20210010

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 19, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Daniel T. and Debra Ann Bearce, Plaintiffs and Appellants, v. Yellowstone Energy Development, LLC, Acting By and Through its Board of Directors, Defendants and Appellees,	Supreme Court No. 20210010 Williams Co. No. 53-2016-CV-01414

APPELLANTS BEARCE'S BRIEF
APPEAL FROM DISTRICT COURT'S ORDER OF DISMISSAL OF ACTION AFTER REMAND ENTERED DECEMBER 9, 2020.
HON. JOSH B. RUSTAD, DISTRICT JUDGE

ORAL ARGUMENT REQUESTED

APPELLANTS BRIEF

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APPELLANTS' STATEMENT OF THE CASE

¶(1) This action was commenced in October 2016 when Plaintiffs/Appellants Daniel T. and Debra Ann Bearce ("Bearce") served a Complaint on Defendant/Appellee Yellowstone Energy Development, LLC ("Yellowstone Energy"). Yellowstone Energy answered the Complaint. Both Bearce and Yellowstone Energy then filed cross-summary judgment motions. A hearing on the Motions was held on March 8, 2018. The Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment was entered on May 25, 2018. The first Judgment (Doc. No. 69) was entered on May 30, 2018, with Notice of Entry filed and served on May 30, 2018.

¶(2) The May 30, 2018 Judgment was appealed by Bearce in Supreme Court case No. 20180010 and by opinion entered dated March 22, 2019, the Judgment of dismissal of the District Court was reversed and the case remanded back to the District Court for an evidentiary hearing on the claim of breach of fiduciary duty.

¶(3) The District Court held an evidentiary hearing on the issue upon remand of any fiduciary duty owed by Yellowstone to Bearce, and by Findings and Order for Judgment dated December 8, 2020 (Doc. No. 131) the trial court on remand found no fiduciary duty existed owed by Yellowstone to Bearce and Judgment for dismissal was entered December 9, 2020 (Doc. No. 136). Notice of entry of Judgment was given December 9, 2020 (Doc. No. 137) and Notice of Appeal of the December 9, 2020 Judgment was filed and served by Bearce on January 22, 2021 to the Supreme Court of North Dakota. This case is now on appeal from the December 9, 2020 Order and Judgment of Dismissal after remand.

APPELLANTS' STATEMENT OF FACTS

¶(4) All of the material facts of this case are undisputed.

¶(5) Yellowstone Ethanol, L.L.C. f.k.a. Yellowstone Energy Development, L.L.C. was formed as a North Dakota Limited Liability Company in May 2006 and the organizing future members of the company signed an Organizational Operating Agreement in April 2007.

¶(6) In the Spring of 2006, before Yellowstone was organized two representatives of Yellowstone went to the home of Daniel and Debra Bearce to negotiate to buy land from Bearce as a site for the construction of an ethanol plant. The Bearce land in Section 35 and 36, Township 153 North, Range 103 West, located East of the town of Trenton, in Williams County, North Dakota was situated adjacent to the existing Burlington Northern BNSF rail line right of way. A negotiated price of $510,000.00 plus "shares totaling $100,000.00" was negotiated and an exclusive option to Purchase the approximately 170-acre parcel of Bearce land located by the existing railroad track was 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."

(See Option Contract attached as Exhibit B to the Affidavit of proof, filed in this action before remand,.) (Doc. Index No. 11)

¶(7) On or about April 21, 2008, Yellowstone as buyer and Bearce as Seller, entered into a Contract for Deed to sell the Bearce parcel of farmland lying next to the existing Burlington Northern Railroad Company right of way in Section 35, Township 153 North, Range 103 West in Williams County, North Dakota for the stated purchase price of $514,860.00, payable by $51,000.00 paid down and the balance with interest at 6% payable in two future installments of $231,930.00 payable on or before the anniversary date of the Contract for Deed. This Contract for Deed was filed of record May 4, 2008 as document No. 655448 in the Office of the County recorder in and for Williams County, North Dakota. (See Contract for Deed attached as Exhibit "C" to the Affidavit of proof, filed in this action before remand, at (Doc. Index No. 12).

¶(8) On or about June 19, 2009, after Yellowstone failed to make its first payment under the Contract for Deed, a Notice of Default of the Contract for Deed was served by Bearce upon Yellowstone. (See copy of such Notice of Default attached at Exhibit "D" to the Affidavit of proof, filed in this action before remand, at Doc. Index No. 13)

¶(9) On or about August 25, 2009, Yellowstone and Bearce did enter into a Modification of 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. In addition, this Modification of Contract for Deed stated 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 copy of August 25, 2009 Modification of Contract for Deed attached as Exhibit "E" to the Affidavit of proof, filed in this action before remand, at Doc. Index No. 14)

¶(10) It is undisputed that for value counted towards the purchase of the subject 170 acres of land, one share of Yellowstone stock to be issued was worth one dollar. One hundred thousand shares of stock was committed to be issued to Bearce pursuant to the option agreement, as was confirmed by letter dated July 20, 2010 from Robert Gannaway, President of Yellowstone to Bearce. (See July 20, 2010 letter attached as Exhibit "G" to the Affidavit of proof, filed in this action before remand, at Doc. Index No. 15)

¶(11) On or about August 3, 2010, Yellowstone closed on the land purchase, paid the cash owed and in December of 2012 issued the 100,000 shares of stock to Daniel and Debra Bearce. (See Copy of the Deed signed by Daniel and Debra Bearce for the subject land as Grantor conveying the land to Yellowstone as Grantee and copy of the settlement check for $538,495.00 was attached as Exhibit "F" to the Affidavit of proof, filed in this action before remand,. (*see* Doc. Index No. 16)

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* August 25, 209 Modification of Contract for Deed

Exhibit "D" to Affidavit of proof, filed in this action before remand, at Doc. Index No. 13)

¶(12) Subsequent to the August 25, 2009 Modification of the Contract for Deed, Yellowstone abandoned its attempt to build and finance an ethanol plant on the Bearce land and Yellowstone entered into a long-term lease with Savage Service Corporation to build an oil train loading facility for Bakken crude oil, and the loading facility with crude oil storage tanks was built on the land purchased from Bearce under the Contract for Deed.

¶(13) It is undisputed in this action, that while promoters of Yellowstone had plans for instituting a multi-tier stock valuation program; no multi-tiered stock valuation program was ever formally created establishing different tiers of stock for the Company, and all stock issued was of the same formal type of value of one dollar per share. (See Findings No. 16 at Doc. Id. No. 131)

¶(14) 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 document the approval of a 3:1 stock split for future Yellowstone members:

> "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 minutes of October 25, 2012 Board meeting of Yellowstone as was attached as Exhibit "J" to Affidavit of proof, filed in action before remand, at Doc. Index No. 19)

¶(15) It is undisputed in this action, that Bearce had their shares committed to them pursuant to the July 20, 2010 letter by Yellowstone before the October 25, 2012 Board action concerning the 3 to 1 split of stock.

¶(16) 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. (See stock ownership schedules showing stock split as was attached as Exhibit "I" to the Affidavit of proof, filed in this action before remand, at Doc. Index No. 18).

¶(17) It is undisputed that in this action, that subsequent to learning about the 3-1 split in stock and upon learning that they were the ONLY investor 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. The Bearce's made demand upon Yellowstone Energy Development, L.L.C. to split their stock in a similar 3 to 1 split, but such demand has been refused. (See minutes of Board of Director for Yellowstone Energy Development, L.L.C. for December, 2012 attached as Exhibit "K" to Affidavit of proof, filed in this action before remand, at Doc. Index No. 20)

¶(18) The Board minutes of December 29, 2011 show that after the initial investment and stock for the initial investment was issued (called "seed money" by Yellowstone Ethanol, L.L.C. in the minutes) that Board members Clinton F. and Robert (Bob) Gannaway put in additional money into the company. By Motion made at the December 29, 2011 meeting, such additional funds were voted to also apply to the 3-1 stock split where the 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 copy of the minutes of the Board of Directors for Yellowstone Ethanol, L.L.C. for December 29, 2011 attached as Exhibit "L" to the Affidavit of proof, filed in this action before remand, at both in the first trial and on remand at Doc. Index No. 21)

¶(19) The Bearce's testified that, at the meeting at their house in the Spring of 2006, to discuss granting the Option to Purchase, the Bearce's inquired if their stock would be the same as all the investors and were told such would be the case. (See transcript p. 65, p. 72 lines 14-19; p. 87 lines 17-24 to p. 89 line 24)

¶(20) It is undisputed Yellowstone had only one class of one dollar par value units (shares) and that the 3:1 stock split was approved before all shares for all members were booked into the unit ledger for Yellowstone in December 2012. (See Findings No. 74, 76, 77, 78, 80 at Doc. Id. 131)

¶(21) Upon remand, at the evidentiary hearing held June 8, 2020, Robert Gannaway, Chief Operating Officer and managing member for Yellowstone testified, at no time, no disclosure or information concerning the intent to give all was ever disclosed to Bearce. The reason given by Gannaway for such non-disclosure was Bearce was not yet then a member, and the land sale had no risk for Bearce as compared to the cash investors.

¶(22) It is an undisputed fact, that prior to the December 2012 booking of the units (shares) on the company ledger sheet, (at which time, the cash investors all got their 3:1 split of extra shares), that Bearce had no knowledge concerning the stated plan by the promotors or organizing Board of Yellowstone, to triple the units for all cash investors, nor the Yellowstone Board action of December 29, 2011 and October 25, 2012 voting to triple the unit shares (stock) for all prospective members except Bearce.

STATEMENT OF THE ISSUES

¶(23) **ISSUE ONE: Whether trial court's determination that no duty was owed by Yellowstone to Bearce was reversible error?**

¶(24) **ISSUE TWO: Whether trial court's determination no breach of duty by Yellowstone occurred involving Bearce was reversible error?**

STANDARD FOR REVIEW

¶(25) On the issue number one, whether there exists a fiduciary duty owed is a question of law subject to a de novo standard of review on appeal. *Kortum v. Johnson,* 2008 ND 154, ¶ 24, 755 N.W.2d 432

¶(26) On the issue number two, whether there was a breach of fiduciary duty, is an issue of fact subject to the clearly erroneous standard of review on appeal. *Kortum, supra,* at ¶ 24.

LAW AND ARGUMENT

I. ISSUE NO. 1

Whether trial court's determination that no duty was owed by Yellowstone to Bearce was reversible error?

¶(27) The trial court on remand entered findings and conclusions (Doc. No. 131) that no fiduciary duty existed between Yellowstone and Bearce, and consequently, no breach of any fiduciary duty occurred as between Yellowstone and Bearce, as concerns the claim by Bearce that the $100,000.00 units (shares) committed by Yellowstone to Bearce should have been given the same 3:1 split before being booked into the member unit ownership ledger at the same as all other members in Yellowstone had their shares booked into the unit ledger to become members.

¶(28) The standard of review, on the issue of existence and breach of any fiduciary duty in this case is: (1) whether the relationship between Yellowstone (through its company board or promotors) and Bearce, create a fiduciary relationship, as a matter of law, subject to de novo review by this Court; and (2) whether such fiduciary duty was then breached by Yellowstone, which is a factual inquiry, subject to an abuse of discretion standard of review on appeal. *Kortum v. Johnson,* 2008 ND 154, ¶ 24, 755 N.W.2d 432.

¶(29) On the issue of the relationship between Yellowstone and Bearce, all of the material facts are undisputed, such that whether a fiduciary relationship existed, can here be decided on appeal as a matter of law. (*Kortum, supra* ¶24)

¶(30) Organizing documents were filed for Yellowstone Ethanol, L.L.C. with the North Dakota Secretary of State in May of 2006. A limited liability operating agreement was

signed by the organizing investors as of April 2007 (Doc. No. 10). The company, by and through its organizational board, then went shopping for land which met their business needs for railroad access to build the proposed ethanol plant.

¶(31) Robert Gannaway ("Gannaway") testified on behalf of Yellowstone, as its chief operating officer (C.O.O.) that Yellowstone was looking for suitable land next to an active railroad line upon which to build the ethanol plant, and found suitable surface land owned by Bearce, west of the town of Trenton, in Western Williams County adjacent to the main railroad line operated by Burlington Northern Railroad.

¶(32) An option to purchase the surface of this parcel of Bearce land was signed between Yellowstone and Bearce on June 14, 2006, and a Contract for Deed exercising the option was entered into by Yellowstone and Bearce on April 21, 2008 for the contract sum of $514,860.00. (Contract for Deed at Exhibit 5 to Affidavit of Proof Doc. No. 12)

¶(33) The April 21, 2008 Contract for Deed page 2, paragraph d, states:

> 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 $100,000.00, in the name of the 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.

¶(34) Yellowstone did subsequent to April 21, 2008, default on the payments due under the Contract for Deed, and Bearce, through their attorney, did give Notice of Default to Yellowstone to cancel the April 21, 2008 Contract for Deed. Yellowstone after receipt of Notice of Default, did enter into negotiations to save the purchase, which resulted in a Modification of Contract for Deed, dated August 25, 2009 (See Exhibit 6 to Affidavit of proof, filed in this action before remand, at Doc. No. 14). This Modification of Contract

for Deed had stated consideration [1] of cash in the sum of $514,860.00 and the same contingent stock provision as was in the original Contract for Deed, where the Modification Agreement stated on page 2 paragraph (d). (Doc. No. 14) 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 $100,000.00 in the name of the 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.

¶(35) Subsequent to the modification of the Contract for Deed, the financing for the building of the proposed ethanol plant fell apart and the Yellowstone looked at other options for use of the Bearce land. Yellowstone found a new opportunity to lease the land for an oil loading facility to be operated by Savage Services. Savage Services wanted to close their deal with Yellowstone in the fall of 2010 and Yellowstone authorized the payoff of the Contract for Deed to Bearce and obtain a deed to the Bearce land.

¶(36) By letter dated July 20, 2010 Robert Gannaway advised Bearce it would be issuing 100,000 shares to Bearce in Yellowstone having a value of $100,000.00, which letter states as follows (See July 20, 2010 letter at Doc. No. 15):

> 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

[1] The North Dakota Limited Liability Act N.D.C.C. 10-32-02 (12) defines "contribution" to include both cash or property. The Operating Agreement for Yellowstone signed in 2007 by the organizing future members also allows property to qualify as a contribution to earn units in the company.

> of $1.00 per share, Yellowstone Ethanol, LLC has not issued shares to its members. However, Yellowstone Ethanol, LLC wishes to assure you that it 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.

This letter exhibit (Doc. No. 15) had the typed words "fully intends" on this letter deleted, and with a handwritten pen line, [the word] "will" comply with the terms set forth in paragraph 2(d) of the Contract for Deed, (which hand written change Gannaway initialed to the letter) was sent to Bearce. (See Doc. No. 15) The letter says nothing about the financing for the ethanol plant falling through, but does state, Bearce was to get their shares in Yellowstone "**at the time shares are issued to all its members."**

¶(37) By check dated August 3, 2010 in the sum of $538,495.00 Yellowstone paid the cash amount of principal and accrued interest for the Modified Contract for Deed (Doc. No. 104) and Bearces signed off on a Warranty Deed to Yellowstone dated August 3, 2020 (Doc. No. 105) for the land described in the Modified Contract for Deed.

¶(38) The testimony by Robert Gannaway was that all units (shares) of all the members, including the Bearce shares, were all first issued at the same time, on the unit ledger. However, it was at this time, just before first creating the unit ledger in December 2012, the cash investors (all members except Bearce) were given a 3:1 split. (Transcript p. 34 line 12 to p. 36 line 12 Transcript p. 45 lines 3-25). (See also Findings Doc. Id. 131 at Nos. 76, 77, 85, 86)

¶(39) It has been admitted at trial on remand, that Bearce was given no notice of the October 25, 2011 or December 29, 2011 Board meetings when the formal action to give

the 3:1 stock split was passed by the Board of Governors. (Gannaway at Transcript p. 37 line 13 to p. 38 line 1). The reason stated by Gannaway on behalf of Yellowstone, was, no notice was given to Bearce of any meeting or action taken at such meetings, because Bearce were **not considered "members"** of Yellowstone. (Gannaway Transcript p.37 line 13-24).

¶(40) The first time Bearce was given information of the 3:1 split to the cash investors, was at the December 18, 2012 annual meeting of Yellowstone (Transcript Gannaway testimony p. 50 line 13-24), at which time the Bearces made inquiry and had objection to being left out and not being treated the same as the other members. (Gannaway Transcript p. 50 lines 21-24).

¶(41) From these admitted facts outlined above, this case concerns the relationship between Bearce and Yellowstone between the time the company was organized in 2007 and when the membership units of all members were issued all at the same time in December 2012.

¶(42) More specifically, the inquiry is the relationship between Yellowstone and Bearce, as of the April 2008 Contract for Deed through the July 20, 2010 letter by Yellowstone to Bearce advising the contingency stock would be issued by Yellowstone to Bearce, despite the initial condition precedent.

¶(43) Here, the company Yellowstone was organized and existing under North Dakota law sufficient to enter into a binding contract for deed and take title to the Bearce land in August of 2010.

¶(44) The above-described Contract for Deed and Modified Contract for Deed between Yellowstone and Bearce, included in the contract price, both a cash amount and stock

(albeit subject to a condition precedent) which condition precedent was waived as of July 20, 2010 letter by Yellowstone.

¶(45) Accordingly, where no members had been vested in the company until the units (stock) were all entered in the unit ledger [2] at the same time in December 2012, it follows either those representing Yellowstone in the purchase negotiations involving the Bearce land, negotiating stock to be included in the consideration for the Bearce land were either promotions of Yellowstone or direct agents of Yellowstone.

In Burneagle Coal & Coke Company v. Henritze, 124 S.E. 224, 229 (Virginia 1924) a good definition of what a promotor is was given, as follows:

"The question of fact as to whether or not one is a promoter must be first decided before the consequent legal obligations resting upon a fiduciary can be imposed upon him. Many efforts have been made by courts to define a promoter, but no perfectly satisfactory definition has yet been made which will apply under all circumstances."

….

This from Richlands Oil Co. v. Morriss, 108 Va. 288, 61 S. E. 762, is helpful in this case: "A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself. A person who procures subscriptions and aids in organizing the company and frames the papers and manages the procuring of options and the vesting of title is a promoter."

[2] Individuals are not "members" in the limited liability company until their name and number of units are booked onto the unit ledger Findings Doc. Id. 131 Nos. 23, 24, 31 and 32.

….

In Old Dominion Copper Mining & Smeltting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 327, this is said:

"In a comprehensive sense "promoter" includes those who undertake to form a corporation and to procure for it the rights, instrumentalities, and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business."

Burneagle, supra, at p. 229

¶(46) Alternatively, these same individuals negotiating on behalf of Yellowstone, who had in place Articles of Organization and had signed an Organizing Agreement for Yellowstone could be legally qualified as acting direct agents of Yellowstone.

¶(47) If because the company had no official members at the time of Yellowstone's purchase and stock negotiations with Bearce, if such organizing board members negotiating with Bearce are promotors under the law, then such promotors, have universally been held to be in a fiduciary duty relationship concerning such negotiations and stock with those intending to invest cash, land or services into the company. See *Killen, Supra* at p. 42; *May v. State,* 127 So.2d 423, 426-427 (Miss. 1961); *Burneagle Coal & Coke Corporation v. Henritze,* 124 S.E. 224, (Va. 1924); *Riles v. Coston-Riles Lumber Co.,* 95 So. 43, 45 (Ala. 1922); *Downey v. Byrd,* 156 S.E. 259, at 259. (Ga. 1930); see also, Vol. 1A Fletcher Cyc. Corporations Section 192, Chapter 9:

> "Promotors of a corporation occupy a special fiduciary relationship to shareholders whom they induce to buy stock. This includes the duty to disclose material facts, including facts concerning the financial structure of the corporation of which the promotors have special knowledge." (citations omitted)

¶(48) The same analysis would apply if the individuals who visited with Bearce in 2008 and 2009 were direct agents of Yellowstone.

¶(49) If this Court concludes, as a matter of law, that because Yellowstone had filed organizational papers with the North Dakota Secretary of State in 2006 and its managing board members had signed a Limited Liability Company Agreement (Operating Agreement) as of April 2007, that Yellowstone, had no promotors, the resulting fiduciary relationship still existed, as a matter of law, between Yellowstone and Bearce, when several board members [3] met with Bearce to negotiate the first contract for deed April 21, 2008, and then after default, negotiated the second modified contract for deed dated August 25, 2009 in which the conditional stock (shares in Yellowstone) was negotiated as part of consideration for the purchase of the Bearce land.

¶(50) The company Yellowstone, being organized as a limited liability company, has the factual elements of being a "closely held company where the typical attributes of a close corporation were identified in *Balvik v. Sylvester,* 411 N.W.2d 383, 386 (N.D.1987):

> The statutory concept of oppressive conduct, and the broad imprecise definitions of the term given by the courts, is best understood by examining the nature and characteristics of close corporations. The typical attributes of a close corporation are that: (1) the shareholders are few in number, often only two or three; (2) the shareholders usually live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock. 1 F. O'Neal and R. Thompson, *O'Neal's Close Corporations* § 1.07 (3d ed. 1987); see also, D. MacDonald, *Corporate Behavior and the Minority Shareholder: Contrasting Interpretations of Section 10-19.1- 115 of the North Dakota Century Code,* 62 N.D.L.Rev. 155 (1986); *Sorlie v. Ness,* 323 N.W.2d 841, 845 n. 2 (N.D.1982).

[3] A resolution of the full Board authorizing a committee has the full authority of the Board N.D.C.C. 10-32-85. Yellowstone Board members were authorized in the minutes to meet with Bearce to negotiate the land purchase.

¶(51) The North Dakota Limited Liability Company Act Chapter 10-32 (in effect in 2006-2012 at the time of interest in this action) defines a "closely held" limited liability company, as a company which "does not have more than thirty-five members". 10-32-02 (10) N.D.C.C.. The facts here clearly establish Yellowstone as a "closely held" company. (This definition of a closely held company is identical to the definition of a closely held company as set forth in the North Dakota business corporation act. 10-19.1-01 (11) N.D.C.C.).

¶(52) Where you have a closely held company, the law imposes a "fiduciary duty" upon the Governors and majority shareholders "to act with good faith, not to act fraudulently, illegally or in a manner prejudicial toward any shareholder." *Brandt v. Someville,* 2005 ND 35 ¶7, 692 N.W.2d 728; citing *Grinaker v. Grinaker* 553 N.W.2d 200, 202-203 (N.D.1996); *Schumaker v. Schumaker,* 469 N.W.2d 793. 797 (N.D.1991); *Balvik v. Sylvester,* 411 N.W.2d 383, 385-389 (N.D.1987).

¶(53) The North Dakota Limited Liability Act, Chapter 10-32 N.D.C.C. (in effect at all times material to this action), has the exact language (as does the North Dakota Business Corporation Act interpreted by the list of cases above, that the conduct of the governors (board) is to discharge their duties "in good faith". Defined by 10-32-02(31) N.D.C.C. as "honesty in fact, in the conduct of the act or transaction concerned".

¶(54) Accordingly, it is clear under the law in North Dakota, the Board of Governors and each unit (share) holder held a fiduciary duty to all members of the company where Yellowstone was a closely held company.

¶(55) The above findings and conclusions by the trial court upon remand found no fiduciary relationship between Yellowstone and Bearce are based upon the circumstance

Yellowstone's obligation to issue unit shares (stock) to Bearce was subject to the contract condition precedent that the shares would be issued if and when Yellowstone obtained financing for construction of the planned ethanol plant. [4]

¶(56) This Court in *Airport Inn Enterprises, Inc. v. Ramage,* 2004 ND 92, ¶11, 679 N.W. 2d 269 defined condition precedent as:

> "A condition precedent is one which must be performed or happen before a duty of immediate performance arises on the promise which the condition qualifies." *Kruger v. Soreide,* 246 N.W.2d 764, 769 (N.D. 1976)

¶(57) However, unlike the facts in *Ramage,* which involved a similar condition precedent involving obtaining financing as a condition precedent to performance, here, the condition precedent was clearly waived by Yellowstone as of the letter notification by Yellowstone to Bearce by letter notification dated July 20, 2010 by Gannaway, in his capacity as Yellowstone's Chief Operating Officer to Bearce, (See July 20, 2010 letter at Doc. No. 15) which states in relevant part:

> 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 it 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 member, 100,000 shares having a value of $1.00 per share.

[4] See Findings Doc 131. Findings Nos. 39, ,40, 414, 47, 48, 50, 51.

¶(58) We have now arrived at the very center issue of this appeal; the question of law, here for this Court to decide as a matter of law, whether the obligation to issue 100,000 of unit shares was part of the land sale consideration, to induce Bearce to enter into the Contract for Deed, subject to a condition precedent which had not yet occurred, although having the stated possibility of the stock being issued, does such undisputed factual relationship place Yellowstone and Bearce in a fiduciary relationship; as a matter of law?

¶(59) In short, where ownership equity in Yellowstone was part of the sale, even on a contingent basis, did the fiduciary relationship exist?

¶(60) To complicate matters, if the fiduciary relationship did not exist due to the contingent nature of the obligation back in 2008 when negotiating the land purchase, does the fiduciary relationship then come into existence as of July 20, 2010 when Yellowstone gave Bearce written notice of waiver of the condition precedent and committed to issuing 100,000 unit shares to Bearce at the same time all other members got their shares?

¶(61) Here, Bearce would point out the offer of 100,000 units of Yellowstone was an important material inducement, even as a contingency, used by Yellowstone to obtain the Contract for Deed to purchase the Bearce land, so much so, the contingent offer was written into the Contract for Deed as part of the consideration for the purchase of the land. (see Contract for Deed *supra.*)

¶(62) If such contingent offer was felt that important, to induce Bearce to sell the land, and bridge the gap between what Bearce wanted in value for their land [5] from what Yellowstone wanted to pay in cash, to make the sale go through; it follows, such

[5] See Findings Doc. 131, No. 60

fiduciary duty would exist as a matter of low consistent with the clear line of cases discussed above.

¶(63) The issue of existence of a fiduciary duty between Bearce and Yellowstone should thus be answered in the affirmative.

II. ISSUE NO. TWO

Whether trial court's determination no breach of duty occurred involving Bearce was reversible error?

¶(64) If this Court determines the conditional promise of unit shares (stock) in Yellowstone as part of the consideration to purchase the Bearce land (which condition precedent was waived by Yellowstone) did create a fiduciary relationship between Yellowstone and Bearce, then the inquiry on appeal shifts to what conduct was required of Yellowstone involving such fiduciary duty and whether Yellowstone did breach such fiduciary duty.

¶(65) A trial court's findings about claims for breaches of fiduciary duty are governed by the clearly erroneous standard of review. *Brandt v. Somerville,* 2005 ND 35 ¶11, 692 N.W.2d 144, *citing, Lonesome Dove Petroleum, Inc. v. Nelson,* 2000 ND 104, ¶24, 611 N.W.2d 54. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law. *Brandt, supra* ¶12, *citing, Hogan v. Hogan,* 2003 ND 105, ¶6, 665 N.W.2d 672.

¶(66) Here in this case, the trial court on remand, made the following findings of fact that no fiduciary duty was owed by Yellowstone to Bearce (see Findings at Doc. No. 131); as follows:

40. The Bearces were not members of Yellowstone Energy until December 2012 so no fiduciary duties were owed to them prior to this time as a matter of law.

41. The Bearces did not receive notices of member meetings prior to December 2012 which was because (i) they were not members prior to issuance of the Unit Ledger in December 2012 and (ii) Yellowstone Energy held only Board meetings but no member meetings prior to that same time.

43. The Bearces were not on the Board so they did not receive, nor should they have expected to receive, notice of the Board meetings.

44. The Bearces never made any inquiry about internal issues of Yellowstone Energy nor did they request a copy of the Company Agreement.

47. There was no relationship between the Bearces and Yellowstone Energy at the time of the Contract for Deed and Modification other than an arm's length buyer and seller.

48. The Subject Property while subject to the Contract for Deed was not at risk like the promotional seed money from the investors.

51. The Bearces did not "contribute"-as defined in section 10-32.1-28, N.D.C.C.-the Subject Property to Yellowstone Energy so the same was not treated as seed money.

52. 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.

54. The 3:1 Increase of promotional seed money promised to cash investors occurred simultaneous with the allocation of all units to all members in December 2012 in connection with the unit ledger. The Allocation of units to the members of Yellowstone Energy occurred only once.

¶(67) Where the fiduciary relationship has universally been described as to act with the utmost honesty and good faith, such duty has incorporated the obligation to disclose all material facts existing between the parties, and in particular regarding companies and their equity owners, the specific duty to disclose the financial structure of the company. *Killeen v. Parent,* 127 N.W.2d 38, (Wis. 1964), *citing, 1 Fletcher, Cyc. Corp.* (perm.ed. 1963 rev. vol.) p. 721, sec. 192; (Wyo 1988), *citing, Killeen, supra; Nuss v. Sabad* 976 F.Supp.2d 231, 247 (N.D.N.Y. 2013) *Fletcher, supra* at section 192. Here, it is undisputed, that the organizing promotors and organizing board of Yellowstone had the plan to give themselves a 3:1 split to increase the value of their "seed money". Such information was admittedly withheld and not disclosed to Bearce when negotiating the purchase of the Bearce land.

¶(68) The above findings by the trial court establish the continency shares (stock) in Yellowstone was made to cover the gap between the purchase price of what [the Bearces] wanted to sell for and that cash [Yellowstone Energy] wanted to pay. (Findings Doc. No. 131 No. 60)

¶(69) In such circumstances, there existed the fiduciary duty of disclosure by Yellowstone to Bearce that there was a plan by Yellowstone to give a 3:1 stock split to the cash investors who put in "seed money", such a disclosure would certainly be of a very significant and material to Bearce when considering selling land to Yellowstone. Further such duty is more acute where the law states the value of land, counts the same as cash, as a "contribution", to qualify for ownership equity in a corporation or limited liability company. (N.D.C.C. 10-32-02 (12))

¶(70) More troubling is the careful wording of the July 20, 2010 letter by Yellowstone waiving the condition precedent and advising Yellowstone would issue the 100,000 unit shares (stock) at the same time all other prospective members got their shares. Nothing is mentioned about giving a 3:1 stock split to all other prospective members right before the shares were booked in the unit ledger. Where the letter states:

> "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".

(see July 20, 2010 letter Doc. No. 15)

¶(71) The letter then gives the impression Bearce will be treated the same as all the other members when the stock is issued where the July 20, 2010 letter states:

> "delivery to you, at the time shares are issued to all its members, 100,000 shares having a value of $1.00 per share".

(see July 20, 2010 letter Doc. No. 15)

¶(72) In *Adams v. Little Missouri Minerals Ass'n.,* 143 N.W.2d 659 (N.D. 1966) this Court discussed the fraudulent nature of half truths and suppression of material information, holding the non-disclosure of material information was actual fraud, which allows the Court to permit the inference of fraudulent inducement due to non-disclosure of material information, was determined to be actual fraud: (See *Adams* at pp. 682-683 finding actual fraud).

In *Adams,* this Court held where facts suppressed by defendant corporation in solicitation of mineral interests for its stock was material and was actual fraud under N.D.C.C. 9-03-08 and such conduct was fraud by silence. *Adams, supra,* p. 683 (citations omitted)

¶(73) Here, Bearce obviously relied upon the contingent 100,000 unit (stock) offer as it was put into the purchase contract and Bearce signed both the Contract for Deed in 2008 (and after the July 20, 2010 letter), Bearce signed the Deed for Yellowstone to get their needed land.

¶(74) The slight of hand by Yellowstone, to triple the unit shares before the stock was posted in the unit ledger was a planned, deliberate and oppressive conduct by Yellowstone.

¶(75) Certainly, after Yellowstone decided to waive the contingent nature of issuing units to Bearce (set forth in the July 20, 2010 letter) Bearce was in exactly the same unit (stock) status as all other prospective Yellowstone members, who had not yet received their units, and not had their shares booked onto the company ledger to then become members.

¶(76) The majority future members of Yellowstone in board meetings not disclosed to Bearce voted themselves more potential profit by getting three times the equity in Yellowstone for no additional consideration.

¶(77) The trail court in its findings adopted the legal analysis advanced by Yellowstone that Bearce was not entitled to my disclosure or notice of board action, as Bearce was then "not a member" and Yellowstone's relationship with Bearce was only that of Vendor – Vendee under the Contract for Deed. This analysis, ignores the undisputed fact, at this time, all other board members, who were the group of "seed money" investors were also, absolutely, not "members" of Yellowstone either as no ownership units had been yet issued until December 2012.

¶(78) After the July 20, 2010 letter, Bearce was a future equity owner in Yellowstone, the same as all other future members at that time, for which Yellowstone owed Bearce a duty not to dilute or freeze out Bearce and engage in oppressive conduct.

¶(79) In *Balvik v. Sylvester,* 411 N.W.2d 383 (N.D. 1987) the North Dakota Supreme Court stated that "oppressive conduct" by majority shareholders is an actionable breach of fiduciary duty owed to the minority shareholders.

> "Oppressive" conduct is not defined in the statute or in the Model Business Corporation Act, from which our statute was derived. See Model Business Corporation Act annotated § 97, at p. 554 (2d ed. 1971); *386 see also, *Robertson's Inc. v. Renden,* 189 N.W.2d 639 (N.D. 1971). Courts construing the Model Act have noted that there are no specific elements necessary to a finding of oppression, but that it is an expansive term that is used to cover a multitude of situations dealing with improper conduct which is neither "illegal" nor "fraudulent." E.g., *McCauley v. Tom McCauley & Son, Inc.,* 104 N.M. 523, 724 P.2d 232 (Ct.App. 1986), and cases cited therein. As the court stated in *White v. Perkins,* 213 Va. 129, 189 S.E.2d 315, 319 (1972):
>
> "The word 'oppressive,' as used in the statute does not carry an essential inference of imminent disaster; it can contemplate a continuing course of conduct. The word does not necessarily savor of fraud, and the absence of 'mismanagement, or misapplication of assets,' does not prevent a finding the conduct of the dominant directors or officers has been oppressive. It is not synonymous with 'illegal' and 'fraudulent.' "
>
> The statutory concept of oppressive conduct, and the broad and imprecise definitions of the term given by the courts, is best understood by examining the nature and characteristics of close corporations. The typical attributes of a close corporation are that: (1) the shareholders are few in number, often only two or three; (2) the shareholders usually live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock. 1 F. O'Neal and R. Thompson, *O'Neal's Close Corporations* § 1.07 (3d ed. 1987); see also, D. MacDonald, *Corporate Behavior and the Minority Shareholder: Contrasting Interpretations of Section 10-19.1-115 of the North Dakota Century Code,* 62 N.D.L.Rev. 155 (1986); *Sorlie v. Ness,* 323 N.W.2d 841, 845 n.2 (N.D. 1982).

Balvik at p. 385.

> **…**
>
> Because of the predicament in which minority shareholders in a close corporation are placed by a "freeze out" situation, courts have analyzed alleged "oppressive" conduct by those in control in terms of "fiduciary duties" owed by

> the majority shareholders to the minority and the "reasonable expectations" held by the minority shareholders in committing their capital and labor the particular enterprise. See generally Annot., *What Amounts to "Oppressive" Conduct under Statute Authorizing Dissolution of Corporation at Suit of Minority Stockholders,* 56 A.L.R.3d 358 (1974); D. MacDonald, *supra.*
>
> For example, the court in *Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 593, 328 N.E.2d 505, 515 (1975), noting the resemblance of a close corporation to a partnership, held that stockholders in a close corporation owe one another substantially the same fiduciary duty of utmost good faith and loyalty in the operation of the enterprise that partners owe to one another. The court stated: "Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They 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." See also, *Alaska Plastics, Inc. v. Coppock,* 621 P.2d 270 (Alaska 1980); *Jones v. H.F. Ahmanson & Company,* 1 Cal.3d 93, 81 Cal.Rptr. 592, 460 P.2d 464 (1969); *Fix v. Fix Material Co., Inc.,* 538 S.W.2d 351, 358 (Mo. Ct.App. 1976); *Baker v. Commercial Body Builders, Inc.,* 264 Or. 614, 507 P.2d 387 (1973).

Balvik at pp. 386-387.

¶(80) The fiduciary duty of absolute food faith by the majority shareholders in a close corporation owed to minority shareholders as found in *Balvik* was reaffirmed in *Schumacher v. Schumacher,* 469 N.D. 793, 797 (N.D. 1997).

> 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.

Schumaker at p. 797.

¶(81) Accordingly, under the undisputed facts, a clear abuse of discretion was made by the trial court on remand, where the trial court has applied the wrong law and found no

fiduciary duty existed between Yellowstone and Bearce. Either the Trial Court committed reversible error under de novo review as a matter of law or the trial court abused its discretion by making factual findings under an erroneous view of the law. Either way, the trial court erred in finding no fiduciary duty, no breach of such duty and thus no oppressive conduct by Yellowstone.

¶(82) The remedy, under such circumstances is to give Bearce the same treatment as was given to all other members except Bearce and triple the Bearce 100,000 units in Yellowstone. That would be justice served.

CONCLUSION

¶(83) The promise (contingent promise) by Yellowstone to Bearce acquiring unit shares (stock) was used by Yellowstone as part of the stated consideration to buy the needed Bearce land for the company. As far back as 2008 Bearce was an anticipated unit owner in Yellowstone if such contingency put in the contract occurred. Such contingency was clearly waived by Yellowstone in July 2010 and Bearce was vested with the same expectancy and future member rights as all other similarly vested future members waiting for their unit shares to be issued, all at the same time, which occurred in December 2012.

¶(84) It was the never disclosed to Bearce, the plan by Yellowstone's Board to triple the value of all cash investors who invested seed money to start the company, which seed money was used in part to buy the needed Bearce land. Just before all unit shares were booked for all members, all members of the organizing board voted themselves triple their number of shares before booking the number of shares on the unit ledger. Every member of Yellowstone except Bearce got the 3:1 split booked onto the ledger.

¶(85) The trial court found no fiduciary relationship, hence, no duty of notice to Bearce, no breach of fiduciary duty and no oppressive conduct.

¶(86) The law referenced above establishes that the relationship between promotors or organizational boards on one side, and subscribing future stockholders on the other side, creates a fiduciary relationship existing as a matter of law.

¶(87) The question here on appeal, for the first time in North Dakota, is whether the stock subscription being contingent on an event occurring, does a fiduciary duty of good faith, fair dealing and here disclosure of the 3:1 split by Yellowstone, exist? Under the obvious rationale that "one cannot be a little bit pregnant" the duty should exist, especially, when

the contingency was waived by Yellowstone and Bearce were vested to receive their unit shares (stock) at the same time all members got their shares booked on to the unit ledger for Yellowstone.

¶(88) Just as was discussed by this Court in *Adams, supra,* half truths to Bearce in the July 20, 2010 letter of waiver vesting Bearce with their right to acquire ownership in Yellowstone, left the reasonable expectation Bearce would be treated the same as all other future members. The plan for the 3:1 stock split was intentionally hidden from Bearce. The point that land, spends as good as cash, under the law to acquire an equity interest in a forming company was ignored by Yellowstone. Such conduct by Yellowstone was actual fraud based on *Adams, supra.*

¶(89) The trial court committed reversible error by applying an erroneous view of the law that Bearce was just a contract seller for the land, and the contingent nature of the units promised, did not create any fiduciary duty. Under either or both a de novo review of law, or clearly erroneous abuse of discretion, caused by an erroneous view of the law, the ruling of dismissal by the trial court on remand was reversible error by the trial court.

¶(90) The obvious equitable remedy here, is to give Bearce the same 3:1 split effective December 2012, when all units were first booked all the member shares on the company ledger of Yellowstone.

¶(91) A duty of good faith and fair dealing was owed by Yellowstone to Bearce beginning back in 2008 when Yellowstone negotiated for the land. That duty includes the duty of disclosure of Yellowstone's intent to give everybody else (except Bearce) a 3:1 stock split. It was not disclosed, as quite obviously, Yellowstone may not have been able

to buy the Bearce land. Yellowstone's conduct was oppressive, and justice needs to be done in this case.

¶(92) The trial court should be overturned and remanded on undisputed facts for a Judgment in favor of Bearce, with instructions the Bearce 100,000 units to be given the same triple 3:1 split all other Yellowstone received effective as of December 2012.

ORAL ARGUMENT REQUESTED

¶(93) Appellants Bearce request oral argument in this appeal after remand on the issue of fiduciary duty.

Dated this 19th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, hereby certifies in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional spaced, 12 point font typeface, and the total number of pages of the above Brief totals 36 pages, inclusive, which is within the limit of 36 pages .

/s/ Charles L. Neff
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Daniel T. and Debra Ann Bearce, Plaintiffs and Appellants, v. Yellowstone Energy Development, LLC, Acting By and Through its Board of Directors, Defendants and Appellees.	**SUPREME COURT NO. 20210010** Williams County District Court No. 53-2016-CV-01414 **CERTIFICATE OF SERVICE**

[¶1] I, Charles L. Neff, hereby certify that the ~~**Amended**~~ **Appellant Bearce's Brief on Remand** and **Appendix** were served by electronic means upon the following on April 19th, 2021, by sending a true and correct copy thereof electronically with the Clerk of the North Dakota Supreme Court, to wit:

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