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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

APPELLANT'S OPENING BRIEF

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs, Appellees, and Cross-Appellant

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendant, Appellant, and Cross-Appellee

SUPREME COURT NO. 20190254

Case No. 08-2016-CV-001107

Appeal of Order for Final Judgment dated July 1, 2019 (Index No. 513), Final Judgment dated July 1, 2019 (Index No. 514), and Order on Costs and Disbursements dated August 19, 2019 (Index No. 531), by the Honorable Judge Thomas J. Schneider, in the South Central Judicial District, Burleigh County, North Dakota

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph (s)

Cases

Statutes and Rules

STATEMENT OF JURISDICTIONAL GROUNDS

[¶1] McCormick, Inc. and its subcorporation Northern Improvement (hereinafter McCormick, Inc. or Plaintiff) asserted jurisdiction based upon alleged breaches of contract and breaches of duty regarding a North Dakota corporation.

[¶2] At trial, Plaintiff changed to a new allegation of a contract between Defendant Terrance (Terry) Fredericks as an individual and McCormick, Inc. or officers of McCormick Inc. *E.g.*, App. 276 (T. at 457:1) (After Defendant had shown that the actual written contract did not provide for Plaintiff taking 5% of gross profits, and after Defendant had shown that Plaintiff was wrong on the facts when Plaintiff claimed that its taking of 5% of profits had been approved by corporate resolution or vote, Plaintiff changed to a new theory that its taking of that money, approximately $1,000,000, from the company, was based upon a separate oral contract "at the ownership level." App. 275-276 (T. at 456-57).

[¶3] As discussed in Section I of the discussion of law below, Mr. Fredericks is an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation (MHA), and the contract was related to work that would be done on the MHA Reservation. The North Dakota courts plainly lack jurisdiction over Plaintiff's new theory of a contract "at the ownership level," *Williams v. Lee* 358 U.S. 217 (1959), and this Court must vacate the judgement and remand with an order that the District Court dismiss the case

ISSUE PRESENTED

[¶4] Do the North Dakota State Courts have jurisdiction over an on-Reservation claim against an enrolled member of a federally recognized Indian Tribe.

[¶5] Even if the District Court had jurisdiction, did it err by refusing to provide the jury with any jury instructions regarding contract law.

[¶6] Did the District Court err by denying Defendant's request to sequester witnesses.

[¶7] Did the District Court err in its order for partial summary judgment and in its order denying a motion to reconsider the same.

[¶8] Did the District Court err when it allowed attorneys who were alleged co-conspirators with Plaintiffs in the fraud at issue in this case to "represent" the plaintiffs.

[¶9] Did the District Court err by entering a judgment which was contrary to the jury verdict and which modified the District Court's prior partial judgment with motion or grounds for modification.

STATEMENT OF THE CASE

[¶10] Plaintiff filed suit in 2016. Defendant filed counterclaims. After pretrial discovery, the District Court granted summary judgment on some of Plaintiff's claims, and without any analysis it denied Defendant's cross-motion for summary judgment on other issues. The matter came for jury trial in 2017. During testimony of the first witness at trial, the witness let slip out that Plaintiff had not provided core discovery in the case, and that the missing discovery included the previously hidden information that Vogel Law Firm had represented Native Energy Construction, LLC (NEC). On Defendant's motion, the Court declared a mistrial and disqualified Vogel Law Firm. Vogel then filed a motion to reconsider, which the District Court granted. Defendant moved to amend the complaint to add claims against Vogel, which the Court denied.

[¶11] The matter came back for trial in 2018. At that trial, the Court gave the substance of all jury instructions requested by Plaintiff and denied all jury instructions requested by Defendant. This included that the Court refused to give any jury instructions on contract. The jury returned a verdict in favor of NEC, and enormous exemplary damages to McCormick. After multiple post-trial motions and issues, the Court entered a final judgment, from which Defendant appealed.

STATEMENT OF FACTS

A. GENERAL BACKGROUND FACTS

[¶12] Native Energy Construction (NEC) was a North Dakota corporation. Mr. Fredericks was NEC's majority owner, and McCormick, Inc. was a minority owner. App 41, 172. NEC conducted business for about 4 years, and was administratively dissolved by the State of North Dakota on May 22, 2015. Doc. 106 ¶13.

[¶13] In 2016, McCormick, Inc., through the Vogel Law Firm, brought the underlying District Court suit against Mr. Fredericks for alleged breaches of the contracts which created the company, for related alleged breaches of duties, and for alleged breaches of a contract to purchase vehicles/equipment from the company.

[¶14] As is undisputed, the written contracts creating NEC provided that profits were to be distributed based upon ownership—51% to Mr. Fredericks and 49% to McCormick.

[¶15] Mr. Fredericks brought counterclaims for McCormick, Inc.'s breaches (described in more detail below). App. 45, 176. Mr. Fredericks acknowledged that he owed some money to McCormick, Inc., but the core issue raised by Mr. Fredericks was that McCormick, Inc. had taken approximately $1,000,000 from NEC, in breach of its duties to NEC because the payments were contrary to the division of profits stated in the written contracts and were not authorized by NEC. Mr. Fredericks asserted that on net, McCormick, Inc. owed far more money to him than he owed to McCormick, Inc.

[¶16] After completion of pretrial discovery and other pretrial matters (including summary judgment in favor of McCormick, Inc. on several smaller claims), the matter came for trial. The largest amount in dispute at the trial was based upon Mr. Fredericks' claim against McCormick, Inc., in which Mr. Fredericks alleged that McCormick, Inc. had breached its duties to NEC and misappropriated NEC funds by skimming off over 5% of

gross profits, approximately $1,000,000. The District Court had, without analysis, previously denied Mr. Fredericks' motion for summary judgment on that claim.

[¶17] McCormick initially falsely asserted that NEC had adopted a resolution which authorized it to take 5% of gross profits. McCormick's witnesses ultimately admitted that there was no such resolution. As will be discussed in more detail in a subsection below, the first trial ended in a mistrial. When the matter came for trial a second time, McCormick changed to a new, unpled, assertion that there was an oral "contract at the ownership level," which authorized McCormick to take 5% of gross profits. App. 275-276 (T. at 456-57).

[¶18] Mr. Frederick objected to Plaintiff's attempt to, yet again, change its claims, but Mr. Fredericks also prepared to argue to the jury that the supposed "oral contract" was barred by merger, by the statute of frauds; and because not even McCormick's own witnesses could state what McCormick was contractually obligated to do in exchange for taking 5% of profits; and because McCormick did not do anything in exchange for the 5% of profits, other than what it was already being compensated for via its 49% share of profits.

[¶19] Mr. Fredericks' position is that McCormick, Inc.'s receipt of over $1,000,000 was contrary to NEC's foundational contracts and was not authorized by NEC corporate resolution or motion. The amount was in addition to other smaller amounts that McCormick, Inc. took without legal authorization, was in addition to amounts that McCormick, Inc. received as its 49% share of profits, and was in addition to other substantial amounts that Northern Improvement received.

[¶20] In NEC's first years of existence, NEC had been profitable in spite of McCormick, Inc. skimming money from gross receipts. But in subsequent years, the amount which

McCormick, Inc. skimmed from receipts resulted in NEC losing money (and Mr. Fredericks' ownership interest being a financial burden to him).

B. FACTS RELATED TO VOGEL'S DISQUALIFICATION

[¶21] On October 3, 2017, the District Court issued an order disqualified Vogel because of Vogel's obvious and previously hidden conflicts, but on January 18, 2018, the District Court vacated that order of disqualification. Mr. Fredericks sought a writ of supervisory control from this Court, which this Court denied without a decision on the merits

[¶22] Steven McCormick was the first witness at trial. He testified that during the relevant time period, he was simultaneously a fiduciary officer of NEC, of Northern Improvement Co., and of McCormick, Inc. He admitted that McCormick, Inc. had skimmed off over $1,000,000 from NEC. Without any cognizable legal theory, he claimed that there was a "contract" which allowed McCormick, Inc. to take that money. App. 120-121

[¶23] During cross-examination, he was attempting, rather unsuccessfully, to explain what services McCormick, Inc. was required to provide under the "contract" that he was claiming existed; what services McCormick, Inc. had, in fact, provided or paid for which could justify it, as a fiduciary to NEC, taking over $1,000,000 of NEC's funds; and then why McCormick, Inc. did not have the supporting documentation which would exist if his testimony had been true (e.g., billing records from professional service providers, documents supporting his claims regarding supposed in-house services). App. 288-289.

[¶24] When faced with those questions, Steven McCormick testified that one of McCormick, Inc.'s substantial task under the supposed contract had been negotiating master service agreements on behalf of NEC. Dkt. 461. He also testified that McCormick, Inc. had engaged for and paid for multiple attorneys and other professionals to perform services for NEC. When pressed for examples, he then testified, as his first specific

example, that McCormick, Inc. had paid for Vogel Law Firm to negotiate the Master Service Agreements between NEC and oil production companies. *Id.*

[¶25] During discovery, Mr. Fredericks had submitted discovery requests for all costs or services which McCormick, Inc. or its agents provided to or for the benefit of NEC or as part of its contractual or other duties to NEC. McCormick, Inc., therefore had a prior duty to have provided those documents to Mr. Fredericks regarding Vogel and other professional services providers referenced by Steven McCormick (even if McCormick, Inc. had been the client, which it was not). McCormick, Inc. violated that discovery duty, and Vogel also signed those discovery responses as the attorney for McCormick, Inc. without correcting McCormick, Inc.'s false responses. App. 188.[1]

[¶26] After Steven McCormick testified to Vogel's previously improperly hidden representation of NEC, Mr. Fredericks immediately moved for a mistrial and disqualification of Vogel. Mr. Fredericks also noted that the previously undisclosed information meant that Vogel itself was one of the alleged conflicted dual agents that McCormick had used to cheat Native Energy and Mr. Fredericks, which were one of the breaches of duty which were to be tried. The District Court granted Mr. Fredericks' motion and declared a mistrial based on Vogel's conflict of interest. *See* Doc. 227 ¶2.

[¶27] Shortly after Mr. Fredericks informed Vogel that he would be bringing suit against Vogel, Vogel submitted a motion to reconsider its disqualification. (Doc. 226-227) (Nov. 14, 2017). That motion provided additional substantial reasons for disqualifying Vogel.

[1] To this day, McCormick and Vogel have never supplemented their prior false and incomplete responses to discovery, to provide the information on the scope of Vogel's improper conflicted dual agency, or regarding other professional services that McCormick continues to claim it paid for.

These included that, to attempt to be allowed to return to the case, Vogel: 1) sought to impeach and discredit NEC/McCormick, Inc. witness Steven McCormick; 2) engaged in improper *ex parte* contact with witness/alleged NEC attorney/Vogel Partner Maurice McCormick[2] and solicited from that attorney an affidavit supporting Vogel's motion, App. 182-83; and 3) provided evidence from which a jury could readily conclude Vogel had breached its duties to Native Energy both before and after it had been disqualified.

[¶28] Maurice McCormick's affidavit in support of Vogel's motion to reconsider in part impeaches and in part attempts to corroborate Steven McCormick's testimony. Maurice McCormick disclosed that Vogel and McCormick, Inc. had contacted him after the mistrial to obtain the affidavit, and that he was providing the affidavit for the benefit of Vogel and McCormick, Inc. He admitted that McCormick, Inc. had "paid the attorneys fees it incurring in negotiating the Master Service Agreements" between NEC and oil companies. (App. 182 ¶3) (emphasis added). He admitted he when he provided those services, he did not treat NEC as his client—that he instead treated McCormick, Inc. as his client! Maurice McCormick further, and falsely, averred he had previously informed Terrance Fredericks' attorney that he had negotiated the contracts on behalf of NEC. (App. at 182-83) (citing letter of October 8, 2014). He asserted (contrary to Steven McCormick's understanding and contrary to black letter attorney ethics law) that because his services were paid for by McCormick, Inc., NEC was not his client when he was negotiating contracts for NEC. Vogel then made that exact same erroneous legal assertion in its discussion of law in support of its motion to reconsider. Doc. 226.

[2] Maurice McCormick is closely related to Steven McCormick and to other officers of McCormick, Inc.

[¶29] Despite Maurice McCormick's admission that he had been negotiating Master Service Agreements for NEC, and despite the fact that Vogel/McCormick had been caught trying to hide that discoverable information from Mr. Frederick, the Court vacated its order disqualifying Vogel. The Court also denied Mr. Fredericks' motion to amend to add claims against Vogel based upon Vogel's belated disclosure of Vogel's breaches of duties.

C. FACTS REGARDING ERRORS AT SECOND TRIAL AND IN POST-TRIAL DECISIONS.

[¶30] The matter was reset for trial, which occurred in September, 2018.

[¶31] At the second trial, Defendant requested jury instructions on contract formation, statute of frauds, and related contract issues, as discussed in detail below. Plaintiff opposed any instruction on those core legal issues in this case, and the District Court refused to give any/all of Defendant's requested instructions regarding contract.

[¶32] The Court then issued an order in limine effectively holding that Defendant could not even present evidence on one of the two core issues in this case—Defendant's allegation that Plaintiff had not provided any substantial services in return for the approximately $1,000,000 which Plaintiff took without contractual authorization.

[¶33] The jury, unsurprisingly since the District Court had effectively prevented Defendant from presenting his evidence or argument, returned a verdict in favor of McCormick, Inc. After numerous post-trial filings, the District Court entered a final judgment, which included numerous provisions favoring McCormick which were not contained within the jury verdict.

[¶34] Defendant timely filed a notice of appeal.

LAW AND ARGUMENT

I. THE NORTH DAKOTA COURTS DO NOT HAVE JURISDICTION OVER THE CLAIM OF A CONTRACT "AT THE OWNERSHIP LEVEL" BETWEEN MCCORMICK, INC. AND MR. FREDERICKS.

[¶35] Subject matter jurisdiction can be raised at any stage of a proceeding. *Trottier v. Bird*, 2001 ND 177, ¶ 5, 635 N.W.2d 157, 159. Here, at trial, after its prior allegations had been disproven,[3] Plaintiff attempted to change to a theory that there was an oral contract between Terry Fredericks as an individual and McCormick, Inc.

[¶36] There were numerous problems with that new theory. It was contrary to law, because the division of profits was expressly provided for in the written contracts which created the company. Those contracts specified that profits were to be disbursed based upon ownership interests (51% to Terry Fredericks and 49% to McCormick, Inc.)

[¶37] The supposed oral contract for additional profits to McCormick was also barred by the Statute of Frauds. Therefore, as will be discussed below, if the North Dakota Courts had jurisdiction over Plaintiff's unpled claim of a contract "at the ownership level," this Court would be required to enter an order remanding with an order that McCormick, Inc. is required to repay the approximately $1,000,000 which it illegally took from NEC in excess of its 49% share.

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[3] Plaintiff repeatedly claimed that there was a corporate vote or corporate resolution authorizing the 5% fee. *E.g.*, App. 57 (McCormick Dep. at 53:13-20) (Plaintiff asserted that McCormick, Inc. had presented the 5% fee to Native Energy and that "it was voted on. So it's more than just an oral agreement; it was a resolution of the company."). It only later realized it had been wrong, that in fact Native Energy had never approved the 5% fee and there was no resolution submitted, voted on, or approved. That is why it then changed at trial to its new theory that the 5% fee was based upon a separate oral contract "at the ownership level." App. 275-276 (T. at 456-57).

[¶38] But, the threshold issue is whether the North Dakota courts have subject matter jurisdiction over the claim that there was an oral contract at the ownership level. The North Dakota courts do not have that jurisdiction.

[¶39] The supposed oral contract at the ownership level was an on-Reservation contract between a non-Indian and an Indian Defendant. *E.g.*, App. 316, 323 (NEC's principal place of business was on the Reservation, and was for a mentor/protégé relationship under the Tribe's laws); App. at 311, 313 (Company's mailing and physical address are on the Reservation, and Terry Fredericks address is on the Reservation); App 283-284 (Steven McCormick admits that the purpose of the company was to create an on-Reservation business, under the Tribe's mentor/protégé program). This is therefore a simple, settled black letter law issue: the only court in which that claim can be heard is the Court of the Three Affiliated Tribes of the Fort Berthold Reservation. *Williams v. Lee*, 358 U.S. 217 (1959) (on-reservation contract dispute between Indian and non-Indian must be brought in the Tribe's Court; cannot be brought in a state court); *Montana v. United States*, 450 U.S. 544 (1981) (tribal courts have jurisdiction over suits stemming from on-Reservation consensual relationships between an Indian and a non-Indian); *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 544 U.S. 316, 327-28 (2008) (discussing that under the *Montana* test, a tribe has jurisdiction over contract disputes arising on trust land).

[¶40] The District Court lacked jurisdiction over the new claim asserted for the first time at trial, of a contract "at the ownership level." The Court therefore is required to vacate the judgment, because Plaintiff expressly predicated its argument for that judgment on its claim of a supposed oral contract "at the ownership level." App. 275-276 (T. at 456-57)

II. IN A CASE WHERE THE CORE ISSUES INCLUDED: WHETHER THERE WAS A CONTRACT, WHETHER A SUPPOSED ORAL CONTRACT TRUMPED THE TERMS OF A WRITTEN CONTRACT, AND WHAT THE TERMS OF ANY CONTRACT WERE, THE COURT COMMITTED AN OBVIOUS REVERSIBLE ERROR BY REFUSING TO GIVE ANY INSTRUCTION WHATSOEVER REGARDING CONTRACTS.

> [¶41] Jury instructions are an explanation and application of the law as it relates to the evidence presented. Their purpose is to inform the jury of the applicable law. To determine whether a trial court commits error in its instructions to a jury, this court considers whether, as a whole, the instructions correctly and adequately advise the jury of the applicable law.

City of Fargo v. Novotny, 1997 ND 73, ¶ 10, 562 N.W.2d 95, 97 (internal citations omitted.

[¶42] Defendant requested instructions on contract formation, statute of frauds, merger, repudiation of contract, breach of contract, interpretation of contract, and the related standard instructions defining terms used in the pattern instruction on contract (e.g., defining "consideration," etc.). App. 131-148.

[¶43] After lengthy discussion, the Court refused to give any instruction whatsoever regarding contracts. App. 262-274 (T. 419-431). This was utterly inexplicable—the core issues in this case were contract issues. In fact, both the plaintiff, App. at 272, line 18, and the Court, App. at 272, lines 16-17, acknowledge that one of Defendant's primary arguments to the jury would be that there under the law for contract formation, "there's no contract." But the Court then refused to give any instruction which would explain for the jury the law that it would have to apply to determine whether there was a contract (as Plaintiff claimed) or no contract (as Defendant claimed).

[¶44] During that same discussion, Plaintiff's attorney expressly notified the Court that he was going to argue to the jury that there was an oral contract for approximately $1,000,000. Mr. Fredericks expressly informed the Court that he was going to argue that there was no oral contract, or in the alternative that supposed oral contract violated the statute of frauds, or in the alternative that the supposed oral contract could not be used to

trump the integrated contract between the owners. *Id. See also* Dkt. 170, Plaintiff's pretrial brief ¶2 (Sept. 27, 2017) ("McCormick and Northern Improvement Company seek money damages against Defendant for breach of contract . . ."); App. 275-276 (T. at 456-57) (Plaintiff argues to the jury that Defendant's argument that Plaintiff unlawfully took approximately $1,000,000 is wrong because the was an oral "contract at the ownership level," through which Plaintiff could take 5% of profits in addition to the 49% of profits which the parties agreed to in the written contract, and Plaintiff asserts to the jury, "Our position is there was a contract.").

[¶45] Yet the jury did not have any instructions which informed it of the law from which it could evaluate whether Plaintiff's "position" was supported by law.

[¶46] Plaintiff did not argue that any of the Defendant's proposed instructions regarding contract law were incorrect, nor did it argue that Defendant's proposed jury instructions would confuse or mislead the jury. Instead its sole assertion was that there was no need to give any instructions on contract! Plaintiff had no possible legal argument for its assertion, and therefore it did not provide any discernable argument to the Court. App. 262-274 (T. 419-431). Instead, it appears that Plaintiff's argument was that because instructing the jury on the law of contract would be devastating to Plaintiff's planned argument, the jury should not be informed of the law which showed that Plaintiff's claims were unsupported. *Id.*

[¶47] After Plaintiff stated that it did not want the jury instructed on the law governing contracts, the Court ruled. It stated: "Overall I think this is a fiduciary duty issue, so I'm not going to add any of those contract instructions." App. 274 (T. 531:4-7)

[¶48] The Court's refusal to instruct the jury on any contract law issue obviously did not follow from the Court's premise. The parties agreed that Plaintiff owed fiduciary duties to

NEC. It was also undisputed that Plaintiffs took 5% of gross profits, approximately $1,000,000, on top of the 49% of profits authorized by written contract; and that there was no resolution or vote by NEC approving the 5% payment. Any reasonable jury would conclude that a fiduciary who takes $1,000,000 without lawful authorization from a company has breached fiduciary duties.

[¶49] The disputed issue—the core of the biggest issue in this case—was whether or not the taking was authorized, and after its various prior arguments had been defeated, Plaintiff was left with an argument that it had been authorized to take $1,000,000 because of an oral contract "at the ownership level."

[¶50] The District Court's error is obvious.

[¶51] This Court has repeatedly reversed district court decisions in civil cases where the appellant's argument was exponentially weaker than Defendant's argument here. For example, in *Hader v. Moen*, 218 ND 174, ¶9, 914 N.W.2d 520 and *Sollin v. Wangler*, 2001 ND 96 ¶6, 627 N.W.2d 159, this Court reversed because the district courts had failed to give ultimate-outcome instructions. In those cases, the juries had been correctly informed of the law which defined the decisions the juries needed to make, but the juries had not been informed of how their decision controlled the ultimate outcome of the case. In that fact scenario, the district court's view was that the ultimate outcome instruction could mislead the jury (an issue which is not even presented in the current case), and one could say that the instructions given by the District Court in those cases were sufficient to allow the parties to make their argument to the jury. In contrast, in the present case, one simply cannot say that. In fact, the jury instructions given in the present case were ideally suited to prevent Defendant from making his argument on the primary issue in this case.

[¶52] The Court should vacate the jury decision and final judgment and remand with an order requiring Plaintiff to disgorge all money it received in excess of the 49% of profits provided for in the written agreement; or in the alternative remand for retrial with proper instructions.

[¶53] The District Court also committed reversible error by failing to give jury instruction on the statute of frauds and merger and integration. *E.g., Spivey v. First Commercial Bank*, 681 So.2d 120 (Ala. 1995). In fact, if this Court were to have jurisdiction over Plaintiff's claim of an oral contract "at the ownership level," this Court should remand with an order that the claim of an oral contract is barred by the statute of frauds, and Plaintiff must repay the approximately $1,000,000 which Plaintiff took contrary to the written contract.

[¶54] In *Spivey*, as in the present case, the parties had entered into a written contract, and the bank later brought suit for fraud related to the contractual relationship. As part of that suit, the bank claimed that the Spiveys had acquiesced to an additional term to that written contract. The Spiveys requested a jury instruction explaining how the statute of frauds would apply to any alleged alteration of the contract terms. The trial court refused to grant that instructions, but the Supreme Court of Alabama reversed, holding that the failure to give the statute of fraud instruction was reversible error. *See also Kaljian v. Menezes*, 42 Cal. Rptr 2d 510 (Cal. Ct. App. 1995 (vacating and remanding a jury verdict because there was sufficient evidence from which a jury could find the that the statute of frauds applied to a contract); *Rachael's Boutique, Inc. v. Cabral*, 2013 Mass. App. Div. 115, 2013 WL 3242013 (unreported) (where there was sufficient evidence that the alleged contract was for sale of goods over $500, the trial court erred when it refused to grant a jury instruction on the UCC statute of frauds); *Wendt v. Feeney*, 67 Mass. App. Ct. 1112, 2006 WL

3078904 (unpublished) (reversing a jury decision on a conversion claim because the trial court had wrongly refused to give an instruction on the statute of frauds).

[¶55] During discussion of jury instructions in the present case, Plaintiff explained that it was going to assert that, on top of the 49% of net profits that it had under the written contract, it somehow had a right to take an additional 5% of gross profits based upon a supposed oral contract "at the ownership level."

[¶56] Mr. Fredericks' position, which was plainly correct, was that: 1) because the integrated written contract, which could only be amended in writing, defined the division of profits, any other provision regarding profits would have to be memorialized in a written amendment to the written contract; and 2) even if there could be a separate oral contract, the alleged "oral contract" would plainly violate the statute of frauds. Plaintiff did not make any argument to the contrary. Instead it vehemently argued that the jury should not be informed of the applicable rule of law.

[¶57] Mr. Fredericks had pled the statute of frauds as a defense,[4] and he had requested an instruction on the statute of frauds based upon North Dakota Code 9-06-04, App. 136, and instructions on merger of contracts in the written contract. Neither the Court nor Plaintiff asserted that the proposed instruction misstated the law.

[¶58] This Court should vacate the jury verdict in this case, and either remand with instructions to require Plaintiff to repay all money it received in excess of 49% of profit, or to have the statute of frauds and merger issues retried to a jury.

[4] The defense is listed as affirmative defense (g) in Mr. Fredericks answer to amended complaint, second amended answer and third amended answer. *E.g.*, App. 180.

III. THE DISTRICT COURT ERRED BY PERMITTING MCCORMICK AND ITS SUBCORPORATION TO EACH HAVE TWO UNSEQUESTERED WITNESSES.

[¶59] North Dakota Rule of Evidence 615 states:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding:
> (a) a party who is a natural person;
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
> (d) a person authorized by statute to be present.

[¶60] In this case, Defendant requested sequestration. App. 243 (T at 7:13-14), and preserved that objection for appeal. App. 250 (T. at 14:15-18). The Court, over Defendant's objection, refused to sequester either of Plaintiffs' primary witnesses. It did so based solely upon its interpretation of subsection (b) of Evidence Rule 615.

[¶61] The precise issue presented under these facts is whether a corporation that owns a subcorporation can designate one person who is an agent of both corporations as the parent company's designee, and then designate a different agent of the both corporations as the subsidiary's representative. This is an issue of first impression in this Court.

[¶62] Rule 615 was based upon and is substantively identical to Federal Rule of Evidence 615, and therefore federal case law interpreting FRE 615 is highly persuasive in this Court. Under that federal case law, a decision not to exclude a witness under Rule 615(1) or (2) is a legal issue, which this Court reviews de novo. *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996).

[¶63] When deciding this legal issue, "[b]ecause of its important role in reaching the truth, Rule 615 carries a presumption favoring sequestration," and the Court therefore should construe the exceptions narrowly. *Id.* Where, as here, there is no case on point in this

jurisdiction, the Court should turn to the underlying purpose of the rule. That underlying purpose strongly supports that the District Court erred in this case when it held that the parent and subcorporation could designate different witnesses.

[¶64] The purpose is to prevent exactly what happened in this case—Plaintiff having its witnesses listen to each other's testimony and shape their trial testimony accordingly.

> Upon a party's request for witness sequestration, Federal Rule of Evidence 615 requires the court to exclude witnesses so that one witness cannot hear the testimony of another. The rule is designed to discourage and expose fabrication, inaccuracy, and collusion. Fed.R.Evid. 615 advisory committee's note; *see also United States v. Leggett,* 326 F.2d 613, 613 (4th Cir.) (noting that witness sequestration "prevent[s] the possibility of one witness shaping his testimony to match that given by other witnesses at the trial"), *cert. denied,* 377 U.S. 955 (1964). The merit of such a rule has been recognized since at least biblical times. The *Apocrypha,* vv. 36–64, relates how Daniel vindicated Susanna of adultery by sequestering the two elders who had accused her and asking each of them under which tree her alleged adulterous act took place. When they gave different answers, they were convicted of falsely testifying. *See* 6 John H. Wigmore, Wigmore on Evidence § 1837, at 455–56 (James H. Chadbourn ed., 1976). It is now well recognized that sequestering witnesses "is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Id.* § 1838, at 463.

Opus 3 Ltd., 91 F.3d at 628.

[¶65] Plaintiff asserted that because McCormick, Inc. and Northern Improvement are both named parties, Rule 615 permitted Plaintiff's attorney designate a person who was on the board of both McCormick and Northern as McCormick's representative, and then to name a person who was the CFO of both McCormick and Northern as Northern's representative, so that both of these McCormick/Northern agent could be unsequestered witness. Its argument is contrary to the language and top the intent of Rule 615.

[¶66] Notably, McCormick, Inc. repeatedly made (and prevailed on) the exact contrary argument regarding the relationship between McCormick and Northern whenever that contrary argument was to its benefit. *E.g.*, Dkt. 527, Response to continued object to cost

bill ¶10 (McCormick/Northern assert that the Court should award costs solely to McCormick, Inc. because, *inter alia*, Northern is merely a subsidiary of McCormick). App. at 285:1-5 (Steven McCormick testifies McCormick and Northern are effectively the same entity, and that therefore "I don't see it as a big deal" that Northern was the party that entered into the mentor/protégée contract with Mr. Fredericks, or that McCormick, Inc. was not a party to NEC's operating agreement or articles of incorporation.)

[¶67] *In Ferreira v. Penzone*, No. CV-15-01845-PHX-JAT, 2018 WL 2087569, at *1 (D. Ariz. May 4, 2018), a defendant made the exact argument which Plaintiffs made here. That court, analyzing the underlying purpose of the rule, rejected the argument. It held that two of the named parties (a government agency and a named officer of that agency) could not designate separate unsequestered witness representatives. That Court discussed why its interpretation of FRC 615 was correct based upon the underlying purpose of FRE 615.

[¶68] This Court should adopt that same interpretation of Rule 615. Consistent with the core purpose of the rule, Plaintiffs had two witnesses who were officers of both the parent company and the wholly owned subcorporation. The District Court erred by allowing both of those officers of both corporations to be unsequestered.

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN THREE OF ITS SUMMARY JUDGMENT DECISIONS.

A. THE DISTRICT COURT WRONGLY GRANTED SUMMARY JUDGMENT ON $9,000 THAT PLAINTIFF ITSELF ADMITTED WAS NOT SUITABLE FOR SUMMARY JUDGMENT.

[¶69] At McCormick, Inc.'s urging, the District Court entered judgment that Mr. Fredericks was required to pay McCormick $49,795.76, which was 49% of the amount which Plaintiff falsely claimed were "unauthorized" profit distributions. Plaintiff's allegation was false in two regards. As discussed in this subsection, the District Court

included $9,000 as a "profit distribution" which was, at the very least, disputed. In fact, Plaintiff conceded that it lacked grounds for summary judgment regarding that the $9,000. Plaintiff therefore modified its request for summary judgment to assert a claim for 49% of $88,144.00 in disbursals. Dkt. 142. But even after Plaintiff conceded that it did not have a basis for summary judgment on the $9,000 payment, the District Court, without noting Plaintiff's concession, entered summary judgment to Plaintiff for that $9,000.

[¶70] Ordering Mr. Fredericks to repay 49% of that $9,000 back again appeared to have been an error caused by oversite. But when Mr. Fredericks notified the Court of that obvious error via his motion to reconsider, and of Plaintiff's own retraction, Doc. 237. Plaintiff opposed correction (without any cogent legal basis) and as with nearly every other issues, the Court issued the order that Plaintiff demanded.

B. THE REMEDY FOR MCCORMICK NOT TAKING ITS DISTRIBUTION IS A CREDIT TO ITS CAPITAL ACCOUNT, NOT A MONETARY JUDGMENT AGAINST MR. FREDERICKS.

[¶71] More significant than the error discussed in the above subsection, what Plaintiff's attorney falsely asserted was an unauthorized profit distribution to Mr. Frederick was, in fact, an authorized payment. Plaintiff's own witnesses repeatedly stated under oath that, contrary to their attorney's assertion, Native Energy had authorized the whole of the payments to Mr. Fredericks. For example, McCormick accountant Mr. Kjos expressly averred that McCormick intentionally (and dubiously from an income tax law perspective) had chosen to "defer" its own receipt of a reciprocal payment. App. 33 ¶24. Under applicable law, that deferred payment was a credit on its capital account. N.D.C.C. 10-32-02 (distributions to members include direct and indirect distributions) §10-32-63 (providing that where a member does not take a distribution share, he becomes a creditor for that amount). Contrary to the correct and simple legal analysis, Plaintiff's attorney

asserted, based upon false allegations of fact and no law, that the proper remedy was to order Mr. Fredericks to pay McCormick, Inc. 49% of the money that he received from Native Energy. McCormick S.J. ¶18 (Dkt. 106). In response, Mr. Fredericks provided a substantial legal discussion showing McCormick's requested remedy was wrong, that instead, at most, the remedy would be that McCormick would have had a credit on its NEC capital account for the profit distribution it had not taken. That amount is $84,687.37.[5] Fredericks Resp. ¶24. In its reply, McCormick merely restated its prior conclusory assertion of law, again without any supporting legal authority.

[¶72] The District Court copied Plaintiff's factually and legally incorrect argument into its order for summary judgment. Mr. Fredericks moved for reconsideration on that holding also, but the District Court denied that request, and it stuck to its erroneous order directing Mr. Fredericks to repay profits based upon Plaintiff's attorney's false allegation that Native Energy had not authorized the payment.

[¶73] This Court should vacate the decision directing Mr. Fredericks to repay money.

[¶74] Correction of this error is important for three reasons. First, and most important as a matter of law, the Court's judgment is wrong. The remedy for McCormick authorizing Mr. Fredericks to obtain a payment but choosing to defer its own payment is simply not a judgement ordering Mr. Fredericks to repay 49%his authorized payment.

[¶75] Second, substantial real-world differences stem from the proper financial accounting. These include tax consequences to both McCormick and Fredericks;

[5] The amount of the credit should have been 49/51st of $88,144.00, which equals $84,687.37.

difference in interest computations; and consequences to both third parties and to NEC's owners if Native Energy lacks sufficient assets to pay all of its lawful debts.

[¶76] Third, and as most financial significance, correction of that error requires this Court to then vacate the related order for punitive damages, as also discussed in Section V, *infra*. McCormick's attorneys used their own false assertion, and the District Court's ratification of that false assertion, as part of their argument that the jury should award punitive damages—implicitly asserting to the jury that the Judge agreed with their claim for punitive damages. Plainly, McCormick's attorneys are wrong (and McCormick's witnesses are, on this point, right): NEC authorized the distribution. This Court needs to correct its error, and, consistent with the testimony of Steven McCormick, this Court should hold that the payments to Mr. Fredericks were proper, that they merely then require proper reciprocal crediting to McCormick's capital account. If, as McCormick's attorneys implied to the District Court, McCormick did not properly add the credit to its capital account in 2014, it is McCormick, not Fredericks, whose actions are improper (and likely tax evasion).[6]

C. THE DISTRICT COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT AGAINST FREDERICKS FOR $44,400.

[¶77] The District Court similarly erred when it granted summary judgment against Mr. Fredericks for $44,400. After the relationship between Mr. Frederick and McCormick broke down and litigation was anticipated, McCormick sent Mr. Frederick a bill for

[6] Showing more savvy than his own attorneys, Jay Kjos attempts to protect McCormick from claims of tax fraud by agreeing with Mr. Fredericks and Steven McCormick (and disagreeing with Vogel) that payment to Mr. Fredericks was authorized by NEC but asserting that NEC simultaneously authorized McCormick to "defer" receipt of its reciprocal distribution because the distribution would have created cash flow problems for NEC. App. 33 ¶24. Mr. Frederick's understanding is that in the closely held corporation, any such "deferral" could not be used to defer the tax consequences to a later year.

$44,400 for supposed work reconditioning equipment. That bill did not contain any itemization. Mr. Frederick admits that McCormick was due some amount for reconditioning, but his view was that the amount due for reconditioning was nowhere near $44,400—that instead McCormick was merely attempting to gouge Native Energy after the relationship had deteriorated. The amount due was, at the very least, in disputed.

[¶78] To attempt to support its exorbitant claim of $44,400 for reconditioning work, McCormick, in its motion for summary judgment cited two documents. First, it cited Jay Kjos' affidavit. That affidavit was inapposite regarding the disputed amount of the reconditioning work. Mr. Kjos only stated that "Fredericks and McCormick agreed that Northern Improvement Company could take possession and recondition the equipment," App. 35 ¶37, and that Northern then did take possession and recondition the equipment, *id.* at ¶ 42. Notably, Mr. Kjos does not even allege that Fredericks agreed to pay for the service, nor does he allege that there was an agreement on the basis for computation of any payment, nor does he allege the value of the services. Second, McCormick cites the unsupported block invoice for $44,400 which McCormick issued after the relationship between Fredericks and McCormick had broken down. McCormick S.J. ¶11 (Dkt. 106).

[¶79] Fredericks sought discovery regarding the supposed services. McCormick was unable to produce <u>any</u> supporting documentation—all it had was the $44,000 block bill. *Id.* This is particularly notable because the supposed services are self-dealing, at a time when McCormick was only looking after its own interests.

[¶80] Despite the obvious dispute regarding the amount due for reconditioning, the District Court, as it did with nearly every issue, simply granted Plaintiff what it requested—summary judgment for $44,400. App. 66, 71, 76. Plaintiff then used that part of the

District Court's order as an additional part of its argument to the jury for punitive damages. This Court should vacate summary judgment on that issue as well, and remand for trial on the amount actually due for reconditioning work.

V. THE JURY VERDICT REGARDING PUNITIVE DAMAGES MUST BE VACATED BECAUSE IT WAS GROUNDED ON THE ERRORS DISCUSSED ABOVE.

[¶81] Under both North Dakota statutes and this Court's decisions, the decision whether to award punitive damages requires consideration of multiple factors, including the amount of actual damages and the scope of improper actions. *E.g.*, *Olmstead v. Miller*, 383 N.W.2d 817, 822 (N.D. 1986). In the present case, as discussed above, the District Court had wrongly decided that Plaintiff was liable for taking an "unauthorized" profit distribution. The jury decision was then based upon that erroneous order. The jury had not been informed of the applicable law of contract. In fact, as discussed above, the actual unscrupulous party in this case was McCormick, Inc. It is a sophisticated business entity, which took approximately $1,000,000 without any contractual authorization, but then had the audacity to assert that Mr. Fredericks was liable for both actual and punitive damages because, inter *alia*, he allegedly received exponentially smaller amounts than $1,000,000 without contractual authorization, because an NEC employee forged Mr. Fredericks' signature, etc. Because the factors that the jury was required to consider in awarding punitive damages were skewed by the errors discussed above, its punitive damage award must be vacated and remanded with instructions to correct the related errors and then determine whether there is a triable issue regarding punitive damages. *Id.*

VI. THE DISTRICT COURT DECISION TO ALLOW VOGEL BACK IN THE CASE WAS ERRONEOUS.

A. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT VOGEL HAD TO BE NEC'S OR MR. FREDERICKS' ATTORNEY AND THAT THERE HAD TO BE CLAIMS ALREADY PENDING AGAINST VOGEL BEFORE VOGEL COULD BE DISQUALIFIED.

[¶82] The District Court initially, and correctly disqualified Vogel once McCormick, Inc.'s witness let it slip out that Vogel had represented NEC. The District Court made multiple related errors when it granted Vogel's motion to reconsider. First, the District Court erroneously held that Vogel could not be disqualified unless it was NEC's attorney. The District Court was wrong because, when analyzing Vogel's conflict based upon Vogel's own interests, the question is whether the planned claims against Vogel create a sufficient risk that Vogel's decision-making would be influenced by the legal claims that would or could be brought against it. N.D. R. Prof. C. ("RPC") 1.7; *id.* at Cmt. 8.[7] The legal standard is not based upon whether the District Court concludes (based solely on information that Vogel chose to use in support of its motion to reconsider, even though Vogel and McCormick were, and still are, failing to provide all of the discoverable information in their possession regarding Vogel's conflicts and work for NEC—hidden discovery that Mr. Fredericks expects will support Steven McCormick's testimony) that Vogel was not NEC's attorney. There is very obviously a substantial risk to Vogel, that it will be found to have been NEC's attorney. That then requires disqualification. *Id.*

[¶83] Second, based upon the same underlying law discussed above, the inquiry regarding whether the conflict is disqualifying simply does not turn on whether the claims against Vogel are already filed, or even whether the claims will be filed (though here, Defendant

[7] As discussed in this Petition, there are already multiple examples in this matter of Vogel making decisions based upon its own self-interests.

had informed the District Court that the claims would be filed). In fact, attorneys can have disqualifying conflicts based upon their own financial exposure, financial interests, or legal ethics concerns without anyone else even knowing about it. *See* RPC 1.7, 1.8. Here, Vogel has had a disqualifying conflict since this case began because of the very substantial claim that only came to light after Steven McCormick let the information slip out at trial and then Maurice McCormick, in his first affidavit, confirmed Vogel's participating in breaches of fiduciary duty. And Vogel has a now very public disqualifying conflict because it is going to be sued for those breaches and it is going to have to defend itself in Court for those claims, after it provides all relevant discovery.

[¶84] As discussed in detail above, Mr. Fredericks' claims against Vogel are based upon facts alleged in Maurice McCormick's first affidavit. Those facts, if believed (or if accepted as a binding admission under evidence rules, as Mr. Fredericks would argue), will be sufficient standing alone to prove some of the claims against Vogel and will support other claims. In his first affidavit, Maurice McCormick admits to negotiating contracts on behalf of NEC, and admits that he did not treat NEC as his client in those negotiations.

[¶85] Similarly, Steven McCormick's testimony during the first trial in this case would, if believed, establish that NEC was Vogel's client. His testimony corroborates, supports, and arguably *res ipsa loquitur* establishes the key element that NEC had a reasonable belief that NEC and Vogel had an attorney/client relationship. Steven McCormick was an NEC officer, he is an experienced business person, and his statement was made as a prepared and sworn witness.

[¶86] While Maurice McCormick attempted to recant his sworn admissions in his first affidavit, Mr. Fredericks expects that that the discovery information that Vogel and

McCormick, Inc. failed to produce (are still failing to produce) will, once finally received, provide further support for Maurice McCormick's first affidavit, Steven McCormick's testimony, and Mr. Rogneby's admissions.[8]

[¶87] But again, at this time, the issue is not whether Vogel will ultimately lose or win the case against it. The issue is whether Vogel should have been disqualified because of its own substantial self-interest and its own substantial risk. Vogel's attempt to evade that issue and the District Court's erroneous order reinstating Vogel without analyzing that issue must be corrected. Vogel must be disqualified.

[¶88] The District Court correctly stated that <u>if</u> Vogel was NEC's or Mr. Fredericks' attorney in a substantially related matter, then the order disqualifying Vogel should not have been vacated. For that one issue (and only for that issue), the Court was correct that Vogel had to be NEC or Mr. Fredericks' attorney.

[¶89] But the District Court committed a common logical error when it then held that Vogel should not be disqualified <u>unless</u> it was NEC's or Mr. Fredericks' attorney; and that Vogel should not be disqualified if the prior representation of NEC or Mr. Fredericks was not a related matter. As discussed in the preceding section, a law firm cannot represent a client in a matter where the law firm itself has substantial risks.

[8] If, as there is strong reason to believe, Maurice McCormick was NEC's attorney, then all of Maurice McCormick's discussion regarding the drafting of his first affidavit and the efforts that went into the attempt to recant that testimony by a second affidavit (including all conversations between Maurice McCormick and Rogneby or other Vogel attorneys) is discoverable. Vogel has already been placed on notice to preserve all evidence regarding such matters.

B. THE DISTRICT COURT ERRED WHEN IT HELD THAT VOGEL WAS NOT NEC'S OR MR. FREDERICKS' ATTORNEY, AND WHEN IT HELD THAT VOGEL HAD NOT REPRESENTED NEC OR MR. FREDERICKS IN A SUBSTANTIALLY RELATED MATTER.

[¶90] In its erroneous order allowing Vogel back in the case, the District Court held, contrary to black letter law, that Vogel was not NEC's attorney because NEC did not pay Vogel's bill, and that even if Vogel represented NEC previously, there is no conflict of interest because the issues before the District Court are not the same or substantially related to Vogel's representation of NEC. App. 213. Although this Court should not even need to reach that issue in order to reinstate the order disqualifying Vogel, this section of this brief will discuss why Vogel should, upon proper legal analysis, be disqualified because Vogel was an attorney for NEC on a substantially related matter.

[¶91] The District Court made that significant ruling based only on what Vogel, without providing discovery, claimed was the scope of its own role. But even then, the strong weight of the evidence showed that Vogel was NEC's attorney. Steven McCormick was an NEC officer. He stated, under oath, that his understanding was that when Vogel was performing services related to the Master Services Agreement, Vogel was acting as NEC's attorney.

[¶92] Maurice McCormick, in his first affidavit, confirmed Steven McCormick's testimony. App. 182. Monte Rogneby signed a filing in which he, too, confirmed Steven McCormick's testimony. Dkt. 227. It was only after Mr. Fredericks provided his response brief on the motion to reconsider, in which he demonstrated these admissions required disqualification, that Maurice McCormick and Mr. Rogneby tried to change their story, to retract their admissions.

[¶93] Although Maurice McCormick and Rogneby attempted to retract their admissions, they did not retract the facts which show that Vogel was in fact NEC's attorney. That is, they still admit that Vogel was reviewing contracts to which NEC was a party and McCormick, Inc. was not, and that their services were performed as a subagent of NEC. They emphatically assert that McCormick, Inc. was entitled to compensation from NEC (part of the $1,000,000) for those services. McCormick, Inc. tasked Vogel with conducting the review and/or negotiations based upon McCormick. Inc.'s role as NEC's agent.

[¶94] The District Court concluded, contrary to black letter law, RPC. 1.8(f), that Vogel was not NEC's attorney because McCormick, Inc. paid Vogel's bill. This Court has adopted Rule 1.8(f) precisely because the person paying the bill is not necessarily the client. Under that rule, and as every attorney should know, an attorney owes his or her fiduciary duties to the client, not to the person paying the bill. Vogel provided legal representation in negotiating Master Service Agreements with oil companies on behalf of NEC. NEC was the client. Steven McCormick understood that. So did Maurice McCormick and Monte Rogneby until they received Mr. Fredericks opposition brief, which showed that they had virtually established claims against their own law firm. Dkt. 231. Vogel was an agent for NEC or was a subagent through McCormick, Inc., *e.g.,* App. 182 ¶4, but in either case Vogel owed its fiduciary duties to NEC. The District Court's incorrect statement that Vogel was not NEC's attorney because McCormick, Inc. paid the bill was legally erroneous and should be vacated.

[¶95] Vogel should have been removed from the case due to the fact that it failed to properly identify its client and failed to disclose the obvious conflict of interest arising out of its prior legal representation of NEC in negotiating Master Service Agreements.

[¶96] In the District Court, Vogel also argued that Mr. Fredericks could not complain about Vogel's conflict of interest because Mr. Fredericks had not brought a derivative action. That too is wrong. The litigation before the District Court involves two shareholders seeking to resolve legal and financial disputes between them. There was no need for Mr. Fredericks to bring a derivative action. In *Schumacher v. Schumacher*, 469 N.W.2d 793 (N.D. 1991), this Court noted that, in a closely held corporation, the distinction between a derivative and direct action become difficult to determine.

[¶97] Vogel goes further and attempts to stand conflict law on its head by arguing no one can sue or McCormick for wrongdoing because it pled its portions of McCormick, Inc.'s claims as a derivative action—that in effect Vogel, as "attorney for NEC, could only be sued if it chose, for NEC, to sue itself. Based on the facts put forth in Maurice McCormick's affidavit, NEC has good faith claims against Vogel that it can bring itself or that Mr. Fredericks can bring derivatively on behalf of NEC. The fact that Vogel brought some claims as derivative claims does NOT provide Vogel and McCormick with immunity from suit for their gross wrongdoing to NEC and to Mr. Fredericks.

[¶98] Now we turn to Vogel's alternative argument that even if Vogel represented NEC previously, there is no conflict of interest because the issues before the District Court are not the same or substantially related to Vogel's representation of NEC. For this argument, Vogel has the burden of proving that the issues before the District Court are not "the same or substantially related" to Vogel's prior representation of NEC in negotiating Master Service Agreements. *Cont'l Res., Inc. v. Schmalenberger*, 656 N.W.2d 730, 736 (N.D. 2003). Additionally, any doubt in terms of disqualification must be resolved in favor of disqualification. *Id*.

[¶99] Vogel did not meet its burden of proof: in fact, it submitted affidavits which prove that it was, in fact NEC's attorney. It appears to assert that it did not realize that it was NEC's attorney, but its own claimed belief that it did not owe fiduciary duties to NEC is one part of why it then violated those duties and must be disqualified. In attempting to meet its burden of proof and show that the issues before the District Court are not the same or substantially related to Vogel's representation of NEC, Vogel utilizes the affidavit of Maurice McCormick, and the portions of the discoverable evidence that they believe is favorable to them, while still failing to comply with their duty to provide the remainder of the discoverable evidence. Maurice McCormick's craftily vague affidavit is irrelevant to Vogel meeting its burden of proof. Mr. McCormick does not state whether he communicated directly with Mr. Fredericks, what information he acquired from Mr. Fredericks and/or NEC, and does not offer or provide any documents regarding Mr. McCormick's negotiations on behalf of NEC. And his and Vogel's changing of their story renders their self-serving claims of little or no evidentiary value. Vogel argues that it did not obtain any confidential information from its prior representation, but its argument is inadequate because, instead of citing to any fact, document, or legitimate authority on the matter to support its burden of proof, McCormick, Inc. and instead of fairly providing discovery, Vogel argue that Mr. Fredericks has not shown that Vogel could have or did obtain confidential information. Vogel had the burden of proof, not Mr. Fredericks, and Vogel did not meet its burden of proof.

[¶100] Likewise, Vogel's prior representation of NEC is substantially related to Mr. Fredericks claims before the District Court. Contrary to Vogel's argument, Mr. Fredericks defines his claims—Vogel's misstatement of the claims is inapposite. McCormick, Inc.

misused its position as agent of NEC, to the detriment of NEC. Vogel engaged in the exact same misconduct, either as a direct agent of NEC or as a subagent through McCormick, Inc. Regardless of whether it was a direct agent or subagent, it breached its duties to NEC. Its misconduct is not merely "substantially related:" its misconduct is part of the largest claim in this case.

[¶101] Mr. Fredericks claims (as contrasted with Vogel's intentional misstatements of Mr. Fredericks' claims are substantially related to the pending case. *E.g., Heckman v. Marche*, 894 N.W.2d 296 (Neb. 2017) (disqualifying law firm which represented a closely held corporation and had only one prior conversation with one of the 50% owner from representing the other 50% owner in subsequent dispute between shareholders); *Williams v. Stanford*, 977 So. 2d 722 (Fla. Dist. Ct. App. 1st Dist. 2008) (reversing dismissal of a claim against a law firm where that law firm had represented the closely held corporation and then represent a shareholder); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (disqualifying law firm, and noting that where the interests of a former client and a current client conflict, a lawyer must ordinarily withdraw from any representation). Similarly, in *In re Brownstein*, the Oregon Supreme Court held that "in a small, closely held corporation the rights of the individual stockholders who control the corporation and of the corporation are virtually identical and inseparable" and that, therefore, "In actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made." *In re Brownstein,* 602 P.2d 655, 656-657 (Ore. 1979). This is consistent with the North Dakota Supreme Court's discussion of closely held corporations in *Schumacher*.

VII. IF THE AWARD OF EXEMPLARY DAMAGES ARE NOT VACATED FOR REASONS DISCUSSED ABOVE, THE DISTRICT COURT ERRED BY ISSUING A FINAL ORDER WHICH STATED THAT THE JURY AWARDED EXEMPLARY DAMAGES "FOR ACTUAL AND CONSTRUCTIVE FRAUD."

[¶102] In its various post-trial filings, Plaintiff asserted that the District Court should include in its final order a statement that the jury's award of exemplary damages was based upon fraud and constructive fraud. It argued that the District Court should add that language because, it claimed, a federal bankruptcy judge would then be required to hold that the exemplary damages were non-dischargeable. Defendant correctly responded that the special jury verdict form in this case simply did not contain a finding that the exemplary damages were based upon fraud. Instead, the District Court used Plaintiff's proposed jury instructions which instructed that the jury could award exemplary damages based upon "malice," which the Court then defined such that the jury could award exemplary damages for actions which might be no more than reckless. App. 103, 105.[9]

[¶103] Without explanation, the District Court signed Plaintiff's proposed order, which included the incorrect assertion that the award of exemplary damages was based upon actual fraud and constructive fraud. If the exemplary award is not vacated for other reasons, the Court should strike the District Court's addition, because that addition was simply not part of the jury's verdict. Then, if the issue were to ever arise in a bankruptcy proceeding, it would be for that judge to determine whether the debt was dischargeable under the applicable federal statute, without the District Court's additional, unexplained "finding" that the exemplary damages were based upon fraud.

[9] Plaintiff submitted instructions prior to the first trial in this matter, and a somewhat longer set of instruction for the second trial. For issues discussed in this brief, the instruction are the same, and the appendix contains Plaintiff's original set.

VIII. IF THE AWARD OF ACTUAL DAMAGES ARE NOT VACATED FOR REASONS DISCUSSED ABOVE, THE DISTRICT COURT ERRED BY ISSUING A FINAL ORDER WHICH WAS CONTRARY TO PLAINTIFF'S CONCESSION THAT THE JURY VERDICT FOR ACTUAL DAMAGES WAS IN FAVOR OF NEC.

[¶104] After the District Court resolved several post-trial issues, it directed Plaintiff to submit a proposed judgement consistent with the jury verdict. Dkt. 469, Order (April 9, 2019). Plaintiff submitted a proposed order which provided, *inter alia*, that the portion of the final order for $352,668.55 was in favor of NEC Construction. Dkt. 470, ¶7(c).

[¶105] Defendant objected to other provisions of Plaintiff's proposed order, as discussed below, but it agreed that the award of $352,668.55 (if not vacated on appeal) had to be attributable solely to NEC Construction. Dkt. 475, 476.

[¶106] The District Court, however, entered a final judgement in which it entered the award of $352,668.55 in favor of McCormick, Inc. and NEC. This, of course, makes a substantial difference for multiple reasons. These include that Mr. Fredericks will ultimately obtain 51% of any money which NEC has after payment of all debts, and because other potential creditors of NEC could make a claim.

[¶107] If that award is not vacated for other reasons, the Court should remand with instructions that, consistent with Plaintiff's own concession, that part of the verdict must be entered solely in favor of NEC. *E.g.*, *Johnson, Johnson, Stokes, Sandberg & Kragness, Ltd. v. Birnbaum*, 555 N.W.2d 583, 585 (N.D. 1996) (parties are bound by their concessions).[10]

[10] Because Plaintiff conceded the issue through its April 12, 2019 proposed order, the Court need not consider, and therefore Mr. Fredericks need not brief, whether Plaintiff's concession was proper or wise. As Mr. Fredericks also noted to the District Court, Plaintiff's concession was, in fact, proper.

IX. THE DISTRICT COURT'S ADDITIONS TO THE JURY VERDICT WERE IMPROPER.

[¶108] The North Dakota constitution and this Court's rules guarantee a right to jury trial. N.D. R. Civ. Proc. 38. Defendant requested a jury trial in this case, and the case was tried to a jury. But after the jury rendered its decision, Plaintiff repeatedly asked the District Court to enter an order "winding up" NEC, and a related judgment which would be part of a liquidation of NEC after prioritization of all claims against NEC after notice to all other potential creditors and which would require prioritization of claims against money in Terry Fredericks capital account with NEC. N.D.C.C. § 10-32.1-54 (1), (2) (providing that assets cannot be distributed until the company has discharged all of its obligations to creditors, including members that are creditors); N.D.C.C. § 10-32.1-53 and 54 (requiring notice to unknown creditors and requiring resolution of NEC's pending suit or claims against Vogel law firm prior to winding up). This led to multiple post-trial filings regarding the content of the final order.

[¶109] On April 9, 2019, the Court issued an order denying Plaintiff's motion to wind up NEC. It directed Plaintiff to submit a proposed order "based upon the jury verdict." Dkt. 469. Plaintiff then in essence submitted the same order it had sought in its denied motion for winding up. That proposed order included terms that were not based upon the jury verdict, and which sought to move McCormick/Northern to the front of the line of both NEC and Terry Fredericks' creditors. Defendant again objected, and has preserved that objection for appeal. Dkt 475, 476.

[¶110] As relevant to the issue discussed in this section of this brief, the District Court, without explanation, reversed itself, and issued an order which provided, *inter alia*, that McCormick/Native had the right to specific assets currently held by NEC, including cash held in bank accounts.

[¶111] The District Court's additions included modification of the District Court's own, already entered, order of partial judgment. That modification was improper because Plaintiff had not even filed the requisite motion under Rule of Civil Procedure 59 or 60 and had not alleged any grounds for modification under Rule 59 or 60.

[¶112] If this Court does not vacate the judgment for other reasons, it should remand with instructions that the District Court revise the judgment so that it is solely a monetary judgment, leaving for a later day, if applicable, determination of how NEC's remaining assets are divided and leaving for a later date a determination of how money in Mr. Fredericks capital account with NEC are allocated.

CONCLUSION

[¶113] For all of the reasons stated above, this Court must vacate the judgment and remand with appropriate orders based upon the discussion of law above.

DATED December 2, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellant certifies that attached brief complies with the page limitation stated in North Dakota Appellate Court Rule 32(a)(8)(A). The page count of the filed electronic document states that the document contains 38 pages.

/s/ Thomas W. Fredericks
Thomas W. Fredericks (ND Bar # 03031)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY E-FILE AND SERVE AND E-MAIL

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs, Appellees, and Cross-Appellant

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendant, Appellant, and Cross-Appellee

SUPREME COURT NO. 20190254

Case No. 08-2016-CV-001107

Appeal of Order for Final Judgment dated July 1, 2019 (Index No. 513), Final Judgment dated July 1, 2019 (Index No. 514), and Order on Costs and Disbursements dated August 19, 2019 (Index No. 531), by the Honorable Judge Thomas J. Schneider, in the South Central Judicial District, Burleigh County, North Dakota

Thomas W. Fredericks (ND Bar # 03031)
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Attorneys for Defendant/Appellee/Cross-Appellee, Terrance Fredericks, a/k/a/ Terry Fredericks.

STATE OF COLORADO

COUNTY OF BOULDER

[¶1.] Debra A. Foulk, being first duly sworn, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-styled action.

[¶2.] That on the 10th day of December, 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, the affiant served upon the person hereinafter named a true and correct copy of the following documents in said matter:

1. **Opening Brief**
2. **Appendix to Appellant's Opening Brief**
3. **Motion Regarding Opening Brief and Appendix**
4. **Affidavit of Service by E-File and Serve and E-Mail**

and caused the same to be e-served through the Court's e-filing program and E-mail, addressed to the following persons:

Monte L. Rogneby (#05029)
Diane M. Wehrman (#06421)
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Attorneys for Plaintiffs/Appellees, McCormick, Inc. and Northern Improvement Company

[¶3.] That to the best of affiant's knowledge, information, and belief, such contact information as given above is of the party intended to be so served.

Respectfully submitted this 10th day of December, 2019.

Debra A. Foulk

Debra A. Foulk, Legal Assistant
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Subscribed and sworn to before me this 10th day of December, 2019.

Elizabeth Miller

Notary Public
My Commission Expires: Mar 22, 2022

ELIZABETH MILLER
Notary Public - State of Colorado
Notary ID 20184013180
My Commission Expires Mar 22, 2022