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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' REPLY BRIEF TO THE ARGUMENT MADE BY YELLOWSTONE IN IT'S BRIEF OF APPELLEE

CHARLES L. NEFF
NEFF EIKEN & NEFF, P.C.
N.D. Bar I.D. #04023
111 East Broadway, P.O. Box 1526
Williston, North Dakota 58802-1526
(701) 577-2000
cneff@nefflawnd.com

ATTORNEYS FOR APPELLANTS
DANIEL T. AND DEBRA ANN BEARCE

TABLE OF AUTHORITIES

CASES:	PARAGRAPH:
Hanson v. Hanson, 52 N.D. 146, 147; 202 N.W. 645, 646 (1924).	¶ 6
Danuser v. IDA Marketing Corporation, 2013 ND 196 ¶34, 838 N.W.2d 488, 499	¶ 19

STATUTES AND RULES:	PARAGRAPH:
31-11-05 (19) N.D.C.C.	¶ 6

¶(1) Comes now Bearce to Reply to the argument made by Yellowstone in its Brief of Appellee as follows:

¶(2) Despite the spin by Yellowstone to describe the unit shares allocated to the cash investors as "seed stock" or "promotional stock" and the unit stock assigned to Bearce as "standard stock"; to be clear, there was at all times material to this lawsuit, only one class of one dollar par value stock. What is at issue here in this lawsuit is the admitted fact that the cash investors by Board action decided to vote themselves a 3:1 stock split of these same class of unit shares.

¶(3) Accordingly, all comment and argument made by Yellowstone, in its Brief, of the intent to have two distinct classes of shares and a planned bonus of a 3:1 stock split to the cash investors, aside; no such separate class of investors was ever created and everybody, including Bearce, got the same class and one dollar par value of membership units referred to as stock.

¶(4) To reply to Yellowstone's position that they had no obligation to issue the 100,000 of unit shares to Bearce, nor any duty owed to Bearce, upon the issue of 100,000 units of one dollar par stock, it is important to review the undisputed facts as it relates to the reason and timing Yellowstone chose to issue the Bearce stock.

¶(5) The undisputed facts are; the letter to Bearce by Yellowstone, advising the 100,000 units of stock would be issued by Yellowstone is dated July 25, 2010. (*See* Letter, Exhibit C, at Appellant Appendix p. 123). The payoff of the Contract for Deed and signing of the Deed by Bearce to Yellowstone occurs on August 3, 2010. (*See* Exhibit G at Appellant Appendix p. 146).

¶(6) The Board minutes of Yellowstone for the date of July 13, 2010 documents Yellowstone now has a contract approved with Savage Service Corporation, to build and lease an oil loading facility which exists today with financing by First National Bank of Williston, to payoff Bearce. These minutes of the July 13, 2010 Board meeting also state:

> 6. DON MOVED AND CLINTON SECOND THAT THE YELLOWSTONE REPRESENTATIVES ARE AUTHORIZED TO RESOLVE THE ISSUE OF STOCK ISSUE TO DAN BEARCE IF THE PROVISION IS BROUGHT UP.
>
> (*See* Exhibit 4 to Deposition of Rodney Fred Prewit, Minutes of Yellowstone Board for October 13, 2010 at Index No. 42)

It is a maxim of Jurisprudence in North Dakota that the law "respects form less than substance". Section 31-11-05 (19) N.D.C.C.; *Hanson v. Hanson,* 52 N.D. 146, 147; 202 N.W. 645, 646 (1924).

¶(7) Applying the above principle of law, it has been shown that when Yellowstone got the financing to pay off the Bearce Contract for Deed to build the oil loading plant, it had its financing and was building an industrial facility, such that Yellowstone, arguably and fairly, would have the duty to then issue the 100,000 unit shares to Bearce as per contract.

¶(8) This issue was on the minds of the Board of Yellowstone as they were preparing to pay off Bearce on the Contract for Deed, as shown by the minutes of the July 13, 2010 Board meeting.

¶(9) The Board of Yellowstone needed the land, so the July 25, 2010 letter advising Bearce, the stock would be issued, went out one week before Yellowstone closed on the sale.

¶(10) Accordingly, in addition to Bearces' waiver of condition precedent argument to support the consideration argument that the Bearce stock was not a gift but was an obligation owed by Yellowstone; we now have a good argument, the stock was also earned, when

Yellowstone was indeed building a plant and had obtained financing to fulfill the condition precedent requiring Yellowstone to issue the stock.

¶(11) In reply to Yellowstone's argument, no duties were owed to Bearce as a matter of law, because there was no duty to issue the stock, characterizing the issue of the stock units promised to Bearce, as akin to a gift, devoid of consideration, or different in risk, as incurred by the cash investors who obtained the 3:1 stock split; it follows, that stock issued of the same class, all had the same risk of the stock becoming worthless if Yellowstone failed as a business. The cash investors would lose cash and Bearce would have lost the last 100,000 dollars of value their land was worth under the Contract for Deed.

¶(12) Stock is stock, and if one was gifted 10 shares of McDonalds Corporation, and McDonalds issued a one dollar per share dividend, you would have a right to ten dollars of total dividend.

¶(13) The point being, once you have a vested interest in a share of stock or membership unit, the same duties are owed to each stockholder or member interest holder of the same class of ownership. It would be ridiculous for this Court to otherwise hold in this appeal.

¶(14) At the time the Board of Directors of Yellowstone voted themselves a "3:1 stock split" their status as yet "unbooked" stock unit holders, was exactly the same as Bearce being informed Yellowstone would issue 100,000 member unit shares to Bearce.

¶(15) The evidence is undisputed, that Yellowstone knew of its stock issue problem to Bearce as of July 13, 2010, and had issued its stock letter to Bearce July 25, 2010, before the Board voted to give its cash investors the benefits of the 3:1 stock split. Once the units were promised to Bearce, the relationship is established and the fiduciary duty rule applies.

¶(16) Finally, Yellowstone in its brief maintains it treated Bearce with good faith and fair dealing, despite owing no fiduciary duty (or any duty) to Bearce for this alleged "sale" with Bearce having no investment or risk in Yellowstone's future.

¶(17) The stock ledger sheet evidencing the number of "booked" shares for each member of Yellowstone (*See* Exhibit I at Appellant Appendix p. 150) lists cash or services rendered contributions for each member except Bearce. The space to list the contribution by Bearce is entirely left blank but does give Bearce a voting ratio of .98%. Such voting ratio would be larger if not for the 3:1 stock split and such is a textbook case of oppression by dilution of an equity owners interest in a company.

¶(18) Accordingly the argument by Yellowstone in its Brief, that no oppression has indeed occurred in this case, fails as a matter of law and simple mathematics.

¶(19) Finally a word about equity and fairness under North Dakota law. North Dakota law grants district courts broad equitable powers to remedy violations of duties of directors. *Danuser v. IDA Marketing Corporation,* 2013 ND 196 ¶34, 838 N.W.2d 488, 499. This equitable point of law is applicable to wrongful conduct in all areas of closely held companies whether they be corporation, limited liability companies and even partnerships.

¶(20) Here, Yellowstone negotiated as part of the sale of Bearce farmland a deal to pay both cash and offer an investment opportunity if the planned business venture of an ethanol plant should come to pass. The clear idea was for Bearce to be able to participate in the planned future business of the Company.

¶(21) The planned ethanol plant is shelved by the Board of Directors in favor of building an oil loading plant on the Bearce land. One week before paying the cash owed under the Contract for Deed and presenting the August 3, 2010 Deed for signature, Yellowstone,

promises in writing on October 25, 2018 to issue the 100,000 of unit share stock to the Bearces despite no ethanol plant being built. Bearce, as of July 25, 2010, had a valid expectation of being stockholders in this closely held company.

¶(22) Then, after the October 25, 2010 stock notification to Bearce, and before the membership interests are officially booked for all members (for both all cash investors and Bearce), the Board votes to increase the holdings of all members except Bearce by a 3:1 stock split of the same class and value of stock units.

¶(23) Bottom line, it really makes no difference as to all the technical issues of sale, investment, consideration, gift or the history of the transactions, which have been put under the microscope in this case. Once the stock was promised on October 25, 2010, the baby is born, and duties of good faith attach. The stock promised to Bearce was of the same class, type and status not yet officially "booked" as was the status then of all shares promised to the group of cash investors. Opting to build an oil loading plant facility and scrapping the ethanol plant ended the old business model and a new venture was being undertaken. It was just greed and the ability of the Board cash investors, to treat themselves to a triple stock bonus, which has landed them now in front of this Court.

¶(24) The equitable concepts of justice and fairness mandate Bearce get the same 3:1 increase the same as all other investors received. Fairness under North Dakota law and justice require nothing less.

Dated this 13th day of November, 2018.

NEFF EIKEN & NEFF, P.C.

By: /s/ Charles L. Neff
CHARLES L. NEFF
N.D. Bar I.D. #04023
Attorney for Plaintiffs
111 East Broadway, P.O. Box 1526
Williston, North Dakota 58802-1526
(701) 577-2000
cneff@nefflawnd.com

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AFFIDAVIT OF ELECTRONIC SERVICE

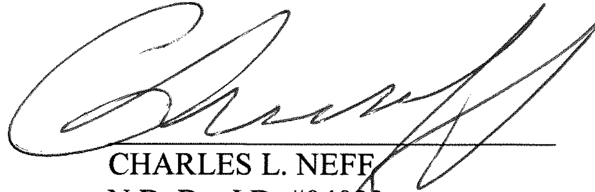
I, Charles L. Neff, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 13th day of November, 2018, I served the following documents:

APPELLANTS BEARCES' REPLY BRIEF TO THE ARGUMENT MADE BY YELLOWSTONE IN IT'S BRIEF OF APPELLEE

on the persons listed below by sending via email to the following addresses:

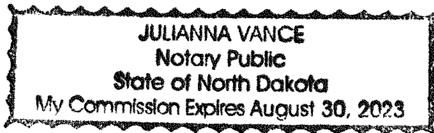
Trevor A. Hunter thunter@crowleyfleck.com

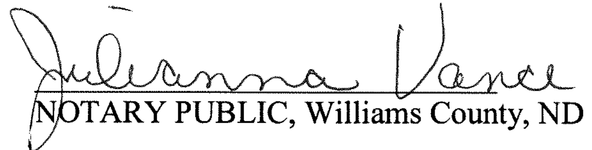
Kent Reierson kreierson@crowleyfleck.com



CHARLES L. NEFF
N.D. Bar I.D. #04023
Attorney for the Plaintiffs
111 E. Broadway, PO Box 1526
Williston, North Dakota 58802-1526
(701) 577-2000
cneff@nefflawnd.com

Subscribed and sworn to before me this 13th day of November, 2018.





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