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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Daniel T. and Debra Ann Bearce,

Plaintiffs,

vs.

Yellowstone Energy Development, LLC, Acting By and Through its Board of Directors,

Defendants,

Daniel T. and Debra Ann Bearce,

Appellants,

Yellowstone Energy Development, LLC, Acting By and Through its Board of Directors,

Appellees.

Supreme Court No. 20180256
Williams Co. No. 53-2016-CV-01414

APPELLANTS BEARCES' BRIEF
APPEAL FROM DISTRICT COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ENTERED ON MAY 25, 2018

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APPELLANTS' STATEMENT OF ISSUES

¶(1) **ISSUE ONE:** Whether the District Court committed reversible error, holding the Bearce units (stock) were still subject to an unoccurred condition precedent, when issued, thus lacking consideration, and thus Bearce was not owed any fiduciary duty by Yellowstone, particularly involving the 3:1 stock split given to all cash money investors in the company?

¶(2) **ISSUE TWO:** Whether District Court errored, as a matter of law, that representations made to Bearce, by agents of Yellowstone, when entering into the August 25, 2009 Contract for Deed (the modification) that the shares contemplated "would be treated the same as the other investors" was not material to the series of transactions for purchase of the land, was not to be considered in any claim for fraud in the treatment of their promised stock units, and was evidence otherwise precluded by application of the parol evidence rule?

¶(3) **ISSUE THREE:** Whether the District Court errored, as a matter of law, when holding no fiduciary duty was owed and breached by Yellowstone, by the Board action to triple the investment interest of all cash investors in approving a "3:1 stock split" for all cash investors to the exclusion of the Bearce membership interest?

APPELLANTS' STATEMENT OF CASE

¶(4) This action was commenced by service of the Summons and Complaint dated July 26, 2013 upon the Registered Agent for Yellowstone Ethanol L.L.C., signed as of July 28, 2013. The Complaint contained counts for breach of fiduciary duty and breach of contract.

¶(5) Yellowstone filed and served its Answer dated August 21, 2013, denying both the breach of fiduciary duty and denying breach of contract claims.

¶(6) After discovery, cross motions for summary judgment were filed and briefed to the District Court. Oral argument on the cross motions for summary judgment was held by the District Court, Hon. Josh B. Rustad, presiding, on March 8, 2018.

¶(7) By Order dated and entered May 25, 2018, the District Court granted Yellowstone's Cross Motion for a summary judgment of dismissal and denied Plaintiff Bearces' Motion for summary judgment.

¶(8) Judgment of Dismissal was entered May 30, 2018, Notice of Entry of Judgment was electronically filed and served May 30, 2018.

¶(9) Notice of Appeal by Bearce was electronically filed and served June 25, 2018. This Judgment of Dismissal is now on appeal to the North Dakota Supreme Court.

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APPELLANTS' STATEMENT OF FACTS

¶(10) The following contains the undisputed facts as occurred in this case which were before the District Court, in this case:

¶(11) Yellowstone Ethanol, L.L.C. f.k.a. Yellowstone Energy Development, L.L.C. ("Yellowstone") was formed as a North Dakota Limited Liability Company in April 2007 to build an ethanol refinery in Williams County, North Dakota.

¶(12) In the Spring of 2006 two representatives of Yellowstone Ethanol, L.L.C. went to the home of Daniel and Debra Bearce to negotiate to buy 170 acres of land, located East of the town of Trenton, in Williams County, North Dakota, situated adjacent to the existing Burlington Northern Sant Fe (BNSF) rail line. A price of $510,000.00 ($3,000.0 per acres for 170 acres) was negotiated under an exclusive Option to Purchase, signed as of June 14, 2006, with the following terms of payment:

"Grantors and Grantee agree that the purchase price for the above-described property shall be 3,000.00 per acre + shares totaling $100,000.00, payable at the following time and in the following manner:

A. Ten percent (10%) of the total purchase price amounting to $51,000.00 at the time of signing this agreement, receipt of which is hereby acknowledged by Grantors. It is agreed between the parties that said payment constitutes a non-refundable down payment on the purchase price.
B. The balance of the purchase price amounting to $459,000.00, together with interest thereon at the rate of six percent (6%) per annum from the date of closing shall be paid in accordance with the terms of a Contract for Deed providing for the balance to be paid in two (2) annual installments."

¶(13) The Option was exercised, and on April 21, 2008, Yellowstone Ethanol, L.L.C., as buyer and Daniel T, Bearce and Debra Ann Bearce, as seller, signed a Contract for Deed to

purchase the 170 acres of farmland lying next to the existing BNSF railway, for the purchase price of $514,860.00.

¶(14) After Yellowstone Ethanol, L.L.C. failed to make its first payment due under the Contract for Deed, a Notice of Default of the Contract for Deed dated June 19, 2009 was served by attorney John MacMaster on behalf of the Bearces.

¶(15) On or about August 25, 2009, Yellowstone Ethanol, L.L.C. and Daniel T. Bearce and Debra Ann Bearce did enter into a curative new Contract for Deed, wherein the payment terms were modified, to now have the first installment of $231,930.00 payable on or before July 1, 2010 and the final payment due on or before July 1, 2011. This modification of Contract for Deed also had an equity interest provision (units of stock) for Bearce which had a condition precedent, as follows:

> d. In addition to the cash amounts stated above, the Sellers shall receive shares in the Buyer's limited liability company totaling a value of $100,00.00, in the name of Sellers, to be delivered following financial close of the financing for the Buyer's ethanol plant to be constructed upon the above described real property.
>
> e. As further consideration for Sellers agreement to enter into this Modification of Contract for Deed Buyer agrees to pay Sellers the sum of $51,000.00, payable at the following times and in the following manner:
>
> i. $35,207.00 upon the execution of this Modification of Contract for Deed, the receipt of which is hereby acknowledged by Sellers.
>
> ii. The balance in the sum of $15,793.00 shall be paid in total, all cash, at the time of financial close of the financing for the Buyer's ethanol plant to be constructed upon the above described real property."

(*See* modified Contract for Deed at Appendix p. 133)

¶(16) On July 25, 2010 (2 weeks before closing on the purchase by Yellowstone), the president of Yellowstone, wrote to Bearce advising their 100,000 stock units would be issued despite the nonoccurrence of the condition precedent. (*See* letter notice of July 25, 2010 at Appendix p. 146)

¶(17) On or about August 3, 2010, Yellowstone Ethanol, L.L.C. closed on the land purchase and paid the cash owed and Bearces signed the Deed to Yellowstone for the 170 acres of land. (*See* Deed at Appendix p. 133)

¶(18) It is undisputed that the agreement for modification of Contract for Deed stated:

> "the Sellers shall receive shares in the Buyer's limited liability company totaling a value of $100,000.00, in the name of the Sellers, to be delivered following financial close of the financing for the Buyers ethanol plant to be constructed upon the above – described real property. (*See* Appendix p. 133)

¶(19) Critical for this appeal, it is undisputed, that Yellowstone by the letter of July 25, 2010 had committed to the issuance of the one hundred thousand shares of stock units before Bearce signed off on the Deed transferring title to the 170 acres of Bearce land to Yellowstone.

¶(20) Subsequent to the August 25, 2009 Modification of the Contract for Deed, Yellowstone Ethanol, L.L.C. abandoned its attempt to build an ethanol plant on the Bearce land, and Yellowstone Ethanol, L.L.C. thereafter negotiated a long term lease with Savage Service Corporation to build an oil train loading facility for Bakken crude oil, which was built and provides income to Yellowstone through to the present time.

¶(21) It is also undisputed in this case, that a compensation package of both cash and shares of Yellowstone Ethanol, L.L.C., stock was issued to a professional structural engineer Michael L. Daly who had experience in building refinery plants of the type envisioned by Yellowstone Ethanol, L.L.C.. Mr. Daly had an employment contract with Yellowstone which provided for payment of cash and stock in Yellowstone.

¶(22) It is undisputed in this case, that while management of Yellowstone Ethanol, L.L.C. had plans for instituting a multi-tier stock valuation program, no member control agreement and no multi-tiered stock valuation program was ever formally created establishing

different tiers of stock for the Company. All stock issued for Yellowstone was of the same formal class of common stock with a par value of one dollar per share.

¶(23) The minutes of the Board of Directors meeting for Yellowstone Ethanol, L.L.C., p.k.a. Yellowstone Energy Development, L.L.C.. for October 25, 2012 have in the written Board minutes the following:

> "Steve M. moved to officially change the name of Yellowstone Ethanol, L.L.C. to Yellowstone Energy Development, L.L.C., Gene K. seconded the motion and motion passed. Ron H. moved that all seed capital money be recorded and recognized at a 3 to 1 split, Don S. seconded the motion and motion passed."

(*See* Board minutes for October 25, 2012 at Appendix p. 153)

¶(24) It is undisputed in this action, that some of the initial shares issued for cash put in by Mr. Daley were given the 3 to 1 split in accordance with the Board action of October 25, 2012. It is also undisputed that some of the shares issued for engineering services believed to be in value of $250,000.00, were not given the 3-1 stock split.

¶(25) It is undisputed in this action, that the 100,000 shares issued to Daniel Bearce and Debra Bearce, husband and wife, were not given the benefit of the 3 to 1 split, which stock units are here the subject of this litigation.

¶(26) It is undisputed, that Bearce, upon learning about the 3-1 split in stock, and upon learning that Bearce were the ONLY investors in Yellowstone Ethanol, L.L.C. p.k.a. Yellowstone Energy Development, L.L.C. who DID NOT get the benefit of the 3 to 1 stock split, made demand upon Yellowstone Energy Development, L.L.C. to split their stock in a similar 3 to 1 split, but such demand was refused. (See minutes of Board of Director for Yellowstone Energy Development, L.L.C. for December, 2012 at Appendix p. 154)

¶(27) The Board minutes of December 29, 2011 document that after the initial investment of cash (called "seed money") by Board members Clinton F. and Robert (Bob)

Gannaway, by Motion made at the December 29, 2011 Board meeting, such additional funds were voted to apply to the 3-1 stock split where such Board minutes stated:

> "Clinton F. asked the members about the additional dollars that he and Bob G. had put in and if that money would get the 3:1 stock split. After discussion Klint H. moved that YE is not accepting any further funds as seed money but will accept the additional funds from Clinton Filler and Bob Gannaway and apply the 3:1 stock split to those additional funds. Steve M. seconded the motion and motion passed."

(*See* minutes of the Board of Directors for Yellowstone Ethanol, L.L.C. for December 29, 2011 at Appendix p. 157)

¶(28) The Bearces have testified by deposition, that at the kitchen table meeting at their house, in the Spring of 2006, to discuss granting the Option to Purchase, the Bearces inquired if their stock "would be the same as all the investors" and were told such would be the case. The two agents of Yellowstone who were at that meeting at the Bearce residence have testified they had no present recollection of what was said about the stock and could not confirm or deny the stated recollection of Daniel and Debra Bearce as concerns the representations made about the stock to be issued to them.

¶(29) Robert Gannaway, when testifying for the Corporation Yellowstone, confirmed, that as of the time of the 3:1 stock split, October 25, 2012, there was only one class of common stock for all stockholders of the company. Yellowstone has always had and continues to have only one class of common stock at one dollar per value for all members.

STANDARD FOR REVIEW

¶(30) The standard for review on cross-motions for summary judgment has been well established under North Dakota law:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record. *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, 2017 ND 266, ¶9, 903 N.W.2d 524 (quoting *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 2013 ND 57, ¶7, 829 N.W.2d 724)

LAW AND ARGUMENT

ISSUE ONE

Whether the District Court committed reversible error, holding the Bearce units (stock) were still subject to an unoccurred condition precedent, when issued, thus lacking consideration, and thus Bearce was not owed any fiduciary duty by Yellowstone, particularly involving the 3:1 stock split, given to all cash money investors in the company?

¶(31) Yellowstone Ethanol, L.L.C. ("Yellowstone") was formed to build an ethanol refinery in Williams County to process Bakken Crude Oil. To build an oil refinery you have to have land. For this purpose agents of Yellowstone met with the Bearces beginning in 2006 to negotiate the purchase of 170 acres of Bearce land located next to the main BNSF railway west of Williston in Williams County. The purchase price negotiated was $3,000.00 per acre totalling $510,000.00 for 170 acres. A 2006 Option Contract for land purchase was signed, followed by a 2008 Contract for Deed for the Bearce land.

¶(32) When Yellowstone defaulted on the 2008 Contract for Deed, Bearces gave notice of default, and Yellowstone entered into negotiations with Bearce to salvage the land purchase. These curative negotiations resulted in the subject modified Contract for Deed dated August 25, 2009 which contained a cash component of such purchase, and equity component for 100,000 unit shares of stock in Yellowstone of $1.00 per unit share for a value of $100,000.00 to make up the difference in the total purchase price. The equity stock component was subject to the

above discussed condition precedent of Yellowstone obtaining funding for and construction of the planned ethanol refinery.

¶(33) The exact wording of the subject condition precedent as contained in the curative Contract for Deed reads as follows:

"the Sellers shall receive shares in the Buyers's limited liability company totaling a value of $100,000.00, in the name of the sellers, to be delivered following financial close of the financing for the Buyers ethanol plant to be constructed upon the above-described real property. (*See* August 25, 2009 Modification of Contract for Deed Exhibit at Appendix p. 133).

¶(34) The District Court, when granting Yellowstone's Cross Motion for summary judgment, relied heavily on the nonoccurring condition precedent, stating as follows:

Yellowstone Energy's duty to issue the units to the Bearces was only triggered after it closed on the financing for the ethanol plant. It is undisputed that Yellowstone Energy never obtained financing for the proposed ethanol plant. In December 2011, Yellowstone Energy indefinitely suspended its efforts to obtain financing for and to construct the ethanol plant on the Subject Property. Despite the fact that the contractual condition precedent set forth in the Contract for Deed had not occurred, the Bearces did receive shares. While the essence of how that occurred is not a material fact, there was evidence presented to the court that many on Yellowstone Energy's board of governors did not wish to issue the Bearces' Units to the Bearces outside the terms of the contract. However, Bob Gannaway, the president and chief executive officer of Yellowstone Energy, after significant advocacy by him and discussion among the Board, successfully convinced the board to issue the Bearces' Units to the Bearces anyway despite not having a duty to do so. *Docket No. 45, Dep. Gannaway 71:14-25, 72:1-15.* The facts here show that the Bearces received, or more accurately, were credited, their units at the same time all other investors in the company were credited with their units. Therefore, the Bearces cannot show that they did not receive everything promised to them by the Contract for Deed and the Modification. In fact, they actually received more than they were promised. For this reason alone, summary judgment in favor of Yellowstone is appropriate.

(*See* Order granting Summary Judgment for Yellowstone at ¶10 at Appendix p. 213)

¶(35) Subsequent to the August 25, 2009 modified Contract for Deed, Yellowstone changed its name to Yellowstone Energy, L.L.C. and abandoned its plans for building an ethanol refinery, instead, Yellowstone Energy, L.L.C. entered into a lease contract with Savage Service Corporation to build a railroad crude oil loading facility on the Bearce land.

¶(36) The Exhibit most critical for this appeal, is the letter dated July 20, 2010, by Robert Gannaway, President of Yellowstone Ethanol, L.L.C. to Bearce (*See* Appendix p. 146) which letter stated as follows:

> Pursuant to paragraph 2(d) of the above-referenced Contract for Deed you, as the "Sellers" in said Contract, are to Receive shares in Yellowstone Ethanol. LLC having a value of $100,000.00, to be delivered following financial close of the financing for the ethanol plant to be constructed by Yellowstone Ethanol, LLC.
>
> As of today's date, July 20, 2010, even though there are subscriptions for shares of Yellowstone Ethanol, LLC and the shares have been assigned a value of $1.00 per share, Yellowstone Ethanol, LLC has not issued shares to its members. However, Yellowstone Ethanol, LLC wishes to assure you that will comply with the terms set forth in paragraph 2(d) of the Contract for Deed by delivering to you, at the time shares are issued to all its members, 100,000 shares having a value of $1.00 per share.

¶(37) The above legal analysis by the District Court, is in error as a matter of law, based on the nonoccurrence of the condition precedent. The correct legal analysis, is, Yellowstone did intentionally waive the condition precedent. The result being Bearces had a vested stock subscription right equal to all other investors, for shares in Yellowstone, as of the date of the waiver July 20, 2010. This vested stock interest of stock units, existed, and was held by Bearce, when the property transaction closed on August 3, 2010 when the Deed was signed and delivered transferring record title into Yellowstone. Bearce therefore earned the subject 100,000 of equity stock units the same as if Bearce purchased 100,000 unit shares in Yellowstone.

¶(38) The ability to waive a condition precedent, and the legal effect of the waiver of a condition precedent, in a contract, has been well established under contract law:

> It is true that parties to a contract are generally free to impose whatever conditions they wish on their contractual undertakings and that if such conditions are not literally met or exactly fulfilled, no liability can arise on the promise qualified by the conditions. *13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts* §§ 38:2, at 370-71, 38:6, at 384-85 (4th ed. 2000) [hereinafter *Williston on Contracts*]. However, it is also "well established that a party to a contract may waive a condition precedent to his or her own performance of a contractual duty, even in the absence of a provision in the contract expressly authorizing a waiver." *13 Williston*

on Contracts § 39:17, at 568-569; *see American Cent. Ins. Co. v. McCrea, Maury & Co.,* 76 Tenn. 513, 525, 1881 WL 4452, at *6 (1881) ("it is in the nature of a condition precedent to be subject to waiver'). This is so even where, as here, the contract contains a clause stating that the entire agreement will be null and void if the condition is not met. *13 Williston on Contracts* §39:17, at 568-69. If, in spite the failure of the condition precedent, the party in whose favor it was drafted performs or receives performance under the contract, the condition precedent is waived. *13 Williston on Contracts* § 39:17, at 569; *8 Catherine M.A. McCauliff, Corbin on Contracts* § 40.4, at 533 (Joseph M. Perillo rev. ed. 1999)[hereinafter *Corbin on Contracts*]. The contract will be enforced despite the nonoccurrence of condition, and the party that waived the condition is estopped from asserting the failure of the condition as a defense in a suit to enforce the agreement. *13 Williston on Contracts* § 39:17, at 569-70.

Tennessee Div. of the United Daughters of the Confederacy v. Vanderbuilt University, 174 SW.3d 98, 115 (Tenn App. 2005) *citing Williston on Contracts.* (treatise citations omitted)

¶(39) The letter by Yellowstone to Bearce of July 20, 2010 is a clear intentional waiver of the prior condition precedent as a matter of law. This waiver vests Bearce with a stock subscription right to 100,000 stock units equity interest no later than when the transaction finalized on August 3, 2010, when the deed for the land was signed and delivered by Bearce to Yellowstone.

¶(40) The District Court's view, that the Bearce Interest was like a gift, devoid of consideration, different in consideration and risk, than the cash investors, due to the applied condition precedent, was reversible error by the District Court. By statute, a "contribution", to a limited liability company, is defined by Statute 10-32-02(12) N.D.C.C. to include: "any cash, property, services rendered…which a member contributes to a limited liability company". Thus, land contribution, counts the same as cash as a "contribution" to a limited liability company.

¶(41) As the District Court noted, at no time, has there ever been a member control agreement, establishing a separate class of member or investor, who contributes cash to Yellowstone.

¶(42) The correct legal analysis is; that as of the date of the waiver of July 20, 2010, the Bearces have equal rights and duties owed to them for their $100,000.00 value of membership

equity interest in Yellowstone, the same as owed to all other investors in Yellowstone, as a matter of law.

¶(43) Yellowstone could have chosen to not issue Bearce the stock in reliance on the nonoccurrence of the condition precedent. However, by waiving the condition precedent, and giving notice of the decision to issue the 100,000 shares of stock, Yellowstone then owes all the duties which come with the subscription to issue the 100,000 shares to Bearce. The District Court errored on this important legal issue.

ISSUE TWO

Whether District Court errored, as a matter of law, that representations made to Bearce, by agents of Yellowstone, when entering into the August 25, 2009 Contract for Deed (the modification) that the shares contemplated "would be treated the same as the other investors" was not material to the series of transactions for purchase of the land, was not to be considered in any claim for fraud in the treatment of their promised stock units, and was evidence otherwise precluded by application of the parol evidence rule?

¶(44) The District Court, in its Order, held, as a matter of law, the representations made by agents of Yellowstone (when brokering the August 25, 2009 modified Contract for Deed involving cash and stock) that the offered stock, if and when issued, would be treated "the same as all the other investors", was not material to a ruling in this case, and was otherwise barred by application of the parol evidence rule. (*See* Order ¶¶ 16,17 and 18 at Appendix p. 213).

¶(45) There was before the District Court, both the Affidavit testimony and Deposition testimony by the Bearces, that beginning when at the kitchen table, to negotiate the terms of cash and stock offered by Yellowstone, and later to cure the present default by Yellowstone, and enter into the modified Contract for Deed, that Bearces stated their clear expectation and inquiry whether their stock in Yellowstone "to be treated the same as the other investors", and Yellowstone's agents, confirmed such stock would be treated the same as the other investors. (*See* Order at ¶11 at Appendix p. 213).

¶(46) These statements by Yellowstone, were not directly refuted by Yellowstone's agents, who were at the table negotiating for Yellowstone. The District Court has made a finding, in this case, that Bearce did not know of Yellowstone's intent to triple the interest of

"seed money" cash investors, and thus, the Bearce stock, was not going to be given the 3:1 increase, as not being considered "seed money" by the Company. (*See* Order at ¶37 at Appendix p. 213)

¶(47) In *Golden Eye Resources, LLC v. Ganske,* 2014 ND 179, ¶18-19, 853 N.W.2d 544, 533, this Court held:

> Accordingly, the parol evidence rule does not apply to the immediate parties to a contract where one of the parties alleges fraud as a defense to the validity of the contract, and parol evidence is admissible to show the inducement for entering the contract. *Symington,* at ¶ 20; *Krank v. A.O. Smith Harvestore Prods. Inc.,* 456 N.W.2d 125, 130 (N.D. 1990); *Smith v. Michael Kurtz Constr. Co.* 232 N.W.2d 35,39 (N.D. 1975); *Verry v. Murphy,* 163 N.W.2d 721, 730 (N.D. 1968); *Schue v. Jacoby,* 162 N.W.2d 377, 382 (N.D. 1968).
>
> This exception to the parol evidence rule applies even if the evidence contradicts or conflicts wit the terms of the written agreement:
>
> > It is widely agreed that oral testimony is admissible to prove fraud or misrepresentation, mistake or illegality. This exception to the parol evidence rule applies even if the testimony contradicts the terms of a completely integrated writing.
>
> 6 Peter Linzer, *Corbin on Contracts* § 25.20[A], at 277-279 (2010) (footnotes omitted). The Court in *Poeppel v. Lester,* 2013 S.D. 17, ¶ 22, 827 N.W.2d 580, recently noted that "[a] substantial majority of jurisdictions follow the traditional, majority view that the parol evidence rule is inapplicable in cases of fraudulent inducement." Thus, "parol or extrinsic evidence is admissible to prove fraud," and "[t}he parol evidence rule is simply not applicable *552 when fraud has been employed as enticement to enter a contract." *Poeppel,* at ¶ 20. In such cases, "[t]o bar extrinsic evidence would be to make the parol evidence rule a shield to protect misconduct." 6 Linzer, *supra*, § 25.20[A], at 280. Furthermore, this Court has expressly cautioned that the statute of frauds may not be employed to perpetrate a fraud or promote an injustice. *See, e.g., Trosen v. Trosen,* 2014 ND 7, ¶ 21., 841 N.W.2d 687; *Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co.,* 338 N.W.2d 64, 70 (N.D. 1983); *Nelson v. TMH, Inc.,* 292 N.W.2d 580, 584 (N.D. 1980).
>
> Section 9-03-08, N.D.C.C., defines actual fraud, and includes statements of fact which the party does not believe to be true, the suppression of material facts by one having knowledge or belief of the fact, and a promise made without any intention of performing it. The making of an affirmative statement of fact, known to be untrue, with intent to induce another to enter into a contract is actionable fraud under N.D.C.C. § 9-03-08. *Kary v. Prudential Ins. Co. of Am.,* 541 N.W.2d 703, 705 (N.D. 1996). Statements of opinion, or which amount to mere puffery or sales talk, do *553 not constitute fraud. *Id.* At 705-706; *West v. Carlson,* 454 N.W.2d 307, 311 (N.D. 1190). As the court explained in *Kary,* at 706 (quoting *Sperle v. Wiegel,* 130 N.W.2d 315, 320 (N.D. 1964)): *Golden Eye, supra* at ¶ 23.

¶(48) Here, the District Court found Yellowstone, had a plan to triple member interest units ("stock") to those investors who put in cash "seed money". Such plan was not disclosed to

Bearce by Yellowstone when Yellowstone was negotiating the August 25, 2009 modified Contract for Deed. Such parol evidence and nondisclosure, was both material and crucial to the claim by Bearce for fraud in the inducement, and supports the equitable claim for Yellowstone to give Bearce the 3:1 stock split the same as was given all other Yellowstone investors except Bearce.

¶(49) On what planet could Yellowstone maintain such disclosure was not material, and that Bearce would have still made the deal for the curative August 25, 2009 Contract for Deed to give Yellowstone the land; if Bearce knew, all the other investors, except Bearce, would get a 3:1 stock split for their Yellowstone membership interest. It is obvious, the land sale was even more critical to Yellowstone's business model, than just cash in the bank. You need land to build an ethanol plant or crude oil loading facility.

¶(50) The District Court errored by holding such inducement evidence, was not material, and was not to be allowed in this case. The purpose of such testimony, was to expose the fraud perpetrated by Yellowstone when inducing Bearce to sell the needed land, and was important evidence material to support Bearces' claim for their reasonable expectations that they be treated fairly and had their stock interests tripled in the 3:1 "stock split". The evidence is undisputed, the Bearce stock was not "treated the same as the other investors." Such nondisclosure was fraud and deceit as defined by 9-10-02(3) N.D.C.C.; 9-03-08(3) N.D.C.C. and 9-03-09(1)(2) N.D.C.C..

ISSUE THREE

Whether the District Court errored, as a matter of law, when holding no fiduciary duty was owed and breached by Yellowstone, by the Board action to triple the investment interest of all cash investors in approving a "3:1 stock split" for all cash investors to the exclusion of the Bearce membership interest?

¶(51) The above errors by the District Court under Issues One and Issue Two above, culminate, in the main event, where the District Court found no breach of any fiduciary duty, no oppression by Yellowstone and no remedy to Bearce for the 3:1 "stock split" never disclosed to Bearce. (*See* Order at Appendix p. 213) The District Court held as Bearce has no investor relationship with Yellowstone, Bearce has no claim for breach of any fiduciary duty. (*See* Order at ¶¶ 33, 37 at Appendix pp. 213)

¶(52) Yellowstone meets the statutory designation as a closely held limited liability company, as having less than thirty-five members 10-32-02 (10) N.D.C.C., as well as Yellowstone, having all of the "typical attributes" of a closely held company, as stated in *Kortum v. Johnson,* 2008 N.D. 154, ¶25, 755 N.W.2d 432, to include a small group of local investors, who know each other, and where many of the members also hold a seat as an officer and board of directors.

¶(53) Whether Yellowstone owed a fiduciary duty to Bearce, as a member, is a question of law that is reviewed under a de novo clearly erroneous standard. *Kortum* at ¶ 24. Such analysis is the same applicable to both corporations and limited liability companies; where the applicable duties of good faith, defining a closely held business organization, preemptive rights and equitable remedies for members have similar, if not identical, statutes for both

corporations and limited liability companies; [Compare 10-19.1-85.1 N.D.C.C. with 10-32-52.1 N.D.C.C. (equitable remedies), 10-19.1-65 N.D.C.C. with 10-32-27 N.D.C.C. (preemptive rights), 10-19.1-60 N.D.C.C. with 10-32-96 N.D.C.C. and 10-32-86 N.D.C.C. (standard of conduct for officers, managers and governors)], it thus follows, the case law principles of good faith, transparency, notice and fair dealing are applicable to both corporations and limited liabilities companies.

¶(54) As Yellowstone meets the criteria for a closely held corporation, and with the clear waiver vesting Bearce with their membership interest of 100,000 units (shares), it plainly follows Yellowstone owed a "fiduciary duty" to Bearce.

¶(55) The District Court was critical of Bearces' claim for oppression not being clearly set forth under limited liability company law. (Order at ¶¶ 28, 29, 30 at Appendix p. 213). The law for oppression in limited liability law is developing and examples of bad conduct are more readily found under corporation cases. North Dakota law for notice pleading Rule 8 N.D.R.Civ.P. only requires "a short and plain statement of the claim" showing the pleader is entitled to relief. *Tibert v. Minto Grain, LLC,* 2004 ND 133 ¶ 18, 612 N.W.2d 294.

¶(56) The Complaint in this action, contains very clear and specific facts and allegations as to the 3:1 stock split, undisclosed to Bearce and having the effect of dilution of their membership interest, which satisfies notice pleading of such claim in a limited liability company. (*See* Count One of Complaint ¶¶ 1-19 at Appendix p. 5)

¶(57) The final issue is when did such fiduciary duty arise, and was such duty breached by the conduct of Yellowstone? It is Bearces' position such duty arose August 3, 2010 with the waiver and vesting of the stock subscription and Yellowstone accepting the Deed for the land August 3, 2010.

¶(58) In *Schumacher v Schumacher,* 469 ND 793, 797 (N.D. 1997) this Court defined the standard of fiduciary duty in a corporation and such standards obviously would also apply to a limited liability company, which has the same statutory language of good faith owed by officers and directors:

> We held in *Balvik, supra,* that majority stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with the utmost of good faith and loyalty in the operation of the enterprise, and " 'may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.' " *Balvik, supra,* 411 N.W.2d at 387 (quoting *Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 328 N.E.2d 505, 515 (1975). We also held that a minority shareholder who has been "frozen out" or otherwise harmed by a breach of fiduciary duty by the majority shareholders is entitled to appropriate relief. *Schumacher* at p. 797. *Citing Balvik v. Sylvester,* 411 N.W.2d 383 (N.D. 1987).

¶(59) The facts are undisputed, that the letter of waiver committing Yellowstone to the $100,000.00 member interest is dated **July 20, 2010**. Hence Yellowstone was aware of its commitment to Bearce before Bearce signed off on the Deed to Yellowstone **August 3, 2010**, with Bearce fully performing the Contract for Deed and earning their promised membership interest. There was no condition precedent existing at the time of the signing of the Deed August10, 2010. The letter of July 20, 2010 would document the description, value and vesting of the Bearce stock. Yellowstone, by accepting the August 3, 2010 Deed for the land, obviously accepted such Bearce contribution, involving the now promised 100,000 units of stock to Bearce meeting the criteria of 10-32-56 N.D.C.C.

¶(60) It is undisputed, that twice the Board of Directors, voted by Company resolution, to grant a 3:1 "stock split" to those investors who put in cash "seed money" into Yellowstone. (*See* copy of Board minutes for October 25,2012 and December 29, 2011 at Appendix pp. 153, 157). Both of these actions occur **after** the July 2010 waiver of the condition precedent, and **after** Bearce signed the Deed on August 3, 2010.

¶(61) As found by the District Court, Yellowstone never has issued "shares" or certificates representing stock in the limited liability company. There was no member control agreement for Yellowstone. There was only one class of units (called stock) at one dollar per member unit as was the same for all members. The above action by the Board did not create any new investment or stock class, but simply tripled the number of shares for cash investors.

¶(62) The 3:1 stock split to triple the cash seed money was done by Board action with no notice to Bearce and was done after Yellowstone obtained the signed Deed for which the 100,000 shares was now consideration supporting the land purchase.

¶(63) The District Court found no oppression or breach of duty, because the Bearce shares had been put on a ledger sheet sometime between December 4, 2012 and December 18, 2012, stating only at that time, of such allocation, did any membership "stock interest" to Bearce vest:

> "The undisputed facts show that the Bearces' units were not diluted because the Bearces, like all other members, owned no units in the company until the allocation shown in the Unit Ledger, which took into account the 3:1 increase for those who invested promotional seed money. (*See* Order at ¶ 20 at Appendix p. 213)
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> Yellowstone Energy was obligated to do the 3:1 increase as it had promised the promotional seed money investors it would do so at the time of allocation of units. Similarly, it met its obligation to the Bearces by paying the cash set out in the agreement and exceeded its obligation by providing a $100,000.00 worth of units even though it was not obligated to do so. (*See* Order at ¶ 21 at Appendix p. 213)
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> The undisputed facts show that the Bearces' Units were not diluted. Therefore, dilution of the Bearces' units is not a sufficient ground for breach of fiduciary duty. The Bearces assertion that they were treated differently than any like kind unitholder is unsupported by the evidence before this Court. The Bearces are correct that there were not two different kinds or classes of units allocated to or held by members of Yellowstone Energy. The difference is, however, what type of money was invested in the company in exchange for the units. (*See* Order at ¶ 32 at Appendix p. 213).

¶(64) In this case, the history of this purchase shows that Yellowstone did not have the cash to pay the initial purchase agreement. That agreement fell into default. You have got to have land to build an oil refinery or build a train loading facility. Accordingly, Yellowstone

negotiated a new cash price and made up the difference with the unit stock offer subject to the above described condition precedent. There was obvious risk to Bearce if such condition precedent did not occur, Bearce would lose the value of these stock units. Further, given the need for land, as key to Yellowstone's business plan, where membership contributions can be in both cash or property (10-32-02(12) N.D.C.C.); it follows, the importance of Bearces' contribution of land, for stock units, should equitably qualify as "seed money" the same as all other initial investors. Bearce had the same risk in losing value by providing "seed money", in the form of land, the same as if they had paid cash into Yellowstone.

¶(65) Additionally, the waiver letter dated October 25, 2012, qualifies a defacto stock subscription agreement for 100,000 units, and the written notification by the letter of July 20, 2010, would qualify as a "statement of interest owned" sufficient to meet the requirements of 10-32-28(2) N.D.C.C. to vest Bearce with an enforceable stock expectancy right as of October 25, 2012.

¶(66) Even if the unit shares fully vested when "booked" in December 2012, the officers and Board of Directors knew of the October 25, 2010 letter to Bearce, committing to the shares, and if all the other members interests were "booked" at the same time in December 2012, the Bearce's stock units were of the same class, supported by consideration (the Deed) and had the same status as all the other cash investors in Yellowstone. The Board resolution, to "split" the shares 3:1, made back in July 2012, shows the Board recognized the then present existence of such shares owed to cash investors in July 2012, in order to "split" them. Such recognition of existence of such cash shares would be equally applicable to the existence and obligation owed for the Bearce shares as of July 2012.

¶(67) The fiduciary standard requiring the utmost "good faith" would require the disclosure of any planned "seed money", two tier plan, by Yellowstone at the time of the negotiations for the modified Contract for Deed, and certainly after the waiver letter of October 25, 2012 and the closing of the sale and Deed, by Bearce to Yellowstone occurring August 2, 2010. Yellowstone thus owed a duty of clear notice, opportunity to come to a meeting of the Board and object, before the Board undertook its official action to vastly increase the shares and holdings of those officers and members who were then on the Board. This is textbook dilution and clear oppressive conduct, which diluted to the interest vested in Bearce for Bearces' 100,000 share units in Yellowstone.

¶(68) Such conduct of nondisclosure, as to the planned 3:1 stock split for cash investors is also clear textbook fraud, which nondisclosure induced Bearce to enter into the modified Contract for Deed, and sign off on the August 3, 2010 Deed to Yellowstone for the needed land, with Bearces' stated expectation, their promised stock, (if and when issued), "would be treated the same", as all other investors in Yellowstone.

¶(69) The issue of parol evidence exception, for fraudulent inducement, is applicable to show the "reasonable expectation" of Bearce to "be treated the same as everybody else", and to prove the oppressive conduct by Yellowstone in this case. Here, all members except Bearce, got to triple their cash membership units and Bearce was never told about the plan. That is clear oppressive conduct as such conduct was defined in *Balvik v. Sylvester,* 411 N.W.2d 383, 385 (N.D. 1987), which resulted in the dilution of Bearces' units and violation of the preemptive rights given by statute to Bearce under 10-32-37 N.D.C.C..

¶(70) The District Court got this issue very wrong as a matter of law. Yellowstone could have chosen not to issue the Stock Units to Bearce, relying on the nonoccurrence of the

Condition precedent of no refinery being built. Yellowstone instead, chose to knowingly waive such condition precedent, creating an enforceable stock expecting in favor of Bearce. At such time, fiduciary duties are then owed, by Yellowstone to Bearce, as a matter of law.

¶(71) The District Court errored as a matter of law to find no duty, no breach of fiduciary duty and no oppressive conduct in this action.

CONCLUSION

¶(72) Yellowstone cured its prior default under the initial Contract for Deed, by negotiating a cash and stock offer to Bearce in the subsequent Contract for Deed performed by the parties. The stock offered to Bearce by Yellowstone was subject to a condition precedent, which condition precedent was subsequently clearly and knowingly waived by Yellowstone on July 20, 2010, creating an enforceable stock subscription right by Bearce for stock units and evidencing an equity membership interest held by Bearce in Yellowstone.

¶(73) Yellowstone's Board and officers, suppressed the plan for a 3:1 cash member stock split and gave Bearce, absolutely no knowledge, or notice, of such Board plan to triple the interests of those who paid cash seed money into the Company. Before the shares were officially "booked", the Board voted themselves a 3:1 increase in their holdings. Such Board conduct occurred knowing the Bearce stock was then unconditionally promised to Bearce and was therefore, an obligation of the Company. Bearce earned such stock when it signed the August 3, 2010 Deed to Yellowstone for the land. Such slippery conduct by the Board and officers of Yellowstone is textbook "oppression" by Yellowstone to dilute the equity interest of Bearce in Yellowstone.

¶(74) Where it has been shown the District Court failed to find such waiver, failed to find such oppressive conduct, and failed to apply the exception for evidence to the parol evidence rule, summary Judgment for Yellowstone, was reversible error by the District Court.

RELIEF REQUESTED

¶(75) The Summary Judgment in favor of Yellowtone should be REVERSED and Judgment should be entered in favor of Bearce or this case be remanded back for trial on what legal or factual issues this Court identifies.

Dated this 30th day of September, 2018.

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