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STATE OF NORTH DAKOTA

In the Supreme Court
State Of North Dakota

Supreme Court No. ~~20180013~~ 20180421

Grand Forks County Case No. ~~18-2017-CV-00020~~ 18-2015-CV-01513

Steven Nelson, individually, and in the right of and for the benefit of J & S Nelson Farms, LLP,

Plaintiffs and Appellants,

v.

James Nelson, Brian Nelson, David Nelson, and J & S Nelson Farms, LLP,

Defendants and Appellees.

APPEAL FROM FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN A. THELEN, PRESIDING

INITIAL BRIEF OF PETITIONER AND APPELLANT STEVEN NELSON

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[¶1] STATEMENT OF THE ISSUES

I. **The District Court committed error by striking important claims from Steven's Complaint as a discovery sanction -- where the plaintiff had disclosed and identified to the defendants literally all of the more than 2,000 transactions in which defendant James had improperly diverted (and converted) partnership funds for his personal use – and where the defendants made no showing in the record of what more the plaintiff could possibly have done to explain these transactions – transactions which defendant James had conducted in the first place**.

II. **The District Court committed error by assessing Steven Nelson the offset sum of $63,113.37 subtracted from the "total sum due Steven" of $173, 397.00 pursuant to the Court's "inherent power to sanction" without having any legal or factual authority to do so.**

III. **The District Court committed error in calculating the value of Steven's interest and specifically by refusing to accept the gift tax valuation on calculation of the Fair Market Value of the partnership as a going concern.**

IV. **The District Court committed error by denying Steven Nelson's post-trial motions under Rule 52, Rule 59 and Rule 60 of the North Dakota Pules of Civil Procedure**.

[¶2] STATEMENT OF THE CASE

[¶3] In the instant litigation, Steven Nelson (Steven) litigation sought injunctive and compensatory relief from defendants James Nelson (James), Brian Nelson (Brian), and David Nelson (David)–upon the grounds that Steven had been wrongfully disassociated from the partnership through a series of wrongful actions undertaken by the defendants over time–but most importantly, because the defendants were responsible for the improper diversion (and conversion) of some two million dollars [$2,000,000.00] in partnership funds for their own personal, non-business-purposes.[1]

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[1] Steven Nelson had previously brought an action against defendant James and also Country Farm Credit Services, banker Randy Skjerven and Certified Public Accountant Chris Feller, in the United States District Court for the District of Minnesota under the

[¶4] The operative facts in this action revolve around the financial transactions of the J&S Nelson Farms partnership from 1998 through the year 2015, and the central documentary evidence in the case consists of the Partnership Agreement(s) and the partnership's financial ledgers which document the many transactions which form the basis for Steven Nelson's claims.

[¶5] Because Steven was a partner in J&S Nelson Farms at the time that the instant action began, Steven was able to obtain and access, over time, a large volume of relevant and probative financial documents from the partnership, and from third parties which were doing business with the partnership.

[¶6] However, while Steven Nelson was a general partner in the J&S Nelson Farms business from the time that the partnership was created through the time that this litigation began, literally ***all*** of the operational documents of the partnership were

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Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et. seq*., but this case was dismissed by the federal district court upon a Rule 12(b)(6) "failure-to-state-a-claim" motion by the defendants. See, *Steven v. James, et. al*., Civil No. 14-4854 (D. Minn.), particularly the decision of the federal district court in, *Steven Nelson v. James Nelson, et. al*., 2015 U.S. Dist. LEXIS 88272, 2015 WL 4136339, *19, (D. Minn. July 8, 2015)["***Without diminishing the severity of the allegations or trivializing any pecuniary or other harm Steven may have in fact incurred***, this is not a RICO case . . . (b)ecause Steven has not alleged any state law claims and instead depends entirely on his federal RICO allegations, the Amended Complaint must be dismissed." (*emphasis added*).], *affirmed* at 833 F.3d 965 (8th Cir. 2016). It should be noted that neither the District of Minnesota, nor the Eighth Circuit in its published, precedential decision, ever suggested that the RICO action brought by Steven was, in any respect, frivolous. Furthermore, none of the defendants in this RICO case ever sought an award of attorney's fees against Steven or his counsel in those proceedings, under Rule 11 of the Federal Rules of Civil Procedure, or indeed on any other basis.

generated by, and in the custody and control of, defendant partners James, Brian, and David.

[¶7] Importantly, ***none of the operative financial documents at issue in this case were originally generated by*** -- ***or were originally in the custody of*** -- ***Steven Nelson***.

A. Steven Nelson's April 1, 2016 Motion for an Order requiring the defendants to provide "an accounting of the partnership business".

[¶8] On April 1, 2016, Steven Nelson filed a motion in the District Court in which the plaintiff represented to the Court as follows;

> Moreover, Steven requests an accounting of J&S Farms to determine the true and accurate value of his interest in the partnership. Considering Steve Nelson's allegations regarding years of fraudulent misrepresentations, withdrawals, and financial mismanagement, as well as J&S Farms' tax returns which indicate Steven was not compensated as required by the partnership agreement, ***an accounting would expedite the litigation of Steve Nelson's civil claims***. ***The accounting would either validate or reject Steven's allegations that defendants failed to keep an accurate accounting of partnership interests***. ***Therefore, it is imperative that this Court require an accounting of the partnership***. (*emphasis added*).
>
> See, pages 11-12 of the Brief of Steven Nelson, filed with the District Court at **Doc. 79**.

[¶9] At a subsequent hearing on this Motion on April 28, 2016, counsel for the defendants incorrectly represented to the Court that the defendants had *already made a sufficient accounting* to Steven Nelson, while defense counsel acknowledged that the defendants also ***were already aware*** of the specific transactions which Steven Nelson was alleging were improper, in the following exchange between defense counsel and the Court, with the Court ultimately ***declining*** to require the defendants to make an accounting to Steven Nelson :

MR. KALER: Right. And so they've [the defendants have] done an accounting, they gave the year end books, in fact they've [Steven Nelson has] had access to the accounting records long before this litigation was started so they know all the transactions. And now it's, you can come into court and challenge certain transactions as part of the accounting and we expect them to do that, we expect them to identify it at some point so you can decide, you know, is that a fair accounting or not? But ultimately that's a trial of fact we have to get to when this case is set for trial. . . .

THE COURT: . . . . ***Require an accounting, there's no reason to issue an order, it's statutory***. And so really to take any action on that at this point . . . . .

THE COURT: ***I'm not disputing that an accounting needs to be made***. ***I'm just, I mean that's required by statutes***. . . .

MR. KALER: It's been done at the end of each year. It was submitted to Steven, and most recently we supplied this information. ***There's underlying transactions, there are thousands and thousands of underlying transactions, and what he's challenging are some of those underlying transactions and our response is he's just wrong***. This is our accounting. This is what the balance of the account is. (*emphasis added*).

Transcript of Motion Hearing of April 28, 2016, at pages 23-24 & 34-35.[2]

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[2] The requirement under Minnesota substantive law that a partner is entitled to a full accounting and disclosure of partnership operations, including partnership financial transactions, derives from multiple sources. See, e.g., Minn. Stat. § 323A.0404(b)(1) ["A partner's duty of loyalty to the partnership and the other partners is limited to the following: (1) ***to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner*** . . . ***derived from a use by the partner of partnership property*** . . . . ". (*emphasis added*).]; Minn. Stat. § 323A.0403(c)(2) ["(c) ***Each partner and the partnership shall furnish to a partner*** . . . (2) ***on demand, any other information concerning the partnership's business and affairs***, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances." (*emphasis added*).]. See, also, the policy expressed in Minnesota decisional law, as in e.g., *Powell v. Anderson*, 2000 Minn. App. LEXIS 704, 2000 WL 943843, * 17 (Minn. App. July 11, 2000)["***A partner has the right to a formal accounting as to partnership affairs if wrongfully excluded from the partnership business or possession of its property by copartners***." (*emphasis added*)].

[¶10] The District Court's statements from the bench at the hearing in which the Court opined that it need not order the defendants to make a full accounting and business disclosure to Steven Nelson was later memorialized by the Court in its written Order of July 6, 2016 [**Doc. 161**], wherein the Court held:

> [¶56] ***Plaintiff's motion to specifically order Defendants or make an accounting concerning the partnership is denied***. (*emphasis added*).
>
> Order of the District Court, [**Doc. 161**], July 6, 2016, at page 6

B. Steven Nelson's June 2016 answers and responses to the defendants' Set I Interrogatories and Requests for Production of Documents

[¶11] Less than a week after the District Court's bench ruling at the April 28, 2016 hearing denying Steven Nelson's motion seeking a full accounting and business disclosure about the partnership, on May 4, 2016, the defendants served Steven with their Set I Interrogatories and Requests for Production of Documents.

[¶12] The central discovery request was Interrogatory No. 7, which read as follows:

> 7. Identify each and every transaction for which you are seeking a recovery on behalf of yourself or J&S Nelson Farms. As to each transaction, identify what was wrong with the transaction; this includes but is not limited to:
>
> a. the specific dollar amount you contend was mishandled;
> b. the date of the transaction;
> b. describe how the transaction should have been handled by the Partnership or partners;
> c. identify your damages and how you calculate it;
> d. identify all documentation and other evidence evidencing the transaction and your contention; and identify all witnesses

[¶13] Steven Nelson provided his first responses to those discovery requests on June 21, 2016. See, the Plaintiff's Answers and Responses to Defendants' Set I Interrogatories

and Responses for Production of Documents, filed on the Register of Actions in the District Court below at **Doc. 171**, **Appx. ****.

[¶14] After an initial objection, Steven Nelson responded to the defendants' Interrogatory No. 7 (a)-(d) as follows:

> (E)xhibits 1, 2, and 3 attached to these production requests and the plaintiff's answers to interrogatories sets out a summary of the transactions and damages as set forth. ***Exhibit 1 is a profit and loss statement based upon the bank records and AgManager separating out the items and transactions in question responsive to this request as the other expense items at the bottom of the schedule while it also compares the different nonbusiness expense items attributable to Jim Nelson and Steve Nelson***. ***Exhibit 2 is the outlay of each transaction as requested identifying the type of transaction, the date of the transaction, the debit and credit accounts attributable to each transaction as well as the amount of each transaction***. ***Exhibit 3 is a numerical representation of the proper capital account calculation by year along with an amount showing how much money Jim will be required to pay Steve to even out the draw accounts***. There is no final specific dollar amount determined as of this time, the date of each transaction that has been identified and put forward in the attached exhibits is referenced therein and, the complaint in the above-captioned case as well as the Federal RICO matter along with the corresponding pleadings and other correspondence between the parties has fairly set forth the allegations as determined to date in the absence of cooperation from the defendants, a summary of the damages that have been identified through 2014 have been included with the caveat that defendants have just recently provided some additional information that may change those calculations which was communicated to counsel who requested that the answers be proffered with what was known to date, see Exhibits 1, 2, and 3 along with these answers to interrogatories, the pleadings and correspondence in the afore-referenced cases as well as the document production accompanying these answers, asked and answered. (*emphasis added*).
>
> District Court at **Doc.171**.

[¶15] The physical preparation of Exhibits 1, 2, and 3 to Steven Nelson's responses to the defendants' Defendants' Set I Interrogatories and Responses for Production of Documents was undertaken by the plaintiff and his counsel, and it is respectfully

submitted that any serious and careful reading of these exhibits which referenced some 2,100 separate financial transactions -- *by one who had bothered to take the time to do so* -- would have made clear that substantial effort had gone into the preparation of these materials, that provided a great deal of responsive, substantive information to the defendants.

[¶16] However, these responses did not satisfy the defendants, who on October 16, 2016, filed a Motion to Compel Discovery [**Doc.168**] in which the defendants sought "an order compelling the plaintiff to answer Interrogatory #7 of the propounded discovery in its entirety, and to the extent documentation exists in support of the response that it be provided in response to Request for Production #4."

[¶17] In response to the defendant's Motion to Compel concerning the defendants' discovery requests served on May 4, 2016 – less than a week after the Court had declined to order the defendants to provide Steven Nelson with a full accounting and business disclosure about the partnership -- the plaintiff implored the Court to recognize the plaintiff's rights to an accounting and full disclosure about the partnership's operations as follows:

> [¶7] ***It should be noted that the Court has already been asked and refused to require the defendants to perform an accounting specifically relating to the personal expenses of the defendants in relation to the partnership***. See Plaintiff's Proposed Order filed April 6, 2016 Doc. # 102. Paragraph # 12 in the plaintiff's proposed order at Doc. # 102 states the following:
>
> > ¶12 That an accounting of the partnership be conducted and provided to Steve Nelson within 30 days. That ***the accounting shall detail all personal expenses paid on behalf of all partners and account for the use of partnership equipment to farm the personal acres of the various partners***.

The court chose not to require the partnership to account for the personal transactions set out more fully in the material provided in Response to Interrogatory # 7 and Request for Document # 4. The relevance here is twofold:

> a) ***It would be blatantly unfair an prejudicial to require the plaintiff to blindly attempt to re-create accountings that were done by the defendants or those hired by the defendants*** -- ***the defendants have the firsthand knowledge of the transactions that have been singled out as likely transactions in contravention of the partnership agreement***; . . .

[¶8] It should be noted that ***where the plaintiff feels he has the factual understanding enabling him to describe transactions he has done so*** as demonstrated in the affidavits signed by the plaintiff one of which was in support of summary judgment at Doc. # 46 paragraphs 14-23 and 31-34, and the plaintiffs' supplemental affidavit at Doc. # 55 paragraphs 7, 10, 16, and 17.

Defendants in trying to compel the plaintiff to rework the transaction require the plaintiff to be an expert or risk being saddled with erroneous calculations. (*emphasis added*).

"Response in Opposition to Motion to Compel Discovery and Brief in support of Cross Motion for a Protective Order", [**Doc. 191**], October 31, 2016, at pages 4-5 thereof.

[¶18] Also in conjunction with the plaintiff's response to the defendant's Motion to Compel Discovery, counsel for the plaintiff submitted an Affidavit [**Doc.192**], in which counsel stated, in pertinent part, as follows:

> 4. Steven is able to and has set forth the facts to the best of his ability that are known to him in regard to the defendant's misuse of partnership funds and assets.
> 5. Steven has compiled the material fed into the spreadsheet which produced to numerical computation attached to the discovery responses by reviewing the financial transactions contained in the partnership accounting file and bank statements in conjunction with his best judgment, familiarity with the business, and recollection of events as they took place . . . . .
> 7. ***That for purposes of initiating a complaint against the defendants Steven was requested to take financial transactions from Ag Manager "the partnership accounting software" and the bank statements of the partnership and to the best of his ability to determine which expenses***

were not farm related and place those in the personal expenses paid on behalf of any of the defendants. . . . . .

11. ***That I stopped in Fargo and met with an associate at Kip Kaler' s office only to find out that they do not even have in their possession the Ag Manager Company file wherein I remotely logged into my office and demonstrated how the transactions listed in the spreadsheet could be cross-referenced in the Ag Manager Company program file***. (*emphasis added*).

Affidavit of DeWayne Johnston, October 31, 2016, [**Doc.192**]

[¶19] Therefore, as of October 31, 2016, Steven Nelson had presented to the defendants ***specific references to some 2,100 specific partnership transactions*** – each broken out by subject category of expense, date of expense, and payee of expense. See, "Exhibit 2" to the Plaintiff's Answers and Responses to the Defendants' Set I Interrogatories and Requests for Production of Documents, served June 21, 2016, as incorporated within the District Court record at [**Doc.171**] on October 13, 2016.

[¶20] For example, "Exhibit 1" to the Plaintiff's Answers and Responses to the Defendants' Set I Interrogatories and Requests for Production of Documents revealed such things as: (1) the partnership paid a total of $56,827.64 for defendant James's personal telephone bills from April 27, 1998 through January 30, 2015 -- all while the partnership paid for none of Steven's personal telephone bills during that same period. "Exhibit 1" to the Plaintiff's Answers and Responses to the Defendants' Set I Interrogatories and Requests for Production of Documents at [**Doc.171**]. In contrast, the spreadsheet evidence also showed that the partnership paid a total of only $34,366.56 for legitimate farm operation telephone expense. *Id.*

[¶21] Although under the Partnership Agreement [filed at **Doc.2 ¶30**], as equal 50%-50% partners in the J&S Nelson partnership, Steven Nelson and defendant James had identical rights to share in partnership distributions, the spread sheet evidence reflected in "Exhibit 1" and "Exhibit 2" of the Plaintiff's Set I discovery responses revealed that defendant James paid to himself $1,171,658.45 [**Doc.222**] more than Steven Nelson had received from April 27, 1998 through January 30, 2015. See, "Exhibit 1" and "Exhibit 2" to the Plaintiff's Answers and Responses to the Defendants' Set I Interrogatories and Requests for Production of Documents at [**Doc.171**].

[¶22] Therefore, under the detailed evidentiary summary which was presented by Steven Nelson in his original discovery responses served in this case on June 21, 2016, the defendants were well informed about which transactional payments made by defendant James were personal in nature, and thus were not proper partnership expenses.[3]

C. The District Court's Order of November 9, 2016 granting the defendants' Motion to Compel Discovery

[¶23] Rejecting Steven Nelson's arguments entirely, in a spare, one-page Order [**Doc.200**] entered on November 9, 2016, the District Court: (1) denied the plaintiff's Motion for a Protective Order ; (2) granted the defendants' Motion to Compel, requiring

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[3] Indeed, defendant James had long ago been given ***specific notice*** (since 2014 in the prior federal RICO action) of precisely *which* J&S Nelson Farms transactions undertaken by James or on his behalf were wrongful, with James having been represented in the RICO case by Fargo attorney Kip Kaeler -- the very same lawyer who has represented defendant James, the partnership J&S Nelson Farms, and the other partners. See, *Steven v. James, et. al.*, 833 F.3d 965, 967 (8th Cir. 2016)["***To establish violations of [RICO] § 1962, Steven listed hundreds of instances in which he says James took money from the partnership for his personal use***." (*emphasis added*).].

the plaintiff to "submit full and complete responses to Defendants' Interrogatory #7 and produce all such documents responsive to Defendants' Request for Production of Documents #4" "by December 8, 2016" (without explaining how the plaintiff could possibly provide more or better information than he had in his discovery responses served June 21, 2016 [**Doc.171**]; and (3) awarded the defendants $1,755.00 in attorney's fees for the making of their Rule 37 Motion to Compel Discovery. [**Doc.200**].

[¶24] After receiving this Order, Steven Nelson was at a loss to understand just how he could possibly offer the defendants a better, more detailed, more complete, or fairer explanation of the transactions than Steven had already provided in his June 21, 2016 responses [**Doc.171**] – given the fact the operative underlying evidence – ***the partnership financial records themselves*** – ***would always remain the same***.

[¶25] After all, Steven had repeatedly provided defense counsel in the instant case -- and in the prior RICO case as well -- with detailed recitations of "***hundreds [even thousands] of instances in which [Steven Nelson said] James (Nelson) took money from the partnership for his personal use***"[4], and Steven simply was unable to provide the defendants with any discovery materials, other than those of which the defendants were already in possession.

[¶26] On January 5, 2017, the defendants filed a second (Amended) Motion to Compel Discovery [**Doc.216**], which was addressed by the Court at a hearing which occurred on March 8, 2017.

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[4] *Steven v. James, et. al.*, 833 F.3d 965, 967 (8th Cir. 2016)

[¶27] Prior to that hearing, on January 23, 2017, in response to this second Motion to Compel, counsel for Steven Nelson filed with the District Court three additional documents in a renewed attempt acquaint the District Court with the substantial quantity and quality of the disclosures which already had been provided by the plaintiff to defense counsel Kip Kaler. See [**Docs. Nos.221-224**].

[¶28] The first exhibit filed in the instant case [**Doc.222**] had been originally produced to defendant James as an exhibit attached to Steven's federal RICO Complaint filed on November 25, 2014.[5] In this document, Steven Nelson had separated out by subject category and year, those transactions made by defendant James which were personal in nature, and thus were not proper partnership expenses. See, also, **Docs. Nos.221-224**.

[¶29] The document again showed specific personal expenses of defendant James's which had been improperly paid for by the partnership, under such subheadings as, "PAYMENTS FROM J&S FOR JAMES' PERSONAL BANK OF AMERICA CREDIT CARD", "JIM'S PERSONAL ELECTRICAL EXPENSES", "JIM'S PERSONAL PROPERTY TAXES", "JIM'S PERSONAL TELEPHONE EXPENSES", "JIM'S PERSONAL WATER EXPENSES", "JIM'S PERSONAL LAND PURCHASES", "JIM'S PERSONAL LOAN OBLIGATIONS", "PAYMENTS FROM J&S FOR JAMES' PERSONAL FOOD EXPENSES", "JIM'S PERSONAL INSURANCE EXPENSES", "JIM'S PERSONAL INCOME TAX AND TAX PREPARATION EXPENSES", "JIM'S PERSONAL REAL ESTATE IMPROVEMENT EXPENSES",

[5] See, *Steven v. James, et. al.*, United States District Court for the District of Minnesota, Civil No. 14-4854.

"PAYMENTS FROM J&S FOR JAMES' PERSONAL BAR VISITS", "CHECKS WRITTEN OUT TO CASH", and "CHECKS FOR MISCELLANEOUS PERSONAL EXPENSES". (*capitalization and underlining emphasis in original*). See, "Exhibit A" to the Affidavit of Steven Nelson, filed into the District Court record on January 23, 2017, at [**Doc.221**].

[¶30] In addition, each improper transaction was separately described and the dollar amounts for all improper transactions in each subject category were totaled up for each year. *Id.*

[¶31] On March 8, 2017, the District Court conducted a hearing on the defendants' second Motion to Compel Discovery, and the following telling exchanges occurred at this hearing between the Court, counsel for Steven Nelson, and counsel for the defendants:

THE COURT:	***So have you completed, have you completed a list of transactions that you are challenging***?
MR. JOHNSTON:	***We have got the preliminary list that is easy, it's 2,700 transactions. But there are also*** **–**
THE COURT:	***But the interrogatory [No. 7] requires you to explain why***.
MR. JOHNSTON:	***Well, it's very simple, Judge, you cannot*** **–**
THE COURT:	***Does it not? Does it not say tell us which transaction and why it's improper***.
MR. KALER:	Yes. From Mr. Steven in writing under oath.
MR. JOHNSTON:	***We did that***. ***It is improper to pay the personal expenses. The transaction should not have occurred. That is the bottom line, and that is what we have said***.
THE COURT:	Assuming that's true, if the transaction occurred for $100 and then they put $100 back in after that, then it just becomes an improper transaction that's been corrected without detriment to the partnership.

MR. JOHNSTON: ***Well, the problem is they've expensed it on their tax return. Every one of those 2,700 entries is contained in their tax return that has been expensed on Schedule F.***[6]

THE COURT: And so did –

MR. JOHNSTON: ***That's a false tax return.***

THE COURT: ***Did they cheat the IRS or did they cheat your client?***

MR. JOHNSTON: ***They cheated them both.*** And I guess the Court might as well understand, we're going to be bringing AgCountry back in. After the work the Court required us to do, we now have more than enough evidence to being in AgCountry once again, we will be filing our motion to amend.

THE COURT: Mr. Kaler? . . . . .

MR. JOHNSTON: ***Well, it's pretty simple. If you look at the transactions, Judge, how can you say it's proper to make a personal expenditure by the partnership?***

THE COURT: Well, it may be –

MR. JOHNSTON: It is absolutely –

THE COURT: ***It may be improper but if they put the money back?***

MR. JOHNSTON: ***That is not proper, Judge,*** Unless –

THE COURT: ***And I'm saying it may not be proper but if they put the money back, then how is there a detriment?***

MR. JOHNSTON: ***That is a trial issue, not a discovery issue.*** (*bold, underlined, italicized emphasis added*).

Transcript of Motion to Compel Hearing, March 8, 2017, page 21, line 6, through Page 22, line 17; and page 24, line 21, to page 25, line 9

[¶32] Put simply, those exchanges at the March 8, 2017 hearing capsulize and succinctly capture Steven Nelson's position – and the seriously erroneous apprehension of the plaintiff's position – both factually and legally -- by the District Court in the proceedings below.

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[6] The improper payment transactions on the part of defendant James were connected by Steven Nelson -- one-by-one -- to the tax returns of J&S Partnership in a connection with both an unsuccessful summary judgment motion filed on April 28, 2017 [**Docs. Nos.249-267** and **269-279**] and in documentary evidence which was admitted as exhibits [**Docs. Nos.491-508**] at the bench trial in this case.

[¶33] On March 30, 2017, the Court entered an "Order Granting Defendants' Motion for Sanctions", stating as follows:

CONCLUSIONS OF LAW

> [¶8] Plaintiff's failure/refusal to comply with the discovery requests connected to defendants' second motion to compel constitute significant misconduct and disregard of the court's prior order to compel and demonstrates significant disregard for the applicable Rules of Civil Procedure. Striking all claims for damages connected to defendants' interrogatory #7, and defendants' request for production of documents #4 is an appropriate sanction for plaintiff's failure to comply with discovery. Because plaintiff will no longer be allowed to pursue a damage claim connected to the information sought by defendants' interrogatory #7, and defendants' request for production of documents #4, plaintiff is no longer required to comply with the discovery request. This does not mean that plaintiff is prohibited from using ledger/account/tax/receipt information and documentation in an attempt to support his other claims for damages including but not limited to his "beet stock" allegations and non-reimbursement for the use of partnership assets in private farming operations claim to name two. as examples.
>
> [¶9] Defendants have justified legal costs and fees in bringing this second motion to compel in the amount of $1320.

ORDER

> [¶10] All claims for damages connected to defendants' interrogatory #7, and defendants' request for production of documents #4 shall be stricken from plaintiff's Complaint and plaintiff will not be allowed to proceed as to those damage claims. Plaintiff is no longer required to answer or comply with defendants' interrogatory #7, and defendants' request for production of documents #4.
>
> [¶11] Plaintiff shall pay Defendants the amount of $1320 as reimbursement for their legal costs and fees in bringing this second motion to compel.
>
> [¶12] No action will be taken concerning defendants' request for an OSC.
>
> "Order Granting Defendants' Motion for Sanctions", March 30, 2017, [**Doc. 247**], at slip opinion pages 4-6, ¶¶8-12

[¶34] A four-day bench trial eventually took place in this case on November 6-9, 2018, during which the District Court rejected numerous offers of proof which were made by Steven Nelson, principally on the grounds that the Court had stricken the plaintiff's claims as to those matters covered by the offers of proof.[7]

[¶35] Following post-trial briefing, the District Court on April 6, 2018 entered its "Findings of Fact, Conclusions of Law, and Order for Judgment" [**Doc.576**], including the following language, which he Court copied – ***almost verbatim*** – the post-trial brief which had been filed by attorney Kip Kaler on behalf of the defendants[8]:

> Steven does continue to argue that various entries in the system were not done correctly. However, those specific entries were stricken from Steven's causes of action (to the extent they are, in fact, stated in the Complaint) due to his failure to provide discovery during the course of this litigation as requested by the Defendants in their interrogatory number 7 and request for production of documents 4 . . . . . (T)his Court entered an order concluding that because Steven did not provide discovery as to those issues, to the extent his Complaint made claims based upon individual transactions he claimed to be inappropriate, those individual transaction claims would be stricken from his cause of action (Doc ID# 247).
>
> "Findings of Fact, Conclusions of Law, and Order for Judgment" [**Doc.576**], at slip opinion page 15

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[7] ***Offers of proof at bench trial

[8] Compare, this language from the Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" [**Doc.576**], at slip opinion page 15, ¶41, with the corresponding language from the "Defendant's Posed Findings of Fact, Conclusions of Law and Order for Judgment", [**Doc.560**], at page 13 thereof, at ¶40 of that latter document. Notably, the plaintiff in later post-judgment proceedings in the District Court entered into the record at [**Doc.619**] an "Adobe Compare Document" which actually compared – word-for-word – the District Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" with attorney Kaler's "Defendant's Post-Trial Brief". It is no overstatement to characterize these two documents – *one as to the another* – as functionally identical.

[¶36] Thereafter, Steven Nelson filed "Alternatively and Consecutively Made Motions by Plaintiff – for a New Trial and/or for Relief from Judgment – Pursuant to North Dakota Civil Procedure Rule 52(a)(5), Rule 52(a)(6), 52(b), Rule 59(b)(1), Rule 59(b)(4), Rule 59(b)(7), Rule 59(c)(1), Rule 59(c)(2), Rule 59(h), Rule 59(i), Rule 59(j), Rule 60(b)(3), Rule 60(b)(4), and Rule 60(b)(6). [**Docs. Nos.610-613**; and **Docs. Nos.618-619**].

[¶37] The District Court ***denied*** these motions on September 25, 2018 [**Doc.624**], and the instant appeal to the Supreme Court of North Dakota has ensued.

[¶38] FACTS

[¶39] As is self-evident from the extensive preceding Statement of the Case, the central appellate issues in this case derive from rulings which were made by the District Court in the course of the procedural progression of this case – most significantly, the decision of the District Court to strike the vast majority of Steven Nelson's claims against the defendants.

[¶40] In that respect, the above-narrated, sweeping decisions by the District Court to strike the essential claims of the plaintiff constitute essential "procedural facts", which were most properly presented within the Statement of the Case section of the instant Brief of the Appellant.

[¶41] Where references to the factual of the District Court are made in the succeeding Argument section of this Brief of the Appellant, appropriate citation will be made to the record reflected in the Register of Actions of the District Court.

[¶42] ARGUMENT

A. The District Court committed error by striking important claims from Steven's Complaint as a discovery sanction -- where the plaintiff had disclosed and identified to the defendants literally all of the more than 2,000 transactions in which defendant James had improperly diverted (and converted) partnership funds for his personal use – and where the defendants made no showing in the record of what more the plaintiff could possibly have done to explain these transactions – transactions which defendant James had conducted in the first place.

[¶43] The procedural facts relating to discovery issues – *as they were addressed by the District Court in this case*–are set forth in extensive documented narrative in the preceding Statement of the Case.

[¶44] Reduced to the essentials, it is a matter of record in this case that Steven had repeatedly provided defense counsel in the instant case -- *and even in the prior RICO case as well beginning back in 2014* – with detailed recitations of "***hundreds [even thousands] of instances in which [Steven Nelson said] James (Nelson) took money from the partnership for his personal use***".[9] See, also ¶¶13-21 and ¶¶24-29, *infra*.

[¶45] Furthermore, the transactions at issue were not complex and esoteric in nature – they were simple instances of more than 2,000 payments which defendant James made to himself for personal uses out of J&S Partnership funds.

[¶46] As plaintiff's counsel stated to the District Court during the March 8, 2017 hearing in this case:

> **MR. JOHNSTON**: ***Well, it's pretty simple***. ***If you look at the transactions, Judge, how can you say it's proper to make a personal expenditure by the partnership***? (*emphasis added*).

See, the more complete exchange between the Court and counsel for both sides at ¶30, *infra.*

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[9] *Steven Nelson v. James Nelson, et. al.*, 833 F.3d 965, 967 (8th Cir. 2016)

[¶47] In this context it is also important to note that it is undisputed in this case that all of the records of J&S Partnership's financial transactions were made by -- or under the direction of -- defendant James.[10] *Murphy v. Snyder*, 2014 U.S. Dist. LEXIS 134097, 33 (E.D.N.Y. August 14, 2014)["(***I)t is beyond cavil that a partner's diversion of partnership funds for personal use, if proved, constitutes a breach of that partner's fiduciary duty***. ***A general partner is also liable for losses caused by fraud, culpable negligence, willful disregard of duty or bad faith***." (*emphasis added*).].

[¶48] Stated as simply as possible – the District Court committed error by refusing to order a true accounting by the defendant James and the other defendants in this case, and by denying Steven Nelson's Motion for an Accounting. See, the authorities set forth in ¶¶ 7-9, *supra*, and Footnote 2, *supra*.

[¶49] In addition, as counsel for Steven Nelson repeatedly implored the District Court to apprehend, the burden always was on defendant James to sustain proof of the accuracy of the J&S Partnership financial records. See, *Plymouth Grain Terminals, LLC v. Lansing Grain Co., LLC*, 2013 U.S. Dist. LEXIS 179185, at **27-28 (E.D. Wash. Dec. 20, 2013)["***The partner controlling the records has the burden of proof of the account's***

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[10] It is well-recognized that ***one partner's exclusion "of a co-partner from the partnership or from partnership property and diverting partnership funds for personal use constitute breaches of fiduciary duty***." *Salomoni v. Venturella*, 2017 U.S. Dist. LREXIS 118285, 2017 WL 3197217, ** 17-18 (C.D. Cal. July 27, 2017), citing *Second Measure, Inc. v. Kim*, 143 F. Supp. 3d 961, 979-80 (N.D. Cal. 2015)); *Schmidt v. Summit Funding, Inc.*, No. 6:15-cv-0640-TC, 2015 U.S. Dist. LEXIS 106563, 2015 WL 4876822, at *3 (D. Or. Aug. 13, 2015); *Blue Earth Biofuels, LLC v. Hawaiian Elec. Co.*, 780 F. Supp. 2d. 1061, 1081-82 (D. Haw. 2011); *Pellegrini v. Weiss*, 165 Cal. App. 4th. 515, 524-27, 81 Cal. Rptr. 3d 387." (*emphasis added*).

accuracy. *Cederlund v. Cederlund,* 7 Wash.App. 320, 321, 499 P.2d 14 (1972) (quoting *In re Tembreull's Estate,* 37 Wash.2d 93, 221 P.2d 821 (1950)) ("***When a managing partner who keeps the books is [sued] for settlement, he must sustain the burden of proof of the correctness of the account***. . . .'". (*emphasis added*).].

[¶50] It was in this setting that the District Court ignored the foundational fact that Steven Nelson had specifically identified more than 2,000 partnership transactions which were ***improper—intrinsically improper because they all were transactions which involved James using partnership funds to pay for his personal expenses***. [11]

[¶51] This was hardly a matter of "rocket science"—but the District Court kept improperly requiring the plaintiff to create the unnecessary, indeed the impossible, in terms of the Court's imagined proper discovery responses to Interrogatory 7 – all at the persistent prodding of defense counsel Kip Kaler, whose briefing language was repeatedly imported -- ***wholesale and essentially verbatim*** – into the District Court's Orders in this case.

[¶52] Importantly, beyond defense counsel's rote litany of demands that Steven Nelson further "explain" in detail how defendant James's $1,171,658.45 in payments [**Doc.223**]

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[11] *Carlson v. Carlson*, 2011 ND 168, ¶¶27-30; 802 N.W.2d 436, 445-446 (N.D. 2011)[" "'[***t]he conduct of partners*** . . . ***during any transaction connected with the*** . . . ***conduct of the partnership is governed by a fiduciary duty which requires every partner to act with the utmost good faith and integrity in the dealings with one another with respect to partnership affairs***.'" *Red River Wings, Inc. v. Hoot, Inc*., 2008 ND 117, ¶ 26, 751 N.W.2d 206 (quoting *Svihl v. Gress*, 216 N.W.2d 110 (N.D. 1974)). The Court further concluded that "a partner has a fiduciary duty of loyalty to the partnership and other partners." *Red River Wings*, at ¶ 26; see also *Akerlind v. Buck*, 2003 ND 169, ¶ 26, 671 N.W.2d 256." (*emphasis added*).].

from the J&S Partnership to himself were improper – ***neither the defendants, nor the Court, ever provided their own explanations on the record of how such additional "explanations" were necessary – proper -- or even possible***.

[¶53] In such a setting in which a district sanctioned a plaintiff for being unable to do the impossible in discovery, the Supreme Court ***reversed*** a district court's dismissal of a plaintiff's complaint under Rule 37 of the North Dakota Rules of Civil Procedure, citing the United States Supreme Court's decision in *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958), and stating:

> Quite comparable to the situation of the appellants here, was that of the petitioner in this case cited, of whom the United States Supreme Court said: "* * * petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." 357 U.S. p. 211. Later in the opinion the Court noted: "* * ***failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner***." 357 U.S. p. 212. (*emphasis added*).
>
> *Erling v. Haman*, 144 N.W.2d 215, 216 (N.D. 1966).

[¶54] The operative sanctions Order in this case is the District Court's March 30, 2017 "Order Granting Defendant's' Motion for Sanctions" [**Doc.247 at ¶¶ 8-10**] in which the Court ordered "stricken from plaintiff's Complaint", "(a)ll claims for damages connected to defendants' interrogatory #7, and defendants' request for production of documents #4". *Id.* at ¶10. [12]

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[12] The District Court did not reference Rule 37 as having been the legal authority under which the severe sanction of striking plaintiff's principal claims from his Complaint was purportedly justified. Apparently, the Court was relying upon that which it considered to be its "inherent power" to level those sanctions against the plaintiff. This was error. See, e.g., *Perius v. Nodak Mutual Insurance Co*., 2012 ND 54, ¶34; 813 N.W.2d 580, 589-590 (N.D. 2012)[" legal scholars have pointed out that ***"[w]hen an appropriate sanction for a***

[¶55] However, regardless of whether discovery sanctions have been imposed by district courts under Rule 37 of the North Dakota Rules of Civil Procedure, or pursuant to a court's "inherent power to sanction", as the Supreme Court explained in *Bachmeier v. Wallwork Truck Centers*, 507 N.W.2d 527, 533 (N.D. 1993):

> In Rule 37 sanctions we have found that ***dismissal of a claim should not be imposed if an alternative, less drastic, sanction is available and is equally effective.*** *E.g., Gohner,* 411 N.W.2d at 79. We believe ***the same rationale applies when the court exercises its inherent power, and therefore the trial court has a duty to impose the least restrictive sanction available under the circumstances***. *Vorachek,* 421 N.W.2d at 50-51 (Rule 37 "***sanctions must be tailored to the severity of the misconduct, and dismissal of an action or entry of default judgment should be used sparingly, only in extreme situations, and should not be used if an alternative, less drastic sanction is available and would be just as effective***."). Dismissal of the entire case with prejudice is perhaps the most restrictive sanction which exists. Imposition of this sanction before the start of trial exacerbates this harshness. ***We prefer that disputes be settled on the merits***. *St. Aubbin v. Nelson,* 329 N.W.2d 874, 876 (N.D. 1983). (*emphasis added*).
>
> 507 N.W.2d at 533

i. There are federal Due Process limitations upon the power of a district court to strike claims from a party's Complaint as a discovery sanction with these constitutional limitations thus limiting the contours of a court's permissible discretion in imposing such sanctions.

[¶56] Additionally, "***when a trial court strikes a party's pleadings*** . . . . ***for abuse of the discovery process, the court adjudicates the party's claims without regard to their merits but based instead upon the parties' conduct of discovery*** . . . ***'(t)here are***

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specific abuse exists under the Rules, a court may not resort to its inherent sanctioning power but must use the sanctions available under the Rules." 6 James Wm. Moore et al., *Moore's Federal Practice* ¶26.06[2] (3d ed. 2011); 8B Charles Alan Wright et al., *Federal Practice and Procedure* § 2282, at 422 (3d ed. 2010) (noting that the United States Supreme Court in *Societe Internationale*, 357 U.S. 197, 207, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), made it clear that ***it is ordinarily inappropriate to look beyond the clearly delineated procedures of Rule 37 for the imposition of sanctions in the discovery context***)."(*emphasis added*). Maring, Justice, concurring specially.

constitutional limitations upon the power of courts . . . ***to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause***.'" (*emphasis added*). *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991), citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-351 (1909); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-706 (1982); *Hovey v. Elliott*, 167 U.S. 409 (1897); and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 456 U.S. 639 (1976). "***Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims lack merit*** . . . ***Although punishment and deterrence are legitimate purposes for sanctions*** (*citations omitted*), ***they do not justify trial by sanctions***. (*citations omitted*). ***Sanctions which are so severe as to preclude presentations of the merits of the case should not be assessed absent a party's flagrant bad faith*** . . . ". (*emphasis added*). *Transamerican Natural Gas Corp. v. Powell*, *supra*, 811 S.W.2d at 918.

[¶57] Finally, in its sanctions Order, the District Court noted that, "(i)t appears to the court that the plaintiff himself has been attempting to make an effort to provide the discovery information requested . . . he has been working hundreds of hours going through all of the financial information provided to him." **[Doc. 247 at ¶7]**.

[¶58] Alternatively, in this setting as well, it is respectfully submitted that it was error for the District Court to impose the severe sanction upon Steven Nelson by striking his principal claims in this case. See, e.g., *Transamerican Natural Gas Corp. v. Powell*, *supra*, 811 S.W.2d at 917.

[¶59] On the basis of the foregoing, it is respectfully submitted that the record of this case in no way supports or justifies the pleading-striking discovery sanctions which the District Court levelled against Steven Nelson in this case, and that the District Court's sanctions decision should thus be vacated, and this case reversed and remanded accordingly.[13]

B. The District Court committed error by assessing Steven Nelson the offset sum of $63,113.37 subtracted from the "total sum due Steven" of $173, 397.00 pursuant to the Court's "inherent power to sanction" without having any legal or factual authority to do so.

[¶60] In the District Court's written Findings of Fact and Conclusions of Law [**Doc.576**] filed following the bench trial in this case – ***a document which was taken virtually verbatim from the defendants' proposed "Findings of Fact, Conclusions of Law and Order for Judgment***" [**Doc.560**] [14] — the District Court subtracted a total of $63,113.37 from the amount of $173,397.00, with this offset having been attributed by the Court to

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[13] Because the District Court's previous entry of discovery sanctions against the plaintiff by striking all of the plaintiff's personal (as opposed to partnership derivative) claims, the Court's entry of summary judgment [**Doc. 368**] must be vacated correspondingly under a de novo standard of review by the Supreme Court. See, also, the District Court's rulings from the bench at trial. Trial Transcript page 21, lines 9-22., and Trial Transcript, pages 24-25.

[14] Compare, this language from the Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" [**Doc.576**], at slip opinion page 15, ¶41, with the corresponding language from the "Defendant's Posed Findings of Fact, Conclusions of Law and Order for Judgment", [**Doc.560**], at page 13 thereof, at ¶40 of that latter document. Notably, the plaintiff in later post-judgment proceedings in the District Court entered into the record at [**Doc.619**] an "Adobe Compare Document" which actually compared – word-for-word – the District Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" with attorney Kaler's "Defendant's Post-Trial Brief". It is no overstatement to characterize these two documents – *one as to the another* – as functionally identical.

plaintiff allegedly having made "frivolous claims and motions", "requested relief already ruled upon by the court", "failed to act in accordance with previous court rulings", "failed to abide by the court's order for sanctions", "failed to make a good faith effort to work with opposing parties or this Court in narrowing the real issues needed to be tried". District Court Findings of Fact and Conclusions of Law [**Doc.576,** at ¶125]. [15]

[¶61] ***Essentially all of this language – included in the District Court's Findings of Fact and Conclusions of Law and order for Judgment – were written in the first instance by defense counsel in his Proposed Findings of Fact, Conclusions of Law and order for Judgment***. See Footnote 14, *supra*.

[¶62] Defense counsel Kip Kaler's written words – shrill and inflammatory as they are – *as adopted wholesale and essentially verbatim by the District Court* – have neither support in the factual record of this case, nor in the law.

[¶63] With regard to the prior action brought by Steven in the United States District Court for the District of Minnesota under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et. seq.*, *Steven Nelson v. James Nelson, et. al.*,

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[15] The District Court did not stop there. Continuing to use – ***verbatim*** -- inflammatory language which had been drafted by defense counsel Kip Kaler – the Court's Order went on as follows: "The behavior exhibited by the plaintiff ranged from simple unpreparedness to an abuse of the court system (e.g. repeated challenges to orders previously issued, failed to clarify the plaintiff's claims (forcing the Court to define plaintiff's "factual scenarios" for trial and then professing a lack of understanding of what was to be tried, but not offering an analysis of the issues for trial), and employing tactics that could not be successful while multiplying the proceedings (offering witnesses that produced no useful testimony for plaintiff, and objections to evidence that had no basis, etc.)." Findings of Fact, Conclusions of Law and Order for Judgment, [**Doc.576,** ¶125]. See, also Footnote 14, *supra*.

2015 U.S. Dist. LEXIS 88272, 2015 WL 4136339, *19, (D. Minn. July 8, 2015), *affirmed* at 833 F.3d 965 (8th Cir. 2016), attorney Kip Kaler wrote – and the District Court Adopted – the following language:

> The fees and costs paid by the Partnership for defense of James in the RICO action were as a direct result of Steven's intentional and inappropriate acts attempting to coerce James to pay Steven more than his Partnership was worth . . . . . the RICO action was baseless as evidenced by the dismissal of the action on the pleadings and as affirmed on appeal . . . Steven's distribution from the Partnership shall be reduced by the (RICO) litigation costs in the amount of $33,666.04 .
> District Court Findings of Fact and Conclusions of Law [**Doc.576, at ¶**122]

[¶64] Of course, attorney Kip Kaler was counsel for defendant James in the RICO case, and notably, Kaler never sought or received an award of attorney's fees by federal district court or the Eighth Circuit in that case. See, the decisions of those courts in *Steven Nelson v. James Nelson, et. al.*, 2015 U.S. Dist. LEXIS 88272, 2015 WL 4136339, *19, (D. Minn. July 8, 2015), *affirmed* at 833 F.3d 965 (8th Cir. 2016).

[¶65] Furthermore, at no time did either of those federal courts even suggest that the Plaintiff's RICO case had been frivolously brought, and a reading of the decisions of the District of Minnesota and the Eighth Circuit make clear that Steven had raised legitimate issues of fact and law which, given the current state of RICO decisional law, were unsuccessful. Far from being frivolous, the case in its Eighth Circuit phase was considered important enough to be among the minority of that appellate court's decisions which are designated to be "published", and thus precedential.

[¶66] Put simply, the District Court's reduction of $33,666.04 from Steven's distribution of $173, 397.00 was unsupported by the factual record, as no evidence was presented in this case through expert testimony or otherwise that the RICO action was frivolous.

[¶67] Furthermore, for those reasons set forth above in the discussion about the District Court's erroneously-imposed sanctions–specifically such sanctions assessed by the District Court under its "inherent power to sanction"–it is further respectfully submitted that the District Court's $33,666.04 "partnership distribution offset" sanction was error and should be vacated by the Supreme Court.

[¶68] For the same reasons, also erroneous is the District Court's sanction against Steven Nelson's partnership distribution in the amount of "25% of [the defendants'] actual costs and fees as compensation for defending this action in response to unnecessary and duplicitous proceedings in this manner". District Court Findings of Fact and Conclusions of Law [**Doc.576,** at ¶126]. The dollar amount of this "offset' sanction was $29,447.00. See, District Court's Order for Judgment, [**Doc.593**, at ¶6].

[¶69] Nary a court rule, statute or decision of the North Dakota Supreme Court was recited by the District Court in support of either of these "partnership distribution offset" sanctions.

[¶70] There thus was no legal or factual basis for the District Court to impose these heavy sanctions, and they should both be vacated by the Supreme Court in the instant appeal. See, *Perius v. Nodak Mutual Insurance Co.*, 2012 ND 54, ¶34; 813 N.W.2d 580, 589-590 (N.D. 2012)(Maring, Justice concurring), and the authorities set forth in Footnote 12, *supra*.

C. The District Court committed error in calculating the value of Steven's interest and specifically by refusing to accept the gift tax valuation on calculation of the Fair Market Value of the partnership as a going concern.

i. Gift Tax Evidence

[¶71] In conjunction with drafting the Restated Partnership Agreement for the J&S Partnership [**Doc. 470**], defendants James, Brian, and David, with the assistance of Certified Public Accountant Chris Feller and others, conducted the required ***fair market valuation of J&S***, and expressed the value of the partnership in increments of a one-sixth (1/6) Equity Partnership Interest. See, the J&S Partnership Gift Tax Return, filed at [**Doc.472**].

[¶72] The value reported as the fair market value of a one-sixth (1/6) equity partner interest in the Partnership by James and Chris Feller was $573,391.00.

[¶73] On or about May 8, 2014, Chris Feller, James, and Genevee Nelson reported to the Internal Revenue Service by signing and filing the United States Form 709 Gift Tax Return under the penalty of perjury that the fair market valuation of J&S as a going concern is $3,440,346.00 ($573,391.00 X 6). **Doc. 472**].

[¶74] The fair market value of $573,391.00 represented a 1/6 equity partnership interest as reported to the IRS on the 709 Gift Tax Return is designated by appraisal to be:

> The value of a gift is the fair market value (FMV) of the property on the date the gift is made (valuation date). The ***FMV is the price at which the property would change hands between a willing buyer and a willing seller, when neither is forced to buy or to sell, and when both have reasonable knowledge of all relevant facts***. FMV may not be determined by a forced sale price, nor by the sale price of the item in a market other than that in which the item is most commonly sold to the public. *See,* Regulation 26 C.F.R. § 20.2031-1. (*emphasis ad*ded)

[¶75] The Form 709 Gift Tax Return computation of Fair Market Value is synonymous with Minn. Stat. § 323A.0701, which describes the value based upon a sale of the entire business as a going concern.

> The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under section 323A.0807(b), if, on the date of dissociation, the ***assets of the partnership were sold at a price equal*** to the ***greater*** of the liquidation value or the ***value based on a sale of the entire business as a going concern*** without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment. (*emphasis added*).
>
> Minn. Stat. § 323A.0701

[¶76] The Restated Agreement developed in 2012 and early 2013 by the coordinating acts of Mike Juntunen, Chris Feller, James, Brian, and David and ultimately signed by both James and Steven is financially represented as follows:

	30-Apr-13			1-May-13	
	James	Steve		James	Steve
1/6 interest	573,391.00			573,391.00	
1/6 interest	573,391.00			573,391.00	
1/6 interest	573,391.00			573,391.00	
1/6 interest		573,391.00	James takes from Steve	573,391.00	
1/6 interest		573,391.00			573,391.00
1/6 interest		573,391.00			573,391.00
	$ 1,720,173.00	$ 1,720,173.00		$ 2,293,564.00	$ 1,146,782.00
				Cash required from James to Steve for 1/6 Equity Partnership Interest	573,391.00
					$ 1,720,173.00

[¶77] In the District Court's Findings of Fact, Conclusions of Law and Order for Judgment [**Doc.576**, ¶128] in this case, in derogation of the requirements of Minn. Stat. Section 323A.0807(b), the District Court ignored the provisions of this statute and made

a finding that the partnership accounting performed by the defendants and submitted to the plaintiff as part of their April 4, 2016 letter to plaintiff's counsel DeWayne Johnston detailing the buyout options ([Trial] Exhibit D-7) as the basis for determining Steven's interest in the partnership. [**Doc.576**, ¶128].

[¶78] The District Court held as follows:

> After making adjustments to the Partnership accounting, Steven's one-third interest in the Partnership is $391,981. Additionally, his capital account balance is $152,416.00. This results in a gross value of Steven's interests in the Partnership of $544,397.

[¶79] In the District Court's calculations, the Court failed to recognize the fact that the J&S Partnership had placed value on the buildings and improvements in each of the federal tax returns which were filed by the Partnership (**Doc. Nos.433-440**), in the February 28, 2014. See, the snapshot/buy-out proposal pictured below that was presented to Steven [**Doc.473**], and the Partnership's balance sheets (**Doc.99**, **Doc.488**, and **Doc.552**). In addition, the Partnership utilized the buildings resulting in depreciated value of the buildings.

Form 1065 (2013) J & S NELSON FARMS, LLP [redacted] Page 5

Analysis of Net Income (Loss)

1 Net income (loss). Combine Schedule K, lines 1 through 11. From the result, subtract the sum of Schedule K, lines 12 through 13d, and 16l					1	179,686.
2 Analysis by partner type:	(i) Corporate	(ii) Individual (active)	(iii) Individual (passive)	(iv) Partnership	(v) Exempt Organization	(vi) Nominee/Other
a General partners						
b Limited partners		179,686.				

Schedule L Balance Sheets per Books

Assets	Beginning of tax year (a)	Beginning of tax year (b)	End of tax year (c)	End of tax year (d)
1 Cash		42,752.		-20,300.
2a Trade notes and accounts receivable	44,874.		78,201.	
b Less allowance for bad debts		44,874.		78,201.
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities				
6 Other current assets (attach stmt)				
7a Loans to partners (or persons related to partners)				
b Mortgage and real estate loans				
8 Other investments (attach stmt) SEE ST 5		516,808.		483,116.
9a Buildings and other depreciable assets	2,432,072.		2,877,808.	
b Less accumulated depreciation	2,084,349.	347,723.	2,314,513.	563,295.
10a Depletable assets				

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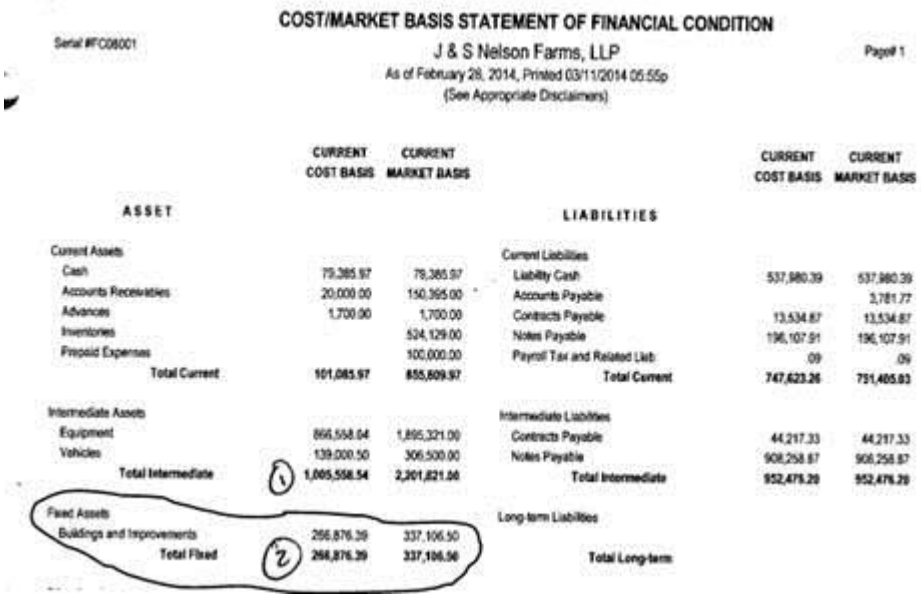

COST/MARKET BASIS STATEMENT OF FINANCIAL CONDITION

Serial #FC08001

J & S Nelson Farms, LLP

Page# 1

As of February 28, 2014, Printed 03/11/2014 05:55p

(See Appropriate Disclaimers)

ASSET	CURRENT COST BASIS	CURRENT MARKET BASIS
Current Assets		
Cash	79,385.97	79,385.97
Accounts Receivables	20,000.00	150,365.00
Advances	1,700.00	1,700.00
Inventories		524,129.00
Prepaid Expenses		100,000.00
Total Current	101,085.97	855,609.97
Intermediate Assets		
Equipment	866,558.04	1,895,321.00
Vehicles	139,000.50	306,500.00
Total Intermediate	1,005,558.54	2,201,821.00
Fixed Assets		
Buildings and Improvements	266,876.39	337,106.50
Total Fixed	266,876.39	337,106.50

LIABILITIES	CURRENT COST BASIS	CURRENT MARKET BASIS
Current Liabilities		
Liability Cash	537,980.39	537,980.39
Accounts Payable		3,781.77
Contracts Payable	13,534.87	13,534.87
Notes Payable	196,107.91	196,107.91
Payroll Tax and Related Liab	.09	.09
Total Current	747,623.26	751,405.03
Intermediate Liabilities		
Contracts Payable	44,217.33	44,217.33
Notes Payable	908,258.87	908,258.87
Total Intermediate	952,476.20	952,476.20
Long-term Liabilities		
Total Long-term		

[¶80] On the basis of the foregoing, the correct valuation of the J&S Partnership should have been $3,440,446.00, rather than the value of $1,169,943 as erroneously determined by the District Court. [**Doc.576**, ¶128]. This calculation of the J&S Partnership value, and the resulting erroneous distribution amounts to the partners of the J&S Partnership, should be vacated by the Supreme Court, and remanded to the District Court for recalculation in conformance with the requirements of Minn. Stat. § 323A.0701.

D. The District Court committed error by denying Steven Nelson's post-trial motions under Rule 52, Rule 59 and Rule 60 of the North Dakota Pules of Civil Procedure.

[¶81] Following the conclusion of the bench trial in this case, Steven Nelson filed "Alternatively and Consecutively Made Motions by Plaintiff – for a New Trial and/or for Relief from Judgment – Pursuant to North Dakota Civil Procedure Rule 52(a)(5), Rule 52(a)(6), 52(b), Rule 59(b)(1), Rule 59(b)(4), Rule 59(b)(7), Rule 59(c)(1), Rule 59(c)(2), Rule 59(h), Rule 59(i), Rule 59(j), Rule 60(b)(3), Rule 60(b)(4), and Rule 60(b)(6). [**Docs. Nos.610-613**; and **Docs. Nos.618-619**].

[¶82] The District Court committed error by denying these motions by Order entered on September 25, 2018 [**Doc. 624**].

Dated this 17th day of April, 2019,

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on April 17th, 2019, the following documents:

1. **INITIAL BRIEF OF THE APPELLANT**

was filed electronically with the Clerk of Court through ELECTRONIC MAIL, and a copy of the above listed documents were mailed electronically to the following:

Kip Kaler (kip@kaler-doeling.com) Patrick Sinner (patrick@kaler-doeling.com)

Dated this 17th day of April, 2019,

/s/ DeWayne Johnston

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