that the first two are covered by the privilege.

App. 132, 133.

[23] The court thus granted the motion to compel production of the 97 documents from before July 1, 2013, when Attorney Sinclair returned to private practice.

Id.

[24] The district court denied, for the present time, the motion to compel as to 662 documents which were generated after Mr. Sinclair returned to private practice with litigation imminent and then commenced. Id. The court, however, left open the possibility that even those documents might have to be produced at a later date. Id.

[25] On April 12, 2016, the district court entered an order granting Respondents' motion to compel discovery from Cornerstone. App. 119-20. The April 12, 2016, order required that Cornerstone produce unredacted and complete copies of all documents and attachments identified on Cornerstone's privilege log within two days. Id.

**F. Cornerstone petitioned for supervisory writ.**

[26] Cornerstone petitioned the Court for a supervisory writ. The Court granted Cornerstone's motion to stay the district court's order pending the Supreme Court's consideration of Cornerstone's petition for supervisory writ. The Court also granted Cornerstone until April 21, 2016, to file a brief in support of the petition for supervisory writ.

**LEGAL ARGUMENT**

**I. THE COURT SHOULD ISSUE A SUPERVISORY WRIT DIRECTING THE DISTRICT COURT TO CONDUCT AN *IN CAMERA* REVIEW OF PRIVILEGED DOCUMENTS.**

**A. The Court issues supervisory writs to prevent injustice when no adequate alternative remedy exists.**

[27] The Court has authority to issue supervisory writs under N.D. Const. art. VI, § 2 and N.D.C.C. § 27-02-04. The Court's authority is exercised on a case-by-case basis and cannot be invoked as a matter of right. State ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546. The Court exercises its discretionary authority to rectify

errors and prevent injustice “in extraordinary cases in which no adequate alternative remedy exists.” Western Horizons Living Centers v. Feland, 2014 ND 175, ¶ 6, 853 N.W.2d 36.

**B. An order compelling a party to disclose privileged information is an extraordinary case.**

[28] An order compelling a party to disclose information subject to a privilege is not directly appealable. Western Horizons Living Centers, 2014 ND 175, ¶ 8, 853 N.W.2d 36. The Court has recognized that once privileged disclosures are made “they cannot be ‘unmade’ and that a party faced with such an order “has no immediate recourse but to answer the requests or be held in contempt.” Id. at ¶ 7. “Consequently, the only feasible remedy available to petitioners is to seek a supervisory writ.” Polum v. ND District Court, 450 N.W.2d 761, 763 (N.D. 1990).

[29] The Court has previously issued a supervisory writ to preclude the disclosure of privileged documents.

[30] In Western Horizons Living Centers, the district court ordered the plaintiff to produce an insurer’s claims file that included attorney-client communications, as well as settlement negotiations and related documents. 2014 ND 175, ¶ 4, 853 N.W.2d 36. The Supreme Court concluded that issues concerning privilege were “of significant public interest” and that a supervisory writ was the plaintiff’s sole remedy. Id. at ¶ 7.

[31] Although the record did not disclose the exact nature of information sought to be protected, the Supreme Court held that, “On its face, some of the information the court ordered disclosed may be subject to privilege or protection under the relevant rules.” Id. at ¶ 8. Accordingly, the Court granted the petition for supervisory writ. Id. at ¶¶ 19-20.

[32] In Trinity Medical Center v. Holum, 544 N.W.2d 148 (N.D. 1996), the plaintiff sought information regarding the hospital's review of a physician's care for patients. The hospital objected, asserting a statutory medical peer review privilege. Id. at 151. The district court ordered production of the documents. Id.

[33] Reasoning that the hospital had no recourse other than to produce the privileged information or be held in contempt, the Supreme Court determined that it should exercise its supervisory jurisdiction. Id. at 151-52. The Supreme Court concluded that the documents were protected by privilege, granted the supervisory writ, and ordered the district court to vacate its discovery order. Id. at 157.

[34] Likewise, in Reems v. Hunke, the hospital sought documents from the plaintiff's medical investigator. Reems v. Hunke, 509 N.W.2d 45 (N.D. 1993). The plaintiff objected that the documents were protected work product, as well as expert opinions secured in anticipation of litigation. Id. at 47. The district court ordered that plaintiff produce the documents. Id. at 47-48.

[35] Exercising its supervisory powers, the Supreme Court first ordered the district court to conduct an *in camera* review of the documents. Id. at 48. The district court subsequently reviewed the documents and ordered that plaintiff needed to produce some of the documents. Id.

[36] The plaintiff again petitioned for a supervisory writ. Id. The Supreme Court determined that the hospital was seeking documents from an individual who was hired by the plaintiff in anticipation of litigation. Id. at 47-48. Specifically, the Court concluded that the documents included mental impressions and conclusions about the case and should not be produced. Id. at 48. Accordingly, the Supreme Court granted the

petition for supervisory writ and directed the district court to vacate its discovery order. Id. at 48-49.

[37] Here, just like in Western Horizons, Trinity Medical Center, and Reems, the Supreme Court should review the district court's discovery order requiring Cornerstone to produce privileged and protected documents. Absent a supervisory writ, Cornerstone will be required to produce said documents – something that cannot later be reversed or remedied and which is in violation of the North Dakota Rules of Evidence and federal law.

**C. The documents requested are privileged.**

[38] Cornerstone properly resisted the Respondents' discovery requests and motion to compel. Those requests broadly sought all communications between Cornerstone and Mr. Sinclair from 2011 to the present. In total, 662 of the documents falling into that category were generated and dated after Mr. Sinclair had returned to private practice, with litigation being overtly threatened and then commenced. Simply stated, Respondents were demanding the communications between Cornerstone and its outside counsel regarding this very litigation.

[39] Cornerstone also withheld 97 documents dated and generated prior to July 1, 2013, when Mr. Sinclair was an employee of Cornerstone because they were protected by the attorney-client privilege and/or FDIC privileges. Cornerstone properly preserved its claim of privilege and declined to produce the documents on the basis of privilege. In compliance with Rule 26(b)(5) of the North Dakota Rules of Civil Procedure, Cornerstone expressly made the claim of privilege by describing the nature of information it was not producing through the creation of a privilege log.

**1. Communications between attorney and client are privileged and protected from disclosure.**

[40] Rule 502(b) of the North Dakota Rules of Evidence provides that “a client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” The privilege applies “to protect confidential communications between clients or their representatives and their lawyer or their lawyer’s representatives.” *Id.* The privilege is intended “to provide clients the freedom to discuss personal matters with their lawyer and to encourage clients or their representatives to freely communicate with their lawyer or their lawyer’s representative without fear of disclosure.” Western Horizons Living Centers, 2014 ND 175, ¶ 16, 853 N.W.2d 36. Moreover, any discovery ordered must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. N.D.R.Civ.P. 26(b)(3)(B); Western Horizons Living Centers, 2014 ND 175, ¶ 13.

[41] The attorney-client privilege is often between attorney and client. N.D.R. Evid. 502(b)(1). It also applies, however, to communications between representatives of the client or between a representative of the client and the lawyer. N.D.R. Evid. 502(b)(4).

[42] Respondents contend that Cornerstone has to produce all of Mr. Sinclair’s communications with Cornerstone because Mr. Sinclair, like other in-house counsel, performed some business functions. Respondents’ position is simply incorrect.

[43] To be clear, Cornerstone does not dispute that an attorney who is acting in a non-legal capacity – in other words, an attorney who is not communicating for the



purpose of facilitating the rendition of professional legal services – is not protected by the attorney-client privilege. That is why Cornerstone produced hundreds of documents in which Mr. Sinclair was communicating about non-legal matters or was serving in a business capacity.

[44] Mr. Sinclair’s communications with Cornerstone that involve legal advice, opinions, strategies, and other legal services *are*, however, protected by the attorney-client privilege. See Western Horizons Living Centers, 2014 ND 175, 853 N.W.2d 36; Simon v. GD Searle & Co., 816 F.2d 397 (8th Cir. 1997); Rabushaka ex rel. U.S. v. Crane Co., 122 F.3d 559 (8th Cir. 1997). The crucial element in establishing that the attorney-client privilege applies is that the communication is made in confidence for the purposes of obtaining legal advice from the attorney. See Progressive Cas. Ins. Co. v. FDIC, 49 F. Supp. 3d 545, 557 (N.D. Iowa 2014).

[45] Courts have previously considered whether the attorney-client privilege protects communications between in-house counsel and its business client. Courts have recognized that in-house counsel often plays a dual role of legal advisor and business advisor. When in-house counsel serves both as a legal advisor and business advisor, and the attorney provides legal advice to the company in the attorney’s capacity as a legal advisor, those communications are protected by attorney-client privilege. See Faloney v. Wachovia Bank, N.A., 254 F.R.D. 204, 209 (E.D. Pa. 2008); In re 3dfx Interactive, Inc., 347 B.R. 394, 403 (N.D. Cal. Bankr. 2006). The critical question is whether the communication in question was made for the purpose of securing legal advice. Kramer v. Raymond Corp., 1992 WL 122856, at \*1 (E.D. Pa. May 29, 1992).

[46] The district court ordered that Cornerstone produce 97 documents that are privileged. Some of those documents reflect communications between Cornerstone and Mr. Sinclair and are protected by the attorney-client privilege. Some of the documents include email subjects or document names which blatantly state that they are “Synergy Atty-Client,” “synergy ATTY-CLIENT COMMUNICATION,” “Synergy legal discussion,” and are requests by Cornerstone for an “opinion.” Other documents include email subjects or document names such as “Atty fees bill Synergy” or “RE: Who is accepting service for Synergy.” Some documents do not have an email subject or document name that reflects that they are privileged, but a review of the substance of the communication shows they are privileged.

[47] Thus, even the titles of some of these documents fully support Cornerstone’s claims that they are communications made for the purpose of securing legal advice or which are reasonably necessary for the transmission of an attorney-client communication. These documents are protected under Rule 502 of the North Dakota Rules of Evidence, and the district court erred in ordering their disclosure.

**2. Federal law restricts the disclosure of exempt banking documents.**

[48] Examination reports, correspondence sent to governmental examiners, and reports to regulators are all types of records which are “exempt records” under federal law. 12 C.F.R. § 309.6(a); 12 C.F.R. § 309.5(g)(8). The FDIC prohibits a bank from disclosing “exempt records,” or the information contained within the records, without the FDIC’s express permission. 12 C.F.R. § 309.6(a). If a bank, such as Cornerstone, receives a request or order seeking disclosure of exempt records, it is required by law to notify the FDIC and decline to produce the records. 12 C.F.R. § 309.7(b).

[49] With respect to exempt records, the FDIC is the holder of the privilege. 12 C.F.R. § 309.6(a). The FDIC will not release exempt documents for use in litigation unless the FDIC determines that (1) the records are relevant to litigation; (2) good cause justifies the disclosure and that all other potential sources of such information have been exhausted; (3) a protective order adequately protects the FDIC's interests; and (4) there is a clear showing that the production is in the best interests of justice. 12 C.F.R. § 309.6(b).

[50] Bank examination privilege exists because regulators require a continuous flow of communications with banks. In re Subpoena served upon the Comptrollers of the Currency and Secretary of the Board of Governors of the Federal Reserve System, 967 F.2d 630 (D.C. 1992). The bank examination privilege encourages open and forthcoming responses from banks to the examiners. Id.

[51] Some of the 97 documents were generated in response to requests from the FDIC. Many of these documents are to or from Syd J. Lawler, Cornerstone's Chief Credit Officer, who is responsible for handling inquiries and examinations with the FDIC. These documents include a communication entitled "Cornerstone Bank Examination with counsel," income statements to be provided to the FDIC, and other documents of which the email subject line even references the "FDIC." Other documents may not reference the FDIC in their subject line or document title but were created for the purpose of responding to an FDIC inquiry. The communications cannot be disclosed without permission by the FDIC. It was therefore error for the district court to order their production.

[52] Indeed, the issue of FDIC privilege has previously been addressed in this case. Cornerstone previously declined to produce FDIC-related documents. The FDIC ultimately appeared in the action and produced numerous documents sought by the Respondents. Dkt. 324. The FDIC may ultimately choose to release additional documents, but Cornerstone cannot independently choose to waive the FDIC privilege.

[53] Cornerstone also notes its concern regarding the issue of waiver. The district court ordered that 97 documents be produced, while leaving open the possibility that it may order production of even those documents dated and generated after Mr. Sinclair had returned to private practice as outside counsel for Cornerstone. The district court expressly noted that the Respondents could bring a further motion or request to produce some or all of the 662 documents generated during the period that Mr. Sinclair was in private practice, once Respondents reviewed the 97 documents generated while Mr. Sinclair was still employed by Cornerstone. That approach raises substantial concerns regarding a waiver of the privilege resulting from the production of the initial 97 documents.

**D. In the alternative, the district court should conduct an *in camera* review of the documents to determine privilege.**

[54] Before a district court orders the disclosure of records which are claimed to be privileged, it should conduct an *in camera* inspection of the documents. Jane H. v. Rothe, 488 N.W.2d 879 (N.D. 1992); Trinity Medical Center, 544 N.W.2d at 151, n.2.

[55] In Jane H., the district court erred in ordering the production of chemical dependency treatment records (protected under federal law) without first reviewing the medical records *in camera* to determine whether the records contained protected

information. Id. at 883. Accordingly, the Supreme Court granted a supervisory writ to order an *in camera* review of the documents. Id.

[56] Likewise, in Western Horizons Living Centers, the Supreme Court concluded that “the resolution of discovery issues sometimes requires a private, in chamber review of the information to determine whether the information is privileged or protected.” Western Horizons Living Centers v. Feland, 2014 ND 175, ¶ 18, 853 N.W.2d 36. The Court ruled that the district court must examine the documents to determine whether the requested information is protected by the attorney-client privilege or is otherwise protected from disclosure. Id. at ¶ 19.

[57] As in Jane H. and Western Horizons, an *in camera* review of the requested documents may be required if the Court is unable to determine that they are protected based on a review of the privilege log. Indeed, Cornerstone and the Respondents *both* requested that the district court conduct an *in camera* review of the documents to determine whether they were privileged.

[58] Despite properly asserting the privilege, providing a privilege log, and both parties requesting an *in camera* review, the district court ordered that the privileged documents be produced without conducting an *in camera* review. An *in camera* review of the documents would demonstrate that in-house and outside counsels’ communications with Cornerstone (and each other) are for the purpose of rendering legal services and therefore privileged. Indeed, some of the documents directly discuss legal strategies and obligations regarding the claims at issue in this lawsuit. Other documents are communications with and involving the FDIC, which are similarly protected from

disclosure. Accordingly, it was error for the district court to require Cornerstone to produce them.

### **CONCLUSION**

[59] Cornerstone seeks a supervisory writ from the Court, directing the district court to reverse an order compelling production of documents from Cornerstone. In the alternative, the Court should order the district court to conduct an *in camera* review of the documents to determine privilege.

Dated: April 25, 2016

/s/ Todd E. Zimmerman

Todd E. Zimmerman #05459

Aubrey J. Zuger #06281

FREDRIKSON & BYRON, P.A.

51 Broadway, Suite 400

Fargo, ND 58102

Telephone: (701) 237-8200

[tzimmerman@fredlaw.com](mailto:tzimmerman@fredlaw.com)

[azuger@fredlaw.com](mailto:azuger@fredlaw.com)

Brad A. Sinclair #04225

Kaler Doeling, PLLP

3429 Interstate Boulevard S.

P.O. Box 9231

Fargo, ND 58106-9231

Telephone: (701) 232-8757

[brad@kaler-doeling.com](mailto:brad@kaler-doeling.com)

Attorneys for Petitioner Cornerstone Bank

## CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Cornerstone Bank in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 4,291.

Dated: April 25, 2016

/s/ Todd E. Zimmerman

Todd E. Zimmerman #05459

Aubrey J. Zuger #06281

FREDRIKSON & BYRON, P.A.

51 Broadway, Suite 400

Fargo, ND 58102

Telephone: (701) 237-8200

[tzimmerman@fredlaw.com](mailto:tzimmerman@fredlaw.com)

[azuger@fredlaw.com](mailto:azuger@fredlaw.com)

Brad A. Sinclair #04225

Kaler Doeling, PLLP

3429 Interstate Boulevard S.

P.O. Box 9231

Fargo, ND 58106-9231

Telephone: (701) 232-8757

[brad@kaler-doeling.com](mailto:brad@kaler-doeling.com)

Attorneys for Petitioner Cornerstone Bank

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT NO. 20160135

Cornerstone Bank, )  
)  
Petitioner, )  
)  
v. )  
)  
The Honorable Lee A. Christofferson, Judge of )  
the District Court, Northeast Judicial District; )  
Troy Schaff, Matthew Friederichs, and Matthew )  
Nelsen, James R. Bullis, Montgomery, Goff & )  
Bullis, P.C., Donald Dabbert, Synergy Real )  
Estate Investments, LLC, Mercantile Associates, )  
LLC, Mercantile Associates II, LLC, and )  
Mercantile Associates III, LLC, )  
)  
Respondents. )

**CERTIFICATE OF SERVICE**

I certify that on April 21, 2016, the following documents were filed:

Brief of Petitioner Cornerstone Bank

Appendix of Petitioner Cornerstone Bank

Copies of the foregoing were served via email, as follows:

W. Todd Haggart  
[thaggart@vogellaw.com](mailto:thaggart@vogellaw.com)

Brad A. Sinclair  
[brad@kaler-doeling.com](mailto:brad@kaler-doeling.com)

Steven J. Lies  
John Bullis  
[jbullis@liesandbullis.com](mailto:jbullis@liesandbullis.com)  
[slies@liesandbullis.com](mailto:slies@liesandbullis.com)

Daniel R. Kelly  
Jacob C. Hendricks  
Ryan A. Olson  
[dkelly@felhaber.com](mailto:dkelly@felhaber.com)  
[jhendricks@felhaber.com](mailto:jhendricks@felhaber.com)  
[rolson@felhaber.com](mailto:rolson@felhaber.com)

The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.



Dated: April 21, 2016

/s/ Todd E. Zimmerman  
Todd E. Zimmerman #05459  
FREDRIKSON & BYRON P.A.  
51 Broadway, Suite 400  
Fargo, ND 58102  
Telephone: (701) 237-8200  
[tzimmerman@fredlaw.com](mailto:tzimmerman@fredlaw.com)

Attorney for Cornerstone Bank

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