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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

THE STATE OF NORTH DAKOTA

Loren Zundel and Richard Zundel, Plaintiff and Appellee v. Stephen Zundel, Defendant and Appellant.	**Supreme Court No.: 20170003** **District Court No.: 23-2015-CV-00023**

BRIEF OF APPELLANT

Appeal of Notice of Entry of Judgement from November 11th, 2016
In District Court Case Number 23-2015-CV-00023
County of LaMoure, Southeast Judicial District
Honorable Daniel D. Narum, Recused
Honorable Jay A. Schmitz, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred as a matter of law when it granted a Rule 12(c) motion dismissing Stephen's claim under N.D.C.C. §47-16-02?

2. Whether the District Court erred as a matter fact when it declared Justina Zundel, Jason Zundel, Kyle Zundel, Keenan Zundel and Allexa Zundel are third party beneficiaries and tenants?

3. Whether the District Court erred as a matter of law and fact when it declared Loren Zundel and Richard Zundel (and third-party beneficiaries) have fully complied with their obligations?

4. Whether the District Court erred as a matter of law and fact when it dismissed Stephen’s eviction action?

5. Whether the District Court abused its discretion when it granted attorney’s fees to Loren Zundel and Richard Zundel?

STATEMENT OF THE CASE

[1] This dispute is over a lease of real property containing grain bins, known respectively as the "Lease" and "Bin Site." (Appendix #14-18). Loren Zundel and Richard Zundel ("Loren" and "Richard") initiated the action against Stephen Zundel ("Stephen") in LaMoure County District Court ("District Court") seeking: 1) a declaratory judgment that they had complied with the terms of the Lease; 2) contribution from Stephen for rents and 3) equitable claims. (Appendix #12-13). Judge Daniel Narum ("Judge Narum") was assigned. (Docket #12). Stephen denied the allegations and counterclaimed, seeking: 1) eviction for various breaches of the Lease; 2) to have the Lease deemed void under N.D.C.C. §47-16-02; and 3) equitable claims. (Appendix #19-30). Loren and Richard opposed Stephen's allegations and sought partial judgment on the pleadings seeking dismissal of some equitable claims and dismissal of Stephen's claim that the Lease was void under §47-16-02. (Appendix #31-33; Docket #27). Stephen opposed the motion. (Docket #31). The District Court granted a partial judgment on the pleadings regarding some of the equitable claims and regarding §47-16-02, which had the effect of dismissing Stephen's claim that the Lease is void but leaving Stephen's claim "for such other and further relief as to the court may deem fair and equitable." (Appendix #30; Appendix #34-41).

[2] Stephen sought partial judgment on the pleading for dismissal of some of the equitable claims raised by Loren and Richard. (Docket # 43). The Court granted said motion. (Docket #65). Stephen raised the unconscionability claim before trial. (Docket #59 ¶ 24).

[3] A trial was held on January 20 and 21, 2016 which was followed by written closing and rebuttal arguments. (Docket #124; Docket #127; Docket #128; Docket #131; Docket #133; Docket #134). The District Court ruled for Loren and Richard by: 1) dismissing Stephen's eviction action; 2) declaring Loren's and Richard's full compliance with the Lease obligations; 3) declaring several third-party beneficiaries as tenants under the Lease; and 4) awarding attorney's fees and costs to Loren and Richard. (Appendix #42-59).

[4] Loren and Richard sought $69,773.05 in attorney's fees, which Stephen opposed. (Docket #145; Docket #148). Judge Narum recused himself due to Richard's ex parte communication with him. (Docket #160). Judge Jay Schmitz ("Judge Schmitz") was assigned and awarded Loren and Richard attorney's fees of $21,182.00. (Docket #161; Docket #165). A proposed order for judgment was submitted to Judge Narum. (Docket #166). Stephen sought the recusal of Judge Narum. (Docket #169). Richard and Loren opposed the recusal but the District Court (Judge Schmitz) intervened and Stephen agreed to Judge Schmitz's execution of the judgment. (Docket #162; Docket #172; Docket #173). Stephen filed a notice of appeal. (Appendix #62-63).

Standard of Review

[5] Issue I (Rule 12(c) dismissal of N.D.C.C. §47-16-02 claim) is reviewed de novo. An appeal of a decision granting judgment on the pleadings under N.D.R.Civ.P. Rule 12 is reviewed de novo. Tibert v. Minto Grain, 2004 ND 133, ¶ 6, 682 N.W.2d 294. A claim should not be dismissed under Rule 12(c) unless the moving party shows beyond a reasonable doubt the claimant could not prove the set of facts in support of his claim which would entitle him to relief. Tibert, 2004 ND 133, ¶ 7, 682 N.W.2d 294;

N.D.R.Civ.P. Rule 12(c). A complaint is taken as true and construed in a light most favorable to the party making it. Id. A complaint will be dismissed only if it is within certainty that it is impossible to prove the claim. Id. Statutory interpretation is a question of law, which this Court reviews de novo. Olson v. Job Service, 2013 ND 24, ¶ 3, 827 N.W.2d 36.

[6] Issue II (Identity of the Tenants) raises questions of fact which are reviewed under the clearly erroneous standard. A finding of fact can be set aside if it is clearly erroneous. Nodak Mutual Insurance Co. v. Bahr-Renner, 2014 ND 39, ¶ 7, 842 N.W.2d 912. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence supports it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made." Id.

[7] Issues III (Compliance with Lease) and IV (Dismissal of Eviction) each raise their own mixed questions of law and fact. Questions of law are reviewed de novo, and the questions of fact are reviewed under the clearly erroneous standard.

[8] Issue V (Attorney's Fees) is reviewed under the abuse of discretion standard and is also subject to the good faith exception. Riemers v. State of North Dakota, 2008 ND 101, ¶ 8, 750 N.W.2d 407. This Court reviews a district court's decision regarding attorney's fees under the abuse of discretion standard. Id. A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law. Overboe v. Brodshaug, 2008 ND 112, ¶ 7, 751 N.W.2d 177. A court acts arbitrarily, capriciously, or unreasonably when its decision is not the product of a rational mental process by which the facts and law relied upon are stated together for the purpose of reaching a reasoned and reasonable decision. Riemers

v. Hill, 2016 ND 137, ¶ 9, 881 N.W.2d 624. A party who argues a good faith modification or extension of law will find safe harbor from an award of attorney's fees. N.D.C.C. §28-26-01.

ANALYSIS

I. The District Court erred as a matter of law in granting a Rule 12(c) motion dismissing Stephen's claim under N.D.C.C. §47-16-02.

A. Facts

[9] Tenants to the Lease may use the Bin Site to store "crops, farming equipment, farming supplies and other purposes related thereto." (Appendix #15–Section 8).

[10] Activities on the Leased Premises included haying, grazing of animals and storage of various grain for both seed storage prior to planting and for harvested crops stored for later sale. (Docket #33). Grain handling also takes place by use of various augers for storage of and removal of grain. Id.

[11] The Lease reserves rent of $400 annually and paid in advance on December 31. (Appendix #15–Section 4).

[12] The Lease had an effective date of January 1, 2006. (Appendix #14-15–Section 3). The duration of the Lease is for the life of all the named tenants (Loren, Richard, Stephen, and Donald who died before this action was commenced) and the grandchildren of Edwin Zundel "living at the time of the commencement of this lease who engage in the practice of farming." (Appendix #14-15–Sections 1(e) and 3). The District Court concluded §47-16-02 was not applicable to void the Lease and dismissed the claim under N.D.R. Civ. Rule 12(c). (Appendix #40 ¶ 25).

B. Law and Argument

[13] Section 47-16-02 says "No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid." N.D.C.C. §47-16-02.

Three Prong Test:

[14] Section §47-16-02 has been interpreted to require a three-prong test for invalidating an agriculture lease. Anderson v. Blixt, 72 N.W.2d 799, 803 (N.D 1955); N.D.C.C. §47-16-02.

[15] Prong one considers whether: (a) the land is capable of an agricultural purpose and (b) the lease is capable of an agricultural purpose. Id.

[16] Prong two considers the reservation of rent or services. Wegner v. Lubenow, 12 N.D. 95, 101-102, 95 N.W. 442, 444-445 (1903).

[17] Prong three considers the ten year threshold. Anderson v. Lyons, 2014 ND 61, ¶¶ 4, 14-17, 845 N.W.2d 1; Blixt 72 N.W.2d at 801-802, 807.

[18] The precise meaning of each of these prongs is unclear, nor is there any stated North Dakota legislative intent. N.D.C.C. §47-16-02. However, like similar statutes in other jurisdictions, §47-16-02 finds its origins in Section 14 of the 1846 New York Constitution. Lerch v. Missoula Brick & Tile Co., 123 P. 25, 26 (M.T. 1912); Wegner, 12 N.D. at 99, 95 N.W. at 443; Ryan v. Sioux Gun Club, 2 N.W.2d 681, 682-683 (S.D. 1942); Constitution.

Prong One "a"—Land Capable of Agricultural Purpose--The Meaning of "Agricultural Land."

[19] Application of §47-16-02 requires the land to be capable of an agricultural purpose. Blixt, 72 N.W.2d at 803. The intent of §47-16-02 originates from New York's

Section 14 which originates from the 1846 New York Constitution that was the product of the 1846 New York Convention. Stephens v. Reynolds, 6 N.Y. 454, 460 (N.Y. 1852); Wegner, 12 N.D. at 98, 95 N.W. at 443; (Appendix #65-68). Courts have relied on the intent of the delegates of the 1846 Convention when analyzing the meaning of agriculture in Section 14 – the predecessor to §47-16-02. Trauger v. Helm Brothers, Inc., 279 N.W.2d 406, 410-411 (N.D. 1979); (Appendix #65-68); Constitution. This Court should take judicial notice of the 1846 Convention as the legislative intent behind §47-16-02.

[20] The District Court narrowed the original intent of §47-16-02 by using the term "Manorial System" and incorrectly equating it to "Manorial Lands." (Docket #41 ¶ 24). Neither "manorial system" nor "cultivate" as applied by the District Court describe the original intent of §47-16-02. "Manorial System" implies a requirement of tilling of land. "Manorial System" Black's Law Dictionary 975 (7th ed. 1999). "Manorial Lands" and "Manor" imply development or improvement of buildings and land. (Appendix #68–Brown); "Manor" Black's Law Dictionary 975 (7th ed. 1999). Section 47-16-02 does not use any of those terms, so we are left with the original intent.

[21] The original intent of §47-16-02 includes the broader meaning of "Manorial Lands" that goes beyond tilling. (Appendix #36-40 ¶¶ 12-26; Appendix #68–Harris). The intent of Section 14 was directed at ending feudal tenures because the delegates favored "the free alienation of property, and discourage the accumulation and perpetuation of large estates in particular families." (Appendix #65–Jordan; Appendix #68–Loomis); Constitution. The use of the word "cultivate" as used by original delegate Mr. Harris implies that feudal tenures did not encourage long term tenants to do anything

but the minimum which results in the slower development of the State. (Appendix #68–Harris). The delegates used the term "cultivate" to mean improve and not simply to till. Id. The delegates used the word "manor" to describe the feudal ownership of the land. (Appendix #68–Brown).

[22] The District Court therefore incorrectly determined §47-16-02 applies only to tilling and pasturing, which it determined was prohibited by the Lease phrase "land not suitable for farming." (Appendix #37-40 ¶¶ 17-26); (Stephen argues "farming" is only a substrata of "agriculture"); (Docket #31 ¶¶ 16-23). The District Court's decision was not based on the "anti-feudal tenures" idea—rather it was based upon a mistaken use of the Stephens' Court application of "manorial land." 6 N.Y. at 456; (Docket # 41 ¶ 24). The District Court cited to Wegner, 12 N.D. at 101-102, 95 N.W. at 444-445 which cited to Stephens, 6 N.Y. at 456-458 (the Stephens' Court included a farm and the Wegner Court included a house and barn rather than just tilled land under their interpretations of "manorial land"). The District Court used a dictionary definition of "manorial system," which ignores the original intent of §47-16-02 as gleaned from the delegates. (Appendix #40 ¶ 24; supra, Appendix #65-68).

[23] Furthermore, the District Court incorrectly determined that agriculture is cultivation (in the sense of tilling) based upon the dictionary definition of "Manorial System" and upon reference to "agriculture" in §47-10.1-01. (Appendix #38-40 ¶¶ 18-24). If "agriculture" is given its plain and ordinary meaning, it can be summarized as the business of growing crops, raising animals, and bringing the resulting products to market. Kjolsrud v. MKB Mgmt. Corp., 2003 ND 144, ¶ 7, 669 N.W.2d 82; "Agriculture" *Merriam-Webster Dictionary* (2017) See: https://www.merriam-

webster.com/dictionary/agriculture?utm_campaign=sd&utm_medium=serp&utm_source=jsonld; "Agriculture" *Oxford Dictionary* (2017) See: https://en.oxforddictionaries.com/definition/agriculture; N.D.C.C. § 47-10.1-01.

[24] However, courts include fixtures in their agricultural purpose analysis. Parthey v. Beyer, 228 A.D. 308, 313 (N.Y. 1930) (included a milk-house); Clark v. Barnes, 76 N.Y. 301, 303-304 (N.Y. 1878) (included a farm); Stephens, 6 N.Y. at 460 (N.Y. 1854) (included a farm); Wegner, 12 N.D. at 98, 95 N.W. at 443 (included a house and barn); (Docket #34 - *Knudson* Pages 5-7) (the trial court included grain bins and grain drying equipment). Even when courts have determined there is no agricultural purpose, Courts have included fixtures in their analysis of agricultural purpose. Lerch, 123 P. at 28 (considered brick factory fixtures); Massachusetts Nat'l Bank v. Shinn, 57 N.E. 611, 612-613 (N.Y. 1900) (considered iron mine fixtures); Trauger, 279 N.W.2d at 410 (considered gravel pit fixtures); Berry-Iverson Co. v. Johnson, 242 N.W.2d126, 132 (N.D. 1976) (considered a radio tower); Ryan, 2 N.W.2d. at 682-683 (considered gun range fixtures).

[25] North Dakota recognizes barns and grain bins as being fixtures that run with the real property. Bellemare v. Gateway Builders, Inc., 420 N.W.2d 733, 735-736 (N.D. 1988); Woolridge v. Torgrimson, 59 N.D. 307, 309, 229 N.W. 805, 806 (N.D. 1930); N.D.C.C. §47-01-03(1);(3). The placing of bins on a property does not take away the agricultural nature of such land. For instance, §47-06-04 anticipates placing of grain bins and other agricultural fixtures on agricultural lands. Additionally, the Internal Revenue Service includes grain bins within the scope of the production of grain and livestock in addition to storage of fungible commodities. *IRS Publication 225*, Page 38. See:

https://www.irs.gov/pub/irs-prior/p225--2015.pdf. The District Court should have included the grain bins in its agricultural purpose analysis and should have concluded the Bin Site to be agricultural land.

[26] Loren's and Richard's argument that the Bin Site is "not suitable for farming" creates a false equivalency of "farming" and "agricultural." (Docket #27 ¶¶ 19-26). Regardless of the wording in the Lease, agricultural activities do take place and are anticipated by the terms of the Lease, which would include seed and grain storage and activities like grain handling through use of augers, etc. at the Bin Site. (Appendix #39 ¶ 23; Docket #33).

[27] Loren and Richard have argued that if the District Court were to void this Lease under §47-16-02, then all long-term railroad leases covering grain elevators would become void. (Docket #38 ¶ 17). However, voiding this Lease on private land would have no impact on long-term leases of grain elevators located on railroad lands. Crops brought to market are stored in community grain elevators. The leases of community grain elevators and public warehouse are governed by §60-06-03 (not by §47-16-02). *Railroad Right-Of-Way*. See: http://www.legis.nd.gov/files/resource/committee-memorandum/59027.pdf. Therefore, Loren's and Richard's public policy arguments on this point should be disregarded.

Prong One "b"—Lease is Capable of Agricultural Purpose.

[28] A lease must also be capable of agricultural purpose. Blixt, 72 N.W.2d at 803. This Lease is capable of agricultural purpose. Agriculture is a business which includes not only the growth of crops and animals but also storage and processing of their products until they are brought to market. "Agriculture," *Merriam-Webster Dictionary*

(2017) See: https://www.merriam-webster.com/dictionary/agriculture; "Agriculture," *Oxford Dictionary* (2017) See: https://en.oxforddictionaries.com/definition/agriculture. Courts have found that "leases capable of agricultural purpose" include leases with a specific purpose of growing crops and animals or of facilitating the growth of crops and animals. Parthey, 228 A.D. at 313 (lease for a milk-house); Clark, 76 N.Y. at 303 (lease for a farm); Stephens, 6 N.Y. at 459 (lease for a farm); Wegner, 12 N.D. at 98, 95 N.W. at 443 (lease for a house and barn); Lyons, 2014 ND 61, ¶ 2, 845 N.W.2d 1 (lease for growing crops); (Docket #34 – *Knudson*, Pages 5-7) (lease for storing and drying crops).

[29] The purpose of a lease is determined by examining it as a whole and giving its words their plain, ordinary, and common meaning. N.D.C.C. §09-07-06; N.D.C.C. §09-07-09. The District Court limited the Lease by incorrectly drawing a connection between the Lease's statement "land not suitable for farming" and the word "cultivate" as discussed above. Although the Lease defines "Bin Site" to mean "the land not suitable for farming," the Lease clearly permits agricultural activities by expressly permitting the placement of grain storage bins on the site, (Appendix #14–Section 1(b)) and "storing crops, farming equipment, and farming supplies and other purposes relating thereto." (Appendix #15–Section 8).

[30] The Lease covers agricultural land because (a) it covers real estate (including grain bin fixtures) capable of grain storage, grain handling, and storage of farm equipment and purposes related thereto which are all agricultural in nature, and (b) the Lease is capable of agricultural purpose because it expressly permits grain storage, storage of farm equipment, storage of farming supplies, and purposes related thereto such as grain handling and storage of seed for planting.

Prong Two—Reservation of Rent.

[31] Prong two requires a lease to reserve rent or services. Wegner, 12 N.D. at 101-102, 95 N.W. at 444-445. The North Dakota Supreme Court defines "rent" as "certain yearly profit, or labor, issuing out of land and tenements, in retribution for its use" and "rent is compensation for the use of land. It is immaterial whether it is paid for with money or services." Kuiper v. Miller, 53 N.D. 711, 714, 207 N.W. 489, 490 (N.D. 1925) (citing Wegner, 12 N.D. at 101-102, 95 N.W. at 444-445 (citing Stephens, 6 N.Y. at 458-460)).

[32] Loren and Richard use the phrase "yearly profits issuing out of land" in their arguments to conclude that only crops sold for profit may constitute rent and that the $400 recited in the Lease is not rent. (Docket #38 ¶¶ 22-23). Their use of this phrase encompasses only part of a quotation from Stephens which the North Dakota Supreme Court cited to in its concluding remarks in Wegner. 12 N.D. at 101-102, 95 N.W. at 444-445 (citing to Stephens, 6 N.Y. at 458-460); (Docket #38 ¶¶ 22-23).

[33] The Lease satisfies the requirements of rent because it is a certain amount of money paid in exchange for the use of the premises. Kuiper, 53 N.D. at 714, 207 N.W. at 490. The Lease calls for $400 in annual rent in advance on the recurring date of December 31. Id. This Court implied in Lyons that rent may be paid in advance which would mean $400 in annual rent is required to be paid in advance on December 31 of each year. 2014 ND 61, ¶ 2, 845 N.W.2d 1; Kuiper, 53 N.D. at 714, 207 N.W. at 490; (Appendix #15–Section 4). Therefore, the Lease term requiring advance payments of $400 as rent each year satisfies the requirement of rent.

Prong Three—Ten Year Threshold.

[34] Prong three requires a court to find an agricultural lease has a duration longer than ten years. Blixt, 72 N.W.2d at 805-806.

[35] Blixt held "[i]f it should extend beyond ten years, and that becomes ascertainable, such issue would be a proper matter for determination at that time." Blixt, 72 N.W.2d at 807. Thus, if it is ascertainable that an agricultural lease will exceed the ten year threshold, then it is within a court's authority to decide whether it exceeds the threshold. Id.

[36] Here it was ascertainable that the Lease would exceed the ten year threshold. (Appendix #14-15–Section 3). When Stephen filed his counterclaim the ten years had not yet elapsed, but the trial date was set for after the Lease's ten year anniversary. (Docket # 31). The stated Lease duration is for the lives of certain named tenants and their children who were actively farming when the Lease commenced in 2006. (Appendix #14–Section 1(e)). The Court decided (incorrectly) that there are eight tenants and the Lease lasts for their lives. (Appendix #60 ¶¶ 3-4). It was inconceivable that all eight tenants would be dead by the time of trial and the case, in fact, went to trial while all eight of those purported tenants were still living. Stephen renewed his claim to have the Lease held void when he filed his pre-trial memorandum and again when he filed his written closing arguments. (Docket #127 ¶ 4); (Docket #131 ¶ 38). It was ascertainable and certain that ten years would elapse and ten years had already elapsed at the time of trial.

C. Conclusion (§47-16-02 Analysis).

[37] The Court erred in determining §47-16-02 was inapplicable because N.D.R.Civ.P. Rule 12(c) views the §47-16-02 claim in a light most favorable to Stephen and there was

no certainty that the §47-16-02 claim was impossible to prove based upon binding and persuasive precedent. Olson, 2013 ND 24, ¶ 3, 827 N.W.2d 36; Tibert, 2004 ND 133, ¶ 7, 682 N.W.2d 294; Trauger, 279 N.W.2d at 410; Berry, 242 N.W.2d at 131-132; Blixt, 72 N.W.2d at 803-807; Wegner, 12 N.D. at 98-104, 95 N.W. at 443-445; (Appendix #36-40 ¶¶ 12-26; Docket #34 – *Knudson*, Pages 5-7).

[38] The original intent behind the §47-16-02 was to abolish long-term leases that discourage transfers and encourage idle hands instead of diligent improvement of the property over time. The intent of the law has been defeated by the decision of the District Court. Failing to void the Lease will lead to a general decline of the property over time, which has already begun to happen as shown by the breaches of Section 6 of the Lease (outlined elsewhere in this brief). This Court should void the Lease as of January 2, 2016.

II. The District Court erred as a matter fact when it declared Justina Zundel, Jason Zundel, Kyle Zundel, Keenan Zundel and Allexa Zundel are third party beneficiaries and tenants

A. Facts

[39] The Lease commenced in 2006. (Appendix #14-15–Section 3). The original Landlord was Edwin Zundel who is the father of Stephen, Loren and Richard. (Docket #133 Pages 3-4, Lines 17-16). The Lease states in Section 1(e) that in addition to named tenants, tenants include "all of Edwin Zundel's grandchildren living at the time of the commencement of this lease who engage in the practice of farming." (Appendix #14–Section 1(e)). No grandchild was farming in 2006. (Docket #133 Page 102-103, Lines 5-3). Loren and Richard recognize that only themselves, Stephen, and Donald (now

deceased) have been tenants under the Lease. (Docket #133 Page 7, Lines 5-7). However, Loren also says: 1) Justina has farmed with him; 2) Allexa farmed for him in 2014 and 3) Keenan now farms a little. (Docket #133 Pages 102-103, Lines 5-3; Docket #133 Page 206, Lines 8-12). No evidence was presented that any of the grandchildren farmed in 2006. The District Court concluded Justina Zundel, Jason Zundel, Kyle Zundel, Keenan Zundel and Allexa Zundel are additional tenants because they are Edwin Zundel's grandchildren. (Appendix #11 ¶¶ 25-30; Appendix #45 ¶ 16).

B. Law and Argument

[40] The District Court's conclusion that Justina, Jason, Kyle, Keenan and Allexa are third-party beneficiaries and thus tenants is clearly erroneous because there is no factual evidence for the District Court to make a declaratory judgment to that effect. Nodak, 2014 ND 39 ¶ 7, 842 N.W.2d 912; (Appendix #45 ¶ 16). The Lease is clear that to be considered a tenant the grandchildren would have to have been farming in 2006 or at the very least be farming at the time of trial. (Appendix #14–Section 1(e)). No evidence was presented that Jason or Kyle have ever farmed nor that Justina, Allexa or Keenan farmed in 2006. Jason, Kyle, Justina, Allexa and Keenan should not be considered tenants because they were not farming in 2006. Nodak, 2014 ND 39, ¶ 7, 842 N.W.2d 912; (Appendix #45 ¶ 16; Docket #133 Pages 102-103, Lines 5-3; Docket #133 Page 206, Lines 8-12). Even if the District Court's conclusion was correct as to Justina, Allexa or Keenan because they have farmed at some time, such a conclusion as to Jason and Kyle without evidence they have ever farmed is clearly erroneous. Id.

C. Conclusion

[41] Here, the District Court's declaratory judgment naming tenants under the Lease lacks factual support, and therefore this Court should overturn that part of the judgment.

III. The District Court erred when it declared Loren Zundel and Richard Zundel (and third-party beneficiaries) have fully complied with Lease obligations.

A. Facts

[42] Section 6 of the Lease requires tenants to "make all repairs as shall be reasonably necessary to keep the Leased Property in good condition and repair." (Appendix #15–Section 6). Stephen (who is the landlord) determined that repairs were required by Loren and Richard and he provided notice in accordance with Section 9. (Appendix #15-16–Sections 6 and 9; Docket #5; Docket #6; Docket #7).

[43] Stephen provided Loren and Richard a Demand Letter on February 10, 2014 and February 28, 2014 with a request to repair the door on bin 8 and roof door on bin 7. (Docket #5; Docket #6). The placement of brazed brass on bin 8 and the replacement roof door on bin 7 did not return either bin to good condition. (Docket #134 Pages 72-77, Lines 24-8).

[44] Stephen provided another Demand Letter on May 29, 2014 with a list of necessary maintenance and repairs to keep the Leased Property in good condition and repair. (Docket #7). Loren and Richard were put on notice that trees needed to be removed from: between bins 11 and 10, between bins 5 and 4, the North side of bin 11, near the foundation of bin 12, the East side of bin 13 and the East side of bins 14 and 15. Id. Loren and Richard were put on notice that the dirt pile in or near the road approach needed to be removed. Id. Loren and Richard were put on notice to repair: the wiring between bins 7 and 4, a hanging electrical box between bins 3 and 4, the wrecked door on

bin 5 and to remove junked grain. Id. No repairs were made within the 90 days' notice as the trees and the dirt pile were not removed and the wiring, electrical box, and wrecked bin door still required repairs at the time of trial. (Docket #134 Pages 72-77, Lines 24-8). Loren and Richard were put on notice to repair the roof door on bin 5 and the subsequent repair did not return the roof door to good condition because it was bolted and wired shut and thus not even functional. Id.

[45] Stephen also demanded in the May 29, 2014 letter that Loren and Richard needed to: cut grass, repair and straightened the border fences, repair the downed fence between Section 1 and Section 2, repair all loose panels for electrical boxes, repair the pole barn on the 40-acre bin site by, removing a tree near the foundation of the red building, replace the door, replace broken window(s), repair roofs, repair siding, paint the red building, repair eaves, replace missing corner protectors and paint the white wood bin. (Docket #7). No such repairs were made within the 90 days' notice. (Docket #134 Pages 72-77, Lines 24-8).

[46] Loren admitted that the Bin Site was in good condition and repair when the Lease commenced in 2006. (Docket #133 Page 157, Lines 2-8). Loren and Richard admitted that preventative maintenance before "failure" was reasonably necessary to keep the property in good condition and repair. (Docket #133 Page 171, Lines 5-10; Docket #134 Page 21, Lines 4-15). At trial, Richard admitted the trees need to be removed. (Docket #134 Page 34, Lines 3-23).

[47] The District Court determined the required repairs were cosmetic and thus not a material breach because they did not interfere with the use or function of the Bin Site. (Appendix #48-49 ¶¶ 31-33).

B. Law and Argument

[48] When interpreting the intent of the parties, a court will interpret a contract as a whole and give words their ordinary and popular sense as they existed at the time of contracting. N.D.C.C. §09-07-03; N.D.C.C. §09-07-04; N.D.C.C. §09-07-09. "[T]he parties' mutual assent to a contract is to be determined by their 'objective manifestations of contractual assent.' Johnson v. Johnson, 2000 ND 170, ¶ 154, 617 NW2d 97. The "[s]ubjective intent, or the lack of it, is not a concern when the parties manifest assent to a term capable of being given a reasonably objective meaning." Hovden v. Lind, 301 N.W.2d. 374, 378 (N.D. 1981).

The term "good" was misinterpreted.

[49] The District Court incorrectly defined the term "good" to include a "functional and operable condition" under the objective standard because it failed to consider the Lease as a whole at the time of contracting. (Appendix #54-56 ¶¶ 57-67). The objective standard allows a court to apply a reasonably objective meaning of a term. Hovden, 301 N.W.2d. 374, 378. However, it does not permit the District Court to ignore material terms of the Lease. Hovden, 301 N.W.2d. 374, 378; N.D.C.C. §09-07-03; N.D.C.C. §09-07-04; N.D.C.C. §09-07-09.

[50] When the Lease is considered as a whole, the "Repair" section is a material term of the Lease. (Appendix #14-18). Collectively, the "Definition," "Repair," "Term," and "Rent" sections define what the Lease means. Id. The "Definition" section provides that "Leased Property" includes the grain bins for aiding in agricultural activities. (Appendix #14–Section 1). The "Repair" section provides that the Leased Property is to be kept "in good condition and repair." (Appendix #15–Section 6). The "Term" section provides

that the Lease lasts for the lives of several people. (Appendix 14-15–Section 3). The "Rent" section provides that only $400 be paid annually. (Appendix #15–Section 4). Section 6 of the Lease establishes the Bin Site was in "good" condition at the commencement of the Lease and what constitutes "good" is measured by looking at the condition of the Leased Property at the commencement of the Lease (and new condition of subsequent additional fixtures). (Appendix 14-15; Docket #133 Page 157, Lines 2-8).

[51] The District Court's interpretation that "good" means "functional and operable" renders the "Repair" section of the Lease meaningless. The District Court's interpretation permits tenants to laze about and only fix the Leased Property when something has broken as measured by the present condition of the Leased Property rather than keeping the "good" condition that existed at the commencement of the Lease. (Appendix #54-56 ¶¶ 57-67). The District Court's flawed interpretation is highlighted when applied to the newer bins erected in 2008 because it would allow tenants to neglect a new fixture until it no longer functions. (Appendix #54-56 ¶¶ 57-67; Docket #133 Pages 22-23, Lines 22-9). If the decision is affirmed that no material breach exists, then the "Repair" section of the Lease will become meaningless especially when Stephen's landlord statutory duties already impose a duty on the landlord to keep the property fit for a particular purpose. N.D.C.C. §47-16-13.

[52] The District Court's application of the objective standard failed to interpret the intent of the parties by at looking at the Lease as a whole and giving words ordinary and popular sense as they existed at the time of contracting (statutory standard for contract interpretation). Olson, 2013 ND 24, ¶ 3, 827 N.W.2d 36; Hovden, 301 N.W.2d. at 378; N.D.C.C. §09-07-03; N.D.C.C. §09-07-04; N.D.C.C. §09-07-09. The misapplication of

the objective standard rendered the material term of "Repair" meaningless when the reasonable intention of the parties was available. Id.

[53] The District Court did not construe "good" within the objective standard which is also contrary to the intent of the Lease as demonstrated through the material terms of the Lease.

There was a material breach.

[54] The District Court incorrectly concluded that there was no material breach of Section 6 by Loren and Richard. (Docket # 143 ¶¶ 62-67). The analysis from Abelmann v. Smartlease indicates the concern should be about whether a "material term" is breached, rather than whether the breach is a "material breach." 2014 ND 227, ¶ 15, 856 N.W.2d 747. As a whole, the material terms of the Lease indicate the Lease Property was in "good" condition at the commencement of the Lease and what constitutes "good" is measured by looking at the condition of the Leased Property at the commencement of the Lease (and new condition of subsequent additional fixtures). (Appendix #14-15; Docket #133 Page 157, Lines 2-8).

[55] Stephen argues Loren and Richard breached Section 6 of the Lease in various ways. (Docket #5; Docket #6; Docket #7). They failed to remove the trees growing out of foundations, junked grain and the dirt pile; and failed to repair: wiring, electrical boxes and wrecked bin doors, etc. (Docket #127 ¶ 20; Docket #134 Pages 72-77, Lines 24-8). Richard admitted the trees need to be removed, which indicates continued presence of the trees would not be consistent with "good condition and repair" and Stephen demanded they be removed on May 29, 2014. (Docket #7; Docket #134 Page 34, Lines 3-23). The

District Court concluded that Stephen's claims of breach under Section 6 did not constitute material breaches. (Appendix #49-50 ¶ 37).

[56] The District Court misapplied the law by applying a material breach standard instead of a breach of a material term standard. Olson, 2013 ND 24, ¶ 3, 827 N.W.2d 36; Hovden, 301 N.W.2d. at 378; N.D.C.C. §09-07-03; N.D.C.C. §09-07-04; N.D.C.C. §09-07-09. The "Repair" section in the Lease requiring tenants to keep "the Lease Property in good condition and repair" is a material term when one considers the minimal rent to be paid and the long-term duration of the Lease. (Appendix #14-15–Sections 3, 4 and 6). The "Repair" section is not meaningless since it puts duties on tenants that would otherwise be imposed on landlords under N.D.C.C §47-16-13. (Appendix #15–Section 6). These errors led the Court to conclude that "good" in the Lease means tenants are only required to repair as necessary "to keep the Bin Site in functional and operable condition" and that failure to make the repairs requested by Stephen were not a material breach because the Bin Site remains "functional and operable." (Appendix #49-56 ¶¶ 37, 57-67).

C. Conclusion

[57] For the reasons stated above, the District Court's conclusion was clearly erroneous and should be overturned to hold that Section 6 of the Lease was breached and that eviction is, therefore, proper.

IV. The District Court erred when it dismissed Appellant's eviction action.

A. Facts

[58] If there is a breach of any term of the Lease, then Section 9 of the Lease is applicable. (Appendix #15-16–Section 9). Section 9 says that "if Tenants fail or neglects

to perform, meet or observe any of Tenants'" obligations under the Lease, then the Landlord shall provide written notice to the Tenants of said failure and if said failure continues beyond 90 days then the Landlord may terminate the agreement, re-enter the Leased Property, and remove Tenants under due process of law. Id. Loren and Richard were provided written notice on February 10, 2014, February 28, 2014 and May 29, 2014 of their failure or neglect to adhere to their Section 6 obligations under the Lease. (Docket #5; Docket #6; Docket #7). The breaches were not cured by the time of Stephen's eviction claim or by the time of trial which were both more than 90 days after the written notice. (Appendix #30; Docket #5; Docket #6; Docket #7; Docket #127 ¶ 20; Docket #134 Pages 72-77, Lines 24-8).

B. Law and Argument

[59] An action of eviction is maintainable when: a party turns out by force a party in possession; a person holds over after termination of a lease; or a lessee violates a material term of the written lease agreement. N.D.C.C. §47-32-01(2); (4); (8).

[60] As argued in other sections of this brief, the District Court erred when it refused to void the Lease under §47-16-02 and when it refused to conclude that Loren and Richard breached material terms of the Lease by failing to make necessary repairs.

C. Conclusion

[61] If the District Court's decision about §47-16-02 or breaches is overturned, then the District Court's decision dismissing the eviction should also be overturned.

V. The District Court abused its discretion when it granted attorney's fees to Loren Zundel and Richard Zundel.

A. Facts

[62] The District Court determined Stephen's counterclaims were frivolous for the following reasons: 1) Stephen requested rent from each tenant when the Lease says rent is due from all tenants; 2) Stephen argued the Lease is subject to §47-16-02; 3) Stephen argued breach of Section 8 (regarding proper and equal use) without factual support and prior written notice; 4) Stephen argued breach of Section 6 (which requires repairs and maintenance) while the District Court concluded breaches were not material breaches; and 5) Stephen attempted to plead unpleaded claims at trial regarding size of the Bin Site and unconscionability. (Appendix #58 ¶ 75).

B. Law and Argument

[63] A party bringing a claim that is frivolous or in bad faith will be subject to reasonable attorney's fees. N.D.C.C. §28-26-01. Under N.D.C.C. §28-26-01, a claim is frivolous when there is such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in his favor. Soentgen v. Quain & Ramstad Clinic, 467 N.W.2d 73, 84 (N.D. 1991); supra, Larson v. Baer, 418 N.W.2d 282, 290 (N.D. 1988).

[64] A court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law. Overboe, 2008 ND 112, ¶ 7, 751 N.W.2d 177. A court acts arbitrarily, capriciously, or unreasonably when its decision is not the product of a rational mental process by which the facts and law relied upon are stated together for the purpose of reaching a reasoned and reasonable decision. Hill, 2016 ND 137, ¶ 9, 881 N.W.2d 624.

[65] A safe harbor from an award of attorney's fees exists when a party argues for the modification or extension of existing law if they are made in good faith. N.D.C.C. §28-26-01.

Rent From Each Tenant

[66] The District Court incorrectly concluded the claim of $400 in rent from each tenant was frivolous because it failed to apply the statutory standard for contract interpretation. (Appendix #58 ¶ 75).

[67] When examined on its own, Section 4 of the Lease is ambiguous as to whether the $400 in rent is owed collectively or individually. (Appendix #15–Section 4; Docket #31 ¶ 9-10). The District Court should have applied the statutory standard for contract interpretation. The Lease includes an indefinite duration spanning the lifetimes of two lineal generations and the lack of distinguishing terms for dealing with such complexities. N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix 14-15; Docket #31 ¶ 9-10; Docket # 41 ¶¶ 6-10). The District Court misapplied the statutory standard for contract interpretation which led to an arbitrary conclusion that the Lease requires tenants to collectively owe $400. Overboe, 2008 ND 112, ¶ 7, 751 N.W.2d 177; N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix #14-18; Docket #31 ¶ 9-10; Docket # 41 ¶¶ 6-10).

[68] Stephen should not have been subject to attorney's fees when the District Court misapplied the statutory standard for contract interpretation in reaching the intent of $400 in rent.

N.D.C.C. §47-16-02

[69] The District Court incorrectly concluded the §47-16-02 claim is frivolous when Stephen relied in good faith on a Trail County District Court decision. (Appendix #58 ¶ 75; Docket # 31 ¶¶ 19-21; Docket #34 – *Knudson*, Pages 5-7).

[70] The Trail County District Court concluded §47-16-02 was applicable to facts and an analysis resembling this case, yet the District Court came to an opposite conclusion. Id. The *Knudson* decision was appealed to this Court which declined to address the §47-16-02 analysis. Knudson v. Kyllo, 2012 ND 155, ¶¶ 11-12, 819 N.W.2d 511; (Docket #34 – *Knudson*, Pages 5-7).

[71] Stephen's claim relied in good faith that the Trail Count District Court analysis of §47-16-02 was appropriate when applied to the grain bins in this case. (Docket #31 ¶¶ 19-21; Docket #127 ¶ 4). The §47-16-02 claim should not have caused attorney's fees when it was brought as a good faith reliance that the law had been modified or extended by *Knudson*. Knudson v. Kyllo, 2012 ND 155, ¶¶ 11-12, 819 N.W.2d 511; N.D.C.C. § 28-26-01; (Docket #31 ¶¶ 19-21; Docket #34 – *Knudson*, Pages 5-7; Docket #127 ¶ 4).

Section 8 Breach

[72] The District Court incorrectly concluded the Section 8 breach claim was frivolous because the Lease permits civil action for notifying and redressing breaches. (Appendix #15-16–Section 9; Appendix #28 ¶ 56; Appendix #58 ¶ 75).

[73] The 90 day notice requirement is expressly "without prejudice to any remedy which might otherwise be used for the collection of arrears for rent, or for the preceding breach of covenant or conditions." (Appendix #16–Section 9 last three lines). Stephen is permitted to bring a Section 8 breach through Section 9 (includes civil actions) when the Lease is read under the statutory standard for contract interpretation. N.D.C.C. §09-07-

03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix #15-16–Sections 8 and 9). The District Court concluded there was no written notice of the Section 8 breach. (Appendix #52-54 ¶¶ 48-55).

[74] That conclusion was a misapplication of the statutory standard for contract interpretation because the District Court should have concluded the Lease as a whole permits civil actions to constitute a written notice under Section 9. N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix #52-54 ¶¶ 48-55). This misapplication led to the District Court's arbitrary conclusion that there was no notice of the Section 8 breach. Overboe, 2008 ND 112, ¶ 7, 751 N.W.2d 177; N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix #52-54 ¶¶ 48-55).

[75] The Court also determined there were no facts forwarded by Stephen that breach of Lease Section 8 had occurred. (Appendix #52-54 ¶¶ 48-55). That is clearly erroneous as the record reflects ample facts forwarded by Stephen that Section 8 had been breached. (Docket #127 ¶¶ 29-38; Docket #131 ¶¶ 28, 38).

Section 6 Breach

[76] The District Court failed to look at the Lease as a whole when interpreting the ordinary meaning "good." Hovden, 301 N.W.2d. at 378; N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Appendix #14-18; Appendix #54-56 ¶¶ 56-67). The District Court's misapplication of the statutory standard for contract interpretation caused a misapplication of the objective standard which led to an arbitrary conclusion as to the meaning of "good." Overboe, 2008 ND 112, ¶ 7, 751 N.W.2d 177; Hovden, 301 N.W.2d. at 378; N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C.

§09-07-09; (Appendix #14-18; Docket # 143 ¶¶ 56-67). This arbitrary conclusion was an abuse of discretion.

[77] A party will not be subject to attorney's fees if there is a basis of actual fact or law upon which a reasonable person could expect a court to render a judgment in their favor. Soentgen, 467 N.W.2d at 84; supra, Larson, , 418 N.W.2d at 290; N.D.C.C. §28-26-01.

[78] Stephen brought his counterclaims for Section 6 eviction in a good faith belief that, under that statutory standard for contract interpretation, the Lease required preventive maintenance and that was breached by Loren's and Richard's inaction. N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Docket #127 ¶¶8-13, 21-28; Docket #131 ¶¶9-13, 18-27, 29-35, 40). Loren and Richard only argued that they were in compliance with a lesser meaning of "good" requiring only a functional Bin Site. (Docket #124 ¶¶ 31-41,49, 81-82; Docket #128 ¶¶ 5-8). If Stephen's argument is correct that "good" is measured against the condition at the commencement of the Lease, then Stephen has brought forth facts to show Loren and Richard breached Section 6. Soentgen, 467 N.W.2d at 84; , supra, Larson 418 N.W.2d at 290; N.D.C.C. § 28-26-01. The District Court could not have found Stephen's claim was frivolous as Stephen relied upon the statutory standard for contract interpretation in determining the meaning of "good" and brought forth facts that demonstrated the breach of Section 6. N.D.C.C. §09-07-03; N.D.C.C. §09-07-06; N.D.C.C. §09-07-09; (Docket #127 ¶¶ 8-13, 21-28; Docket #131 ¶¶ 9-13, 18-27, 29-35, 40).

[79] Stephen should not have been subject to attorney's fees when he relied upon the statutory standard for contract interpretation in determining the meaning of "Tenants shall, at their expense, make all repairs as shall be reasonably necessary to keep the

Leased Property in good condition and repair" and Stephen brought forth facts to support his claim of breach of Section 6.

Unpleaded Claims

[80] The District Court incorrectly concluded that Stephen brought unpleaded claims when he raised factual issues regarding the size (in acreage) of the Leased Property and when Stephen made an argument of unconscionability of the rent amount.

[81] Stephen brought his breach claims involving disrepair of the fence and pole barn in good faith reliance on the fact that the Lease expressly defines the "Leased Property" as "approximately Forty (40) acres of land." (Appendix #14–Section 1(d)). Section 6 requires repairs to the "Leased Property." (Appendix #15–Section 6). The District Court concluded the Bin Site is only 4.8 acres after Loren and Richard put the size of the Bin Site into question by arguing the pole barn and fences were outside of the Bin Site. (Docket #124 ¶¶ 88-90; Docket #127 ¶¶ 18-19; Docket #131 ¶¶ 34-35). The Lease makes no mention of 4.8 acres and regardless of the size of the Bin Site, the Lease requires repair to the Leased Property which is defined to be approximately 40 acres. (Appendix #14-18). Stephen brought the Section 6 breach claims based upon the terms of the Lease and neglect of Loren of Richard to abide by those terms within the 40-acre-Leased Property, which would preclude attorney's fees under Soentgen and Larson. 467 N.W.2d at 84; supra, 418 N.W.2d at 290.

[82] The District Court incorrectly held the unconscionability claim was frivolous. (Appendix #58 ¶ 75). Stephen included in his pleadings "[f]or such other and further reliefs as to the court may deem fair and equitable" which under Smestad v. Harris allows a party to bring a equitable claim at a later date. 2012 ND 166, ¶¶ 11-12, 820 N.w.2d

363. Unconscionability is an equitable claim. Langer v. Bartholomay, 2008 ND 40, ¶ 23, 745 N.W.2d 649. Stephen alleged unconscionability before trial. (Docket #59 ¶24). Therefore, there was no basis for the District Court to find that Stephen did not plead unconscionability. Soentgen, 467 N.W.2d at 84; supra, Larson, 418 N.W.2d at 290.

[83] Stephen should not have been subject to attorney's fees for unpleaded claims when he argued a relevant disputed fact as to the size of the Leased Property and when he did make a separate equitable claim in his counterclaim and raised this again pre-trial and during and after trial specifically as unconscionability under N.D.C.C. §47-16-13.3(2).

C. Conclusion

[84] For the foregoing reasons, the District Court's award of attorney's fees should be reversed.

OVERALL CONCLUSION

[85] For the reasons stated in each sub-section above, Appellant Stephen Zundel asks the Court to reverse the District Court's Judgment and declare the Lease void and/or breached and remand with instructions for the District Court to evict Loren and Richard and any of their children in possession.

Dated this 24th day of March 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, Stephen Zundel in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellant 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, statement of issues, signature block, certificate of service and this certificate of compliance, totals 7786.

Dated this 24th day of March 2017.

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IN THE SUPREME COURT THE STATE OF NORTH DAKOTA

Loren Zundel and Richard Zundel,	)	
	)	**Supreme Court**
Plaintiff and Appellee.	)	**File No. 20170003**
	)	
v.	)	**LaMoure County District Court**
	)	**File No. 23-2015-CV-00023**
Stephen Zundel,	)	
	)	**AFFIDAVIT OF**
Defendant and Appellant.	)	**ELECTRONIC MAILING**
	)	
	)SS:	

[1] David McCallum, being first duly sworn, does depose and state that he is of legal age and not a party to the above-entitled matter.

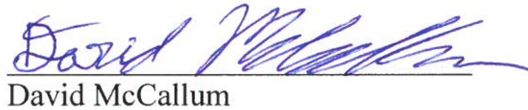
[2] On the 24th day of March, 2017 Affiant served by Electronic Mailing from Lisbon, North Dakota, a true and correct copy of the following document:

1. Motion Requesting Judicial Notice;
2. Appellant's Brief;
3. Appellant's Appendix; and
4. Affidavit of Electronic Mailing.

On: **Benjamin Hasbrouck**

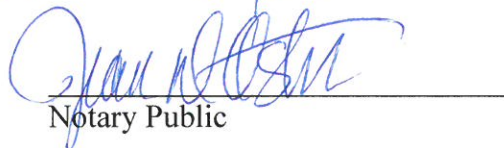
EMAIL ADDRESS: bhasbrouck@fredlaw.com

[3] To the best of Affiant's knowledge, the Email addresses, above given were the actual addresses of the parties intended to be served.

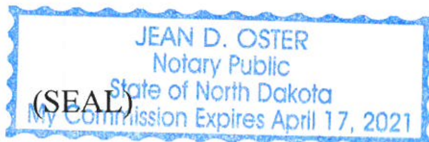


David McCallum

Subscribed and sworn to before me this 24th day of March 2017.



Notary Public



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