

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Terrance Fredericks, in his personal capacity,
as majority owner of Native Energy
Construction, and derivatively on behalf of
Native Energy Construction,

Plaintiffs/Appellants,

v.

Vogel Law Firm, Maurice G. McCormick,
Monte L. Rogneby, McCormick, Inc., and
Northern Improvement Co., Inc.,

Defendants/Appellees.

SUPREME COURT NO. 20190272

Civil No. 08-2019-CV-00489

ON APPEAL FROM ORDER DATED AUGUST 20, 2019

BURLEIGH COUNTY DISTRICT COURT
STATE OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DANIEL J. BORGEN

**BRIEF OF APPELLEES MCCORMICK, INC. AND NORTHERN
IMPROVEMENT COMPANY**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the District Court err when it concluded all of Fredericks' claims against McCormick, Inc. and Northern Improvement Company in this action were barred under the doctrine of res judicata because they were raised or were capable of being raised in the prior action?

II. Did the District Court err by dismissing Fredericks' claims without allowing discovery?

III. Are McCormick, Inc. and Northern Improvement Company entitled to an award of costs and attorneys' fees for defending against Fredericks' frivolous appeal?

ORAL ARGUMENT REQUESTED

[¶1] McCormick and Northern Improvement request oral argument in this matter. Oral argument will be helpful to the Court in understanding the underlying facts and procedure of this case as it relates to the companion case, Burleigh County No. 08-2016-CV-01107; Supreme Court No. 20190254. Oral argument will also be helpful in application of this Court's claims preclusion and issue preclusion cases.

STATEMENT OF THE CASE

[¶2] This is the second case between these parties. The "Original Action" (Burleigh County Case No. 08-2016-CV-01107) brought by McCormick, Inc. and Northern Improvement Company against Plaintiff-Appellant Terrance Fredericks resulted in a money judgment against Fredericks in favor of McCormick, Northern Improvement and Native Energy Construction of \$1,013,172.70 including a jury award of punitive damages in favor of McCormick of \$400,000 for Fredericks' actual and constructive fraud.¹ Unhappy with the jury's rejection of his counterclaims in the Original Action, Fredericks attempted to relitigate his failed claims against McCormick and Northern Improvement by bringing this action with the same allegations and claims for relief. Fredericks' claims against McCormick and Northern Improvement in this action are frivolous. All of Fredericks' claims against McCormick were litigated, or should have been litigated, in the Original Action. The doctrine of res judicata is an absolute bar on Fredericks' claims against McCormick and Northern Improvement. The District Court properly dismissed all

¹ The Original Action is currently the subject of appeal in Supreme Court No. 20190254.

of Fredericks' claims against McCormick and Northern Improvement. That decision should be affirmed.

[¶3] Fredericks initiated this action by Complaint dated February 15, 2019. (App. at 9-18; Supp. App. 92-103.²) Fredericks' Claims here are the same as the claims he made, or attempted to make, in the Original Action.

[¶4] McCormick and Northern Improvement moved to Dismiss the Complaint or Alternatively for Summary Judgment on March 13, 2019, on the grounds that all of Fredericks' claims are barred by res judicata. (App. at 50-51.)

[¶5] Fredericks submitted a Cross-Motion for Summary Judgment on Liability on April 12, 2019. (App. at 54-55.)

[¶6] The District Court conducted a hearing on May 21, 2019 on the limited issue of res judicata and the parties submitted supplemental briefing on that issue following the hearing.

[¶7] The District Court heard argument on the cross motions for summary judgment on June 28, 2019. On August 20, 2019, the Court dismissed Fredericks' Complaint with prejudice. The Court concluded the claims asserted against McCormick and Northern Improvement were brought in the Original Action, or were capable of being raised in the Original Action, and were therefore barred by res judicata. (App. at 57-64.)

[¶8] Fredericks submitted his Notice of Appeal and Order for Transcript on September 6, 2019. (App. at 83-84.)

² Pages 2 and 8 of Fredericks' Complaint were omitted from Appellant's Appendix. The version of the Complaint filed with the District Court at Register of Actions #1 did not include pages 2 and 8. However, Fredericks served on Defendants-Appellees' the Complaint included in this Supplemental Appendix.

STATEMENT OF THE FACTS

Original Action Burleigh County Case No. 08-2016-01107

[¶9] The District Court took judicial notice of all proceedings in the Original Action and this Court should as well.³

[¶10] The Original Action litigated the competing allegations that the owners of Native Energy (McCormick and Fredericks) brought against each other. Both claimed the other breached duties owed to each other and to Native Energy. Fredericks asserts identical breach of duty allegations against McCormick and Northern Improvement in this action, all based on the operation of Native Energy.

[¶11] Native Energy is a North Dakota limited liability company formed to perform dirt construction work related to oil activities on and off the Fort Berthold Reservation (Supp. App. 174.) Native Energy was formed in 2010 and is owned 51% by Fredericks and 49% by McCormick. (Supp. App. 178.)

[¶12] Fredericks and his wife, Nadine Fredericks, were paid a salary for the services they provided to Native Energy and Native Energy paid to McCormick a consulting fee of 5% of gross income as compensation for the professional and technical services provided by McCormick. (Supp. App. 136 and 146.) In addition to the salary or consulting fee paid to the owners of Native Energy, Native Energy also made distributions of profits to its owners in proportion to their 51% and 49% ownership. (Supp. App. 183.)

³ N.D.R.Evid. 201 (“The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction; or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”); *see Patten v. Green*, 397 N.W.2d 458, 459 (N.D. 1986) (taking judicial notice of record in prior civil action).

[¶13] McCormick and Northern Improvement initiated the Original Action on May 13, 2016, raising caused of action of breach of fiduciary duty and breach of contract. (Supp. App. 180.) Fredericks counterclaimed against McCormick and Northern Improvement alleging breach of duty and unjust enrichment claims. (*See* Supp. App. 205-216.⁴) All of Fredericks' counterclaims against McCormick and Northern Improvement in the Original Action relate to the operation of Native Energy.

[¶14] In 2017, McCormick sought permission to amend its Complaint to assert claims derivatively on behalf of Native Energy and also to assert claims for exemplary damages because Fredericks' acts were fraudulent and/or malicious. (Register of Actions #36.) While Fredericks objected to the assertion of claims for punitive damages, Fredericks did not oppose McCormick's request to assert derivative claims on behalf of Native Energy. (Register of Actions #37.) The Court allowed the amendment and McCormick and Northern Improvement filed their Amended Complaint. (Supp. App. 189-194.)

[¶15] In 2017 in the Original Action, in support of his motion for summary judgment, Fredericks submitted to the District Court an eleven page affidavit with numerous attachments relating to Native Energy's operations and Fredericks' allegations that McCormick and Northern Improvement breached duties to Fredericks and to Native Energy. (Supp. App. 135-176.) Amongst the topics covered in Fredericks' affidavit are McCormick's receipt of a 5% management fee from Native Energy and Fredericks' allegations that certain lease purchase agreements between Native Energy and Northern

⁴ While the Court authorized the amended answer, affirmative defenses and counterclaims, the authorized pleading was not filed with the Court.

Improvement were improper. (*Id.* at 137 and 145.) This Affidavit shows that the issues before the Court in the Original Action are the same as the issues raised in this case.

[¶16] In the Original Action the parties litigated all issues related to the operation of Native Energy, including the appropriateness of the 5% management fee Native Energy paid to McCormick, the appropriateness of the lease-purchase agreements between Native Energy and Northern Improvement, and the duties McCormick, Northern Improvement, Fredericks and Native Energy owed to each other regarding Native Energy. All of Fredericks' claims – the same claims raised in this action – were rejected by the Court and the jury. (Supp. App. 177-188 and 218-220.)

[¶17] The Court and the jury found that it was Fredericks who breached duties to McCormick, Northern Improvement and Native Energy. The District Court granted partial summary judgment against Fredericks prior to trial. The Court concluded: 1) Because Fredericks received distributions from Native Energy without McCormick receiving a proportionate amount, Fredericks must pay to McCormick part of his distributions to make distributions proportionally equal based on each's ownership of Native Energy;⁵ 2) Fredericks must repay to Native Energy the amount of payment due to Native Energy services completed by Native Energy that he converted for his personal use in violation of his duty to loyalty to Native Energy (\$35,104); 3) Fredericks must authorize Native Energy to pay to Northern Improvement the amounts due for the work performed by Northern Improvement in preparing Native Energy's equipment for auction (\$44,400); and 4)

⁵ The amount shown in this partial summary judgment order which Fredericks is obligated to pay to McCormick regarding unequal distributions was reduced prior to entry of final judgment.

Fredericks must pay to Native Energy the agreed upon amounts for the equipment Fredericks purchased from Native Energy (\$168, 879). (Supp. App. 177-188.)

[¶18] The Jury also found Fredericks liable. It found Fredericks breached fiduciary duties, committed actual fraud, and that he committed constructive fraud. It awarded Native Energy and McCormick compensatory damages of \$352,668.55 and it awarded McCormick punitive damages of \$400,000. (Supp. App. 218-220.)

[¶19] The initial jury trial in the Original Action commenced October 3, 2017. The Court during the first day of trial granted to Fredericks a mistrial based on Fredericks' claim of a conflict of interest involving the Vogel Law Firm. (Supp. App. 197.) During cross-examination Steve McCormick, Jr. testified that Vogel attorney Maurice McCormick had reviewed master service agreements between Native Energy and various oil companies at the request of McCormick and McCormick paid those attorneys' fees as part of the professional and technical services McCormick provided to Native Energy in exchange for its 5% management fee. (Supp. App. 132-133.) Fredericks claimed the legal work performed by Vogel on McCormick's behalf required Vogel to be disqualified from representing McCormick and Northern Improvement in the Original Action. (Supp. App. 197.)

[¶20] Following the mistrial, McCormick moved the Court for an Order declaring the Vogel Firm was not disqualified. On January 18, 2018, the Court concluded the Vogel Law Firm was not disqualified from representing McCormick and Northern Improvement in the Original Action. The Court found that the Vogel Law Firm had not represented Native Energy in 2010-2011 when it reviewed master service agreements between Native Energy and various oil companies and that the Vogel Law Firm had not represented Fredericks.

(Supp. App. 195-204.) Further, the Court ruled that even if Vogel’s review of the master service agreements was considered the representation of Native Energy, the subject matter of the lawsuit – the allegations by both owners of Native Energy that the other breached duties owed to Native Energy and to the owners of Native Energy – were not the same or substantially similar to the review of the master service agreements. (*Id.*) Thus, the Court ruled the Vogel Law Firm was not disqualified from representing McCormick, individually and derivatively on behalf of Native Energy, and Northern Improvement Company in the Original Action.

[¶21] While the Court was reviewing the disqualification issue, Fredericks moved to amend his counterclaim to assert additional claims against McCormick and Northern Improvement, on his own behalf and on behalf of Native Energy, and to add the Vogel Law Firm as third-party defendant. Ruling from the bench at the April 30, 2018, motion hearing, the Court denied Fredericks’ request to add the Vogel Law Firm as a third-party defendant.⁶ The Court authorized Fredericks to assert all of the additional claims, individually and on behalf of Native Energy, Fredericks’ claimed to have against McCormick and Northern Improvement including claims regarding the 5% management fee, the Northern Improvement lease purchase agreements, and other claims for breach of fiduciary duties alleged by Fredericks. The Court directed Fredericks’ counsel to file a proposed order and a proposed, amended pleading consistent with the Court’s directions. (Addendum, page 4.) Fredericks; counsel, however, did not submit a proposed order.

⁶ The Court took judicial notice of the proceedings in the Original Action. The Partial Transcript of the April 30, 2018 hearing was filed in the Original Action at Register of Actions #551. A copy of the partial transcript is attached as an addendum to this brief.

Instead, on August 9, 2018, 34 days before the rescheduled trial, Fredericks served and filed his Third Amended Answer, Affirmative Defenses and Counterclaims⁷. Contrary to the Court's directions, Fredericks included in the Third Amended Answer allegations about the Vogel Law Firm and the alleged conflict of interest. (Addendum, pages 7-26.) The Third Amended Answer included expanded breach of duty claims against McCormick and Northern Improvement. McCormick moved to strike the Third Amended Answer because it included allegations about the Vogel Law Firm contrary to the Court's Order and because to the extent any of the claims of breach of fiduciary were new, they were untimely. The Court struck the pleading because it was untimely and because the filing disobeyed the Court's instructions. (Supp. App. 217.)

Claims in this Action

[¶22] The allegations against McCormick and Northern Improvement in this matter are identical to Fredericks' counterclaims which were tried to a jury in the Original Action or are claims Fredericks could have raised had he timely submitted his Third Amended Answer consistent with the Court's ruling. To the extent that any claims in the Third Amended Answer were not presented to the jury it is due to Fredericks' lack of diligence. Res judicata precludes Fredericks from asserting in this action claims arising from the same facts as those claims fully litigated or which could have been raised against McCormick and Northern Improvement in the Original Action. As the claim against McCormick and

⁷ The Third Amended Answer, Affirmative Defenses and Counterclaims filed by Fredericks in the Original Action at Register of Action # 330 is attached as an addendum to this brief.

Northern Improvement in Fredericks' Complaint in this action are virtually identical to the claims in the Third Amended Answer, the District Court properly applied res judicata.

LAW AND ARGUMENT

I. Standard of Review

[¶23] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial so long as there are no genuine issues of material fact or if the only issues to be resolved are questions of law. *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 11, 878 N.W.2d 397. The moving party must establish that there are no genuine issues of material fact and they are entitled to judgment as a matter of law. *Holverson v. Lundberg*, 2016 ND 103, ¶ 12, 879 N.W.2d 718. The District Court must view the evidence in the light most favorable to the party opposing summary judgment, and that party should be given the benefit of all favorable inferences which can reasonably be drawn from the record. *Id.* Whether the District Court properly granted summary judgment is a question of law which [this Court] reviews de novo on the entire record. *Thimjon Farms Partnership v. First Intern. Bank & Trust*, 2013 ND 160, ¶ 8, 837 N.W.2d 327 (quoting *Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564 (internal citations omitted)).

[¶24] The District Court dismissed Fredericks' claims against McCormick and Northern Improvement holding the claims were precluded by res judicata. "Whether res judicata or collateral estoppel applies presents a question of law which is fully reviewable on appeal." *Ungar v. North Dakota State University*, 2006 ND 185, ¶ 10, 721 N.W.2d 16.

II. The District Court Did Not Err When it Concluded All of Fredericks' Claims Against McCormick and Northern Improvement Company Were Barred Under the Doctrine of Res Judicata

A. *Fredericks' Claims Arise From Same Operative Facts as in the Original Action*

[¶25] “Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies.” *Riverwood Commercial Park, L.L.C. v. Standard Oil Co.*, 2007 ND 36, ¶ 13, 729 N.W.2d 101, 106-07. “Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to the parties and their privies in all other actions.” *Id.*

[¶26] Res judicata and collateral estoppel afford “finality to the resolution of a legal dispute, which in turn increases certainty, discourages multiple litigation, and conserves scarce judicial resources.” *K & K Implement, Inc. v. First Nat’l Bank*, 501 N.W.2d 734, 737-38 (N.D. 1993). In *Littlefield v. Union State Bank, Hazen*, this Court explained:

In resolving whether a subsequent action involves the same claims or issues as those that were raised or could have been raised in a prior proceeding, we begin with the rule that res judicata applies even though the subsequent claims may be based upon a different legal theory. But, if the subsequent claims are based upon the identical factual situation as the claims in the prior proceeding, then they should have been raised in the prior proceeding. It matters not that the substantive issues were not directly decided in the prior action; the key is that they were “capable of being, and should have been, raised as part of the [prior] proceeding.”

Littlefield v. Union State Bank, Hazen, 500 N.W.2d 881, 884 (N.D. 1993) (quoting *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 385 (N.D. 1992)) (citations omitted) (emphasis added).

[¶27] Similarly, Rule 13 of the North Dakota Rules of Civil Procedure provides “[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against any opposing party, if the claim: arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” N.D. R. Civ. P. 13(a)(1) (emphasis added). This Court has “construed ‘transaction and occurrence’ broadly

to avoid a multiplicity of suits and to mean a claim that is ‘logically related’ to the opposing party’s claim.” *Security Nat. Bank., Edgeley v. Wald*, 536 N.W.2d 924, 928 (N.D. 1995) (quoting *Leo Lumber Co. v. Williams*, 191 N.W.2d 573, 576 (N.D. 1971)). Where a party fails to properly plead a compulsory counterclaim, the party is precluded from asserting the counterclaim in a subsequent action under the doctrine of res judicata. *Id.*

[¶28] The Original Action was initiated in 2016 by McCormick and Northern Improvement. Fredericks counterclaimed and asserted breach of duty and unjust enrichment claims.

[¶29] On February 23, 2017, Fredericks filed an unopposed motion to amend his Answer and Counterclaim. On March 22, 2017, the Court granted Fredericks’ leave to serve and file his First Amended Answer and Counterclaim. Fredericks’ counsel, however, for some unknown reason did not serve or file his First Amended Answer and Counterclaim. (*See* Supp. App. 205-216.)

[¶30] In his first Amended Answer and Counterclaim, which never became operative, Fredericks alleges that McCormick breached duties owed to Native Energy when it collected a 5% management fee; McCormick breached duties when it loaned Native Energy money to cover expenses; and McCormick breached duties when it allegedly failed to timely sell certain items of water transfer equipment owned by Native Energy. (*See* Supp. App. 205-216.)

[¶31] In March 2017, Fredericks submitted to the Court his affidavit in support of summary judgment. The affidavit contains Fredericks’ breach of duty claims, whether or not included in his pleadings. (Supp. App. 135-176.) Fredericks’ March 2017 affidavit alleges breaches of duty related to McCormick’s receipt of a 5% management fee and the

lease purchase agreements between Native Energy and Northern Improvement Company.
(*Id.* at 137 and 145.)

[¶32] At the start of the jury trial in the Original Action, Fredericks' counsel outlined Fredericks' breach of duty claims:

- It was a breach for McCormick to collect the five percent management fee;
- It was a breach for McCormick to approve of leases between Native Energy and Northern Improvement.

(Addendum, pages 27-31.⁸)

[¶33] As part of Fredericks' counsel's closing argument, he highlighted additional alleged breaches of duty related to alleged self-dealing between McCormick, and Northern Improvement at Native Energy's expense. (Addendum, pages 32-33.⁹)

[¶34] The identical nature of the claims in this case and the claim which were brought, or which could have been brought in the Original Action, is further evident by comparing the Complaint in this action to the failed Third Amended Answer in the Original Action.

[¶35] Paragraph 13 of the Complaint in this action provides:

13. McCormick, Inc., NIC, and Vogel each had the legal duty to disclose to Native Energy and Mr. Fredericks that Vogel had performed services for Native Energy. They had legal duties to disclose that information to Mr. Fredericks, based upon fiduciary duties and based upon proper discovery requests seeking that information. They violated these legal duties by not

⁸ McCormick and Northern Improvement ask this Court to take judicial notice of all of the proceedings in the Original Action. Attached as part of the addendum to this brief is an excerpt of Mr. Rasmussen's opening statement to the jury on September 12, 2018 in the Original Action summarizing Fredericks' claims.

⁹ McCormick and Northern Improvement ask this Court to take judicial notice of all of the proceedings in the Original Action. Attached as part of the addendum to this brief is an excerpt of Mr. Rasmussen's closing argument to the jury on September 14, 2018 in the Original Action.

only failing to disclose the information but by refusing to provide the information when requested.

(App. at 10; Supp. App. at 94.) Paragraph 41 of the Third Amended Answer in the Original Action makes the same allegation:

41. Neither McCormick, nor Northern Improvement, nor Vogel Law Firm disclosed to Mr. Fredericks that Vogel's attorneys had represented Native Energy. McCormick and Northern Improvement had legal duties to disclose that information to Mr. Fredericks, based upon fiduciary duties and based upon proper discovery requests seeking that information. They violated these legal duties.

(Addendum, page 18.)

[¶36] Paragraph 14 of the Complaint provides:

14. Native Energy and Fredericks did not discover these breaches until the aborted trial in McCormick v. Fredericks, 08-2016-CV-01107.

(App. 10-11 and Supp. App. 94-95) Paragraph 42 of the Third Amended Answer is identical:

42. Native Energy and Fredericks did not discover these breaches until the aborted trial in this matter.

(Addendum, page 18.)

[¶37] Paragraphs 15 and 16 of the Complaint provide:

15. Prior to that aborted trial, Fredericks had submitted discovery requests to McCormick, Inc. and NIC. Truthful responses to those discovery requests would have required disclosure of Vogel's prior work for Native Energy.

16. In response to those discovery requests, McCormick, Inc., NIC, and Vogel again failed to disclose the existing conflicts of interest, thereby covering up the breaches of duty until their witness let the information slip out during the aborted trial.

(App. 11; Supp. App. 95.) Paragraph 14 of the Third Amended Answer raises similar allegations:

McCormick used the services of Vogel Law Firm (Vogel) and other law firms for legal services to Native Energy. McCormick used other

professional firms or individuals for other services, but it has unlawfully refused to provide the names of those other professionals. Neither McCormick nor Vogel nor any other professionals have disclosed to Native Energy or to Terrance Fredericks the value of scope of the services that Vogel or other provisional provided related to Native Energy or the amount that was paid for such services.

(Addendum, page 13.)

[¶38] In Paragraph 17 of the Complaint in this action Fredericks alleges:

17. Throughout the life of Native Energy, McCormick, Inc. took five percent (5%) of the gross revenues as "consulting fees." McCormick, Inc. did little to no actual consulting and any such consulting was as part of its existing duties as a 49% owner.

(App. at 11; Supp. App. at 95.) The identical statement appears in Paragraph 8 of the Third

Amended Answer:

8. Throughout the life of Native Energy, McCormick took five percent (5%) of the gross revenues as "consulting fees." McCormick did little to no actual consulting and any such consulting was as part of its existing duties as a 49% owner.

(Addendum, page 7.)

[¶39] Fredericks alleges in Paragraphs 18 and 19 of his Complaint:

18. No agreement, either written or oral, was entered into for the payment of consulting fees to McCormick, Inc.

19. The Operating Agreement of Native Energy does not allow a member to collect payments from the company's gross revenues.

(App. at 11; Supp. App. at 95.) Similarly, Paragraphs 9 and 10 of the Third Amended

Answer allege:

9. No agreement, either written or oral, was entered into for the payment of consulting fees to McCormick, and no agreement, either written or oral, defines the services or other quid pro quo that McCormick was required to provide in exchange for any "consulting fee."

10. Native Energy's Operating Agreement did not allow a member to collect payments from the company's gross revenues.

(Addendum, page 13.)

[¶40] Paragraph 22 of the Complaint:

22. Vogel and McCormick, Inc. have both failed to comply with their legal duty to disclose to Native Energy or to Fredericks the value or the scope of the services it provided related to Native Energy or the amount that it received for such services.

(App. at 12; Supp. App. at 96.) Similarly, the Third Amended Answer paragraph 12 alleges:

12. McCormick has not disclosed to Native Energy or to Terrance Fredericks the time spent, wages and benefits paid, or value of the services it provided, or the amounts it paid for such services.

(Addendum, page 13.)

[¶41] Paragraphs 23, 24 and 25 of the Complaint allege:

23. In contracting for legal services for Native Energy, including services from Vogel (and, upon information and belief, from other law firms), McCormick, Inc. had attorneys provide their fiduciary duty to McCormick, Inc. instead of to Native Energy. For all such services, Native Energy and/or Fredericks were clients of the law firms providing the services.

24. At all times relevant hereto, McCormick, Inc. and Vogel knew that there was no agreement for McCormick, Inc. to take consulting fees from Native Energy.

25. At all times relevant hereto, McCormick, Inc. and Vogel knew that the Operating Agreement did not allow a member to collect payments from the company's gross revenues.

(App. at 12; Supp. App. at 96.) In nearly identical language, paragraphs 19, 23, and 24 of the Third Amended Answer allege:

19. In contracting for legal services for Native Energy, including services from Vogel (and, upon information and belief, from other law firms and professional services), McCormick had attorneys provide their fiduciary duty to McCormick, instead of to Native Energy. For all such services, Native Energy and/or Terrance Fredericks were clients of the law firms providing the services.

23. At all times relevant hereto, McCormick and Vogel knew that there was no agreement for McCormick to take consulting fees from Native Energy.

24. At all times relevant hereto, McCormick and Vogel knew that the Operating Agreement did not allow a member to collect payments from the company's gross revenues.

(Addendum, page 15.)

[¶42] Paragraphs 26 and 27 of the Complaint:

26. McCormick, Inc. or NIC entered into sales contracts or "lease to own" contracts with Native Energy for equipment. All of those contracts were "self-dealing." Those contracts were in McCormick, Inc. and NIC's interests and were not in Native Energy's interest. Through the contracts, McCormick, Inc. or NIC guaranteed that Native Energy would pay more than the fair market value for the goods, and locked Native Energy into disadvantageous fixed overhead contrary to Native Energy's interests. Fredericks, on information and belief, believes that Vogel drafted, reviewed, or provided analysis of said contracts to the benefit of McCormick, Inc. and to the detriment of Native Energy.

27. McCormick, Inc. or NIC also entered into multiple contracts with Native Energy to provide employees and services on Native Energy contracts. All of those contracts were "self-dealing." All of those contracts were in McCormick, Inc. or NIC's best interests, but were not in Native Energy's best interests. Through the contracts, McCormick, Inc. or NIC guaranteed that Native Energy would pay more than the fair market value for the services. For all such contracts, McCormick, Inc. or NIC failed to fully disclose to Terrance Fredericks and to Native Energy information necessary to determine whether the contracts were fair to Native Energy and to Terrance Fredericks. Plaintiff, on information and belief, believes that Vogel drafted, reviewed, or provided analysis of said contracts to the benefit of McCormick, Inc. and to the detriment of Native Energy.

(App. at 12-13; Supp. App. at 96-97.) Paragraphs 35, 36 and 37 of the Third Amended

Answer contain nearly identical language:

35. McCormick or NIC entered into sales contracts or "lease to own" contracts with Native Energy for equipment. All of those contracts were "self-dealing." Those contracts were in McCormick and NIC's interests and were not in Native Energy's interest. Through the contracts, McCormick or NIC guaranteed that Native Energy would pay more than the fair market value for the goods, and locked Native Energy into disadvantageous fixed overhead contrary to Native Energy's interests. For all such contracts, McCormick or NIC failed to fully disclose to Terrance Fredericks and to Native Energy information necessary to determine whether the contracts were fair to Native Energy and to Terrance Fredericks.

36. McCormick or NIC also entered into multiple contracts with Native Energy to provide employees and services on Native Energy contracts. All of those contracts were “self- dealing.” All of those contracts were in McCormick or NIC’s best interests, but were not in Native Energy’s best interests. Through the contracts, McCormick or NIC guaranteed that Native Energy would pay more than the fair market value for the services. For all such contracts, McCormick or NIC failed to fully disclose to Terrance Fredericks and to Native Energy information necessary to determine whether the contracts were fair to Native Energy and to Terrance Fredericks.

37. As part of its unlawful plan to take money from Native Energy, McCormick worked in conjunction with Vogel Law Firm.

(Addendum, pages 16-17.)

[¶43] In addition to identical factual allegations, all of which relate to the operations of Native Energy, Fredericks also asserts the same causes of action. Paragraph 45 of the Complaint provides:

45. McCormick, Inc. and NIC breached their duties to Native Energy or Fredericks by having their attorney negotiation contracts "for Native Energy" while having those attorneys provide their fiduciary duties to McCormick, Inc. and NIC, and by failing to disclose this fact to Native Energy and Fredericks.

(Supp. App. at 99.) Similarly, the first cause of action in the Third Amended Answer from the Original Action is also for “Breach of Fiduciary Duty and/or Contract.” It includes the following in Paragraph 52:

52. McCormick breached this duty to Native Energy or Fredericks by causing Vogel Law Firm to negotiate contracts for Native Energy without disclosing that Vogel Law Firm was acting on behalf of McCormick in those negotiations and without informing Native Energy or Fredericks of the scope and value of its services.

(Addendum, page 20.)

[¶44] Paragraph 53 of the Complaint alleges:

53. Vogel's wrongful actions resulted in a mistrial which caused costs to Native Energy and/or Fredericks.

(App. at 15; Supp. App. at 100.) Paragraph 58 of the Third Amended Answer alleges:

58. McCormick's wrongful actions resulted in a mistrial which caused costs to Native Energy and/or Fredericks.

(Addendum, page 21.)

[¶45] Fredericks' claims in this case are properly summarized as follows:

1. McCormick and Northern Improvement failed to make proper disclosures as part of their discovery responses in the Original Action;
2. McCormick breached duties when it collected the five percent management fee;
3. McCormick breached duties when it approved the leases between Native Energy and Northern Improvement;
4. McCormick breached duties when it approved contracts between Native Energy and Northern Improvement for contact services from Northern Improvement; and
5. McCormick caused the mistrial in the Original Action and should have to pay costs to Fredericks.

[¶46] All of Fredericks' claims in this case were actually tried in the Original Action or they could have been tried in the Original Action. As noted above, Fredericks' allegations of McCormick's alleged self dealing concerning the management fee; the leases, and contracts with Northern Improvement were actually argued to the jury in the Original Action. Fredericks claims concerning alleged discovery abuses and for costs related to the mistrial were for the Court in the Original Action to consider and decide. Fredericks never, however, made any discovery motions in the Original Action and never requested costs from the mistrial. Fredericks' waived these issues.

[¶47] The inclusion of Vogel Law Firm, Maurice G. McCormick, and Monte L. Rogneby as Defendants in this action does not alter that Fredericks was obligated to assert all claims against McCormick and Northern Improvement in the Original Action. *See Simpson v.*

Chicago Pneumatic Tool Co., 2005 ND 55, ¶ 10, 693 N.W.2d 612 (privity exists between a party and its attorney for alleged wrongful conduct in prior action for purposes of res judicata and collateral estoppel).

[¶48] The District Court did not error when it dismissed Fredericks' claims against McCormick and Northern Improvement. All of Fredericks' claims were decided in the Original Action or should have been decided.

B. Reversal of the Judgment in the Original Action Does Not Preclude Application of Res Judicata

[¶49] Fredericks asserts without citation to any authority that if he prevails in his appeal in the Original Action, Supreme Court No. 20190254, that this Court must reverse the decision dismissing all of Fredericks' claims in this action. Fredericks' assertion is the exact opposite of what the law provides. Res judicata is a bar to Fredericks' claims in this action, regardless of the outcome of the appeal in the Original Action. Fredericks' only path for relief for his alleged failure to be able to bring claims against McCormick and Northern Improvement is to convince this Court to reverse and remand the Original Action for further proceedings. Regardless of the outcome of the appeal in the Original Action, Fredericks' claims against McCormick and Northern Improvement in this action are barred by res judicata. *See Littlefield v. Union State Bank, Hazen*, 500 N.W.2d 881 (additional citations omitted) ("It matters not that the substantive issues were not directly decided in the prior action; the key is that they were capable of being and should have been raised as part of the [prior] proceeding.").

III. Fredericks' Appeal Against McCormick and Northern Improvement is Frivolous Justifying an Award of Costs and Attorney's Fees

[¶50] McCormick and Northern Improvement sought from the District Court in this action an award of attorneys' fees under North Dakota Century Code §§ 28-26-01 and 28-26-31 because there is a complete absence of actual facts or law entitling Fredericks to relief against McCormick and Northern Improvement. The District Court declined to award McCormick and Northern Improvement their costs and disbursements, including attorney fees. McCormick and Northern Improvement did not appeal the District Court's denial of the request for fees and costs for the proceedings below, but they request this Court award fees and costs for this appeal.

[¶51] Fredericks' dogged pursuit of McCormick and Northern Improvement is bad faith litigation. Having failed in all respects in the Original Action, Fredericks asserts identical claims in this new action and when the claim is properly dismissed with prejudice because it is barred by res judicata, Fredericks has chosen to pursue a frivolous appeal. "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." *Witzke v. City of Bismarck*, 2006 ND 160, ¶ 19, 718 N.W.2d 586 (citing *Riemers v. O'Halloran*, 2004 ND 79, ¶ 16, 678 N.W.2d 547).

[¶52] It cannot be argued in good faith that the factual allegations set out in Fredericks' Complaint in this case are different from the factual allegations against McCormick and Northern Improvement set out in Fredericks' failed Third Amended Answer and the claims actually tried in the Original Action. Fredericks' appeal is groundless and devoid of merit. Pursuant to Rule 38 of the North Dakota Rules of Appellate Procedure, this Court should

award to McCormick and Northern Improvement just damages, and double costs, including reasonable attorney's fees for having to defend against the frivolous appeal.

CONCLUSION

[¶53] This Court should affirm the District Court Order dismissing with prejudice Fredericks' Complaint. The claims asserted against McCormick and Northern Improvement are identical to those raised in the Original Action. Fredericks is therefore barred from asserting those claims in a new action.

Respectfully submitted January 15, 2020.

VOGEL LAW FIRM

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ATTORNEYS FOR APPELLEES
MCCORMICK, INC. AND NORTHERN
IMPROVEMENT COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 27 pages including the Certificate of Compliance.

Respectfully submitted January 15, 2020.

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ATTORNEYS FOR APPELLEES
MCCORMICK, INC. AND NORTHERN
IMPROVEMENT COMPANY

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Terrance Fredericks, in his personal capacity,
as majority owner of Native Energy
Construction, and derivatively on behalf of
Native Energy Construction,

Plaintiffs/Appellants,

v.

Vogel Law Firm, Maurice G. McCormick,
Monte L. Rogneby, McCormick, Inc., and
Northern Improvement Co., Inc.,

Defendants/Appellees.

SUPREME COURT NO. 20190272

Civil No. 08-2019-CV-00489

ON APPEAL FROM ORDER DATED AUGUST 20, 2019

BURLEIGH COUNTY DISTRICT COURT
STATE OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE DANIEL J. BORGEN

**APPELLEES' MCCORMICK, INC. AND NORTHERN IMPROVEMENT
COMPANY ADDENDUM**

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STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
McCormick, Inc. and Northern Improvement Company,)
)
Plaintiffs,) Case No. 08-2016-CV-01107
)
vs.)
)
Terrance Fredericks a/k/a Terry Fredericks, in his personal capacity as majority owner of Native Energy Company, and derivatively on behalf of Native Energy Construction,)
)
Defendant.)

PARTIAL TRANSCRIPT OF MOTION HEARING

Before
The Honorable Thomas J. Schneider
District Judge

Monday, April 30, 2018
Morton County Courthouse
Mandan, North Dakota

APPEARANCES:

FOR THE PLAINTIFF:	MONTE ROGNEY AND DIANE WEHRMAN ATTORNEYS AT LAW 200 N Third St, Ste 201 Bismarck, North Dakota 58501
FOR THE DEFENDANT:	JEFFREY RASMUSSEN ATTORNEY AT LAW 1900 Plaza Drive Louisville, CO 80027

1 (THE FOLLOWING PARTIAL PROCEEDINGS WERE HAD AND MADE OF
2 RECORD, AS FOLLOWS, on April 30, 2018)

3 -----

4 THE COURT: All right. Okay. First of all, to the
5 motion to reconsider, the thing I think should be looked into
6 right away would be whether or not there is a discrepancy
7 between what the Court ordered and what the clerk actually
8 signed. So that should be looked into to see if that's
9 something that needs to be clarified.

10 All right. Then the only thing I don't recall, I'll
11 have to tell you that I don't recall right off the top of my
12 head here that -- maybe have to be looked into, is Mr.
13 Rasmussen making the argument about the \$22,000. I don't
14 recall that issue right off the top of my head.

15 I'll give McCormick a chance to review that, even
16 Fredericks, about that particular issue. I don't recall all
17 the details there. I have read the parties' briefs, but I
18 don't recall the issue of the \$22,000 issue, so I can't make a
19 decision on that right away, so -- but all the other issues
20 regarding reconsideration, I've made the ruling in those and I
21 stand by those rulings. So those rulings will not be changed.

22 As far as the motions to amend, I believe, Mr. Rogneby,
23 you're saying that it's not necessary for either party now
24 to -- the way the law has been changed, to have a derivative
25 action, that direct claims can be brought. So I think the

1 defendant could bring direct claims, but not against -- I don't
2 think Vogel Law Firm should be in this lawsuit.

3 As far as being sued, I don't -- I think that would be
4 just total confusion. If you want to sue them, you sue them
5 directly, but not in this particular lawsuit. So the Court
6 would not allow the amendment to bring in Vogel Law Firm as a
7 defendant in any way in this lawsuit. So that would be denied.

8 But, you know, if there's going to be a direct claim,
9 you know, by the defendant -- not against Vogel Law Firm, but
10 whatever else they're asking to amend the Complaint, the Court
11 would grant that.

12 I think that's about all I can say for today, other
13 than waiting for some response on whether the Court will just
14 consider its previous ruling, but after I get the information
15 on the \$22,000, whether somehow was some misunderstanding there
16 on the Court's part, I'm not sure right at this point, so it
17 probably -- troubles me a little bit about whether or not the
18 parties had agreed to something or agreed to the facts on that.
19 I just don't remember off the top of my head so we need to look
20 at that.

21 So, Mr. Rogneby, I don't know what kind of timeframe
22 you're thinking about as far as submitting something
23 supplemental to the Court regarding the \$22,000 issue, I --

24 MR. ROGNEBY: I think we could send the -- like a
25 letter response, if that would be acceptable.

1 THE COURT: That would be fine too, as long as Mr.
2 Rasmussen --

3 MR. ROGNEBY: We can do that within a week, I think.

4 THE COURT: Okay. Mr. Rasmussen would get a chance to
5 either respond or send something simultaneously. Tell me what
6 you'd rather do, Mr. Rasmussen.

7 MR. RASMUSSEN: Probably respond.

8 THE COURT: Okay. All right. How much time do you
9 think you would need to --

10 MR. RASMUSSEN: Within a week of receipt.

11 THE COURT: Okay. All right. That would be great.
12 All right. So basically what I'm saying is that, Mr. Rogneby,
13 you'd be -- on behalf of your clients you would have to do the
14 order denying any reconsideration of what I've just put on the
15 record here, and also denying the bringing Vogel Law Firm into
16 the -- and Mr. Rasmussen, about bringing the direct actions,
17 you would have to submit to the Court a proposed order also.

18 Anything else before we recess here?

19 MR. ROGNEBY: Nothing from us.

20 THE COURT: No?

21 THE COURT: Mr. Rasmussen?

22 MR. RASMUSSEN: No.

23 THE COURT: Okay. All right. Then that's all for
24 today.

25 And as you said too, if you can agree to something, let

1 me know that too, okay?

2 MR. ROGNEBY: Yeah.

3 THE COURT: All right.

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CERTIFICATE OF COURT REPORTER

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF MORTON)

I, Jane Gillig, a duly appointed official court reporter,
CERTIFY that I recorded in shorthand the foregoing
proceedings had and made of record at the time and place
indicated.

I FURTHER CERTIFY that the foregoing and attached 5
typewritten pages contain an accurate transcript of my
shorthand notes then and there taken.

Dated at Mandan, North Dakota, on August 20, 2018.



Jane Gillig
Official Court Reporter

THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY
TO THE REPRODUCTION OF THE SAME BY ANY MEANS, UNLESS UNDER THE
DIRECT CONTROL AND/OR DIRECTION OF THE CERTIFYING COURT
REPORTER.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

McCormick, Inc. and Northern Improvement
Company,

Plaintiffs,

v.

Terrance Fredericks a/k/a Terry Fredericks, in
his personal capacity, as majority owner of
Native Energy Company, and derivatively on
behalf of Native Energy Construction

Defendant.

Case No. 08-2016-CV-01107

**THIRD AMENDED ANSWER,
AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS**

Defendant, Terrance Fredericks (“Fredericks”), for his Third Amended Answer to the Complaint of the Plaintiffs McCormick, Inc. (“McCormick”) and Northern Improvement Company (“NIC”), states as follows:

DEFENDANT’S ANSWER TO PLAINTIFFS’ COMPLAINT

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit.
7. Admit.

8. Denied in part and admitted in part. Fredericks denies that any agreement for management services was signed. Fredericks admits he signed the document(s) described as lease purchase agreements; however, Fredericks denies the documents operated leases and states that the document are legal documents which speak for themselves. Fredericks admits to the remainder of the paragraph 8.

9. Denied.

10. Admitted in part and denied in part. Fredericks admits that he entered into lease. Fredericks denies the remainder of the Paragraph 10.

11. The allegations of Paragraph 11 require no response as the referenced document speaks for itself. In the event that a response is required, Fredericks denies all allegations.

12. Admitted in part and denied in part. Allegations regarding an extension of the agreement reference a document that speaks for itself and no answer is required. In the event a response is required, Fredericks denies all allegations regarding the extension document. Fredericks admits that the parties agreed that Native Energy Construction, LLC (“Native Energy”) should be dissolved and liquidated under the laws of the State of North Dakota.

13. Denied. Fredericks lacks the knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of Paragraph 13 and therefore denies such allegations, and Fredericks further states that it cannot determine the scope of the term “exclusive control” as used in that paragraph and therefore denies the same.

14. Denied. Paragraph 14 contains multiple factually unspecified vague allegations, for which Fredericks can neither admit nor deny and therefore denies the same. To the extent Fredericks can determine what the Plaintiff is or may be referring to, Fredericks denies all of the

allegations of paragraph 14 on the grounds that they are either untrue, were allowed by Native Energy's Operating Agreement, or were not a breach of fiduciary duty.

15. Admit.

16. Admit.

17. Admitted in part denied in part. Fredericks admits that NIC performed some services. Fredericks denies that NIC is entitled to the entire \$44,400 due to a failure to provide substantive evidence of work performed.

18. Denied. Fredericks did not deny payment and believed that NIC would be paid as part of the winding up of the LLC. Fredericks further believes that NIC overcharged for its services or at least failed to provide sufficient documentation of services provided.

19. Denied. Fredericks believed that any payment would be paid as part of the winding up of the LLC.

20. Denied. Fredericks believed that any payment would be paid as part of the winding up of the LLC.

21. Denied. The allegations in Paragraph 21 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 21.

22. Denied. The allegations in Paragraph 22 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 22.

23. Denied. The allegations in Paragraph 23 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 23.

24. Denied. The allegations in Paragraph 24 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 24.

25. Denied. The allegations in Paragraph 25 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 25.

26. Denied. The allegations in Paragraph 26 constitute a legal conclusion not requiring a response. To the extent the allegations do not constitute a legal conclusion, Fredericks denies the allegations set forth in Paragraph 26.

27. Denied. Fredericks denies that Plaintiffs are due any compensation or judgment.

AFFIRMATIVE DEFENSES

1. For affirmative defenses to the Complaint, Fredericks alleges and states as follows:
 - a. Plaintiffs fail to state a claim upon which relief can be granted.
 - b. Plaintiffs' claims are barred by the Doctrine of Laches or any applicable statutes of limitations.
 - c. Plaintiffs' claims are barred by the Unclean Hands Doctrine.
 - d. Plaintiffs' claims are barred by the Doctrine of Estoppel.
 - e. Plaintiffs' claims are barred by the Doctrine of Waiver.
 - f. Plaintiffs' claims are barred by the Doctrine of Accord and Satisfaction.

- g. Plaintiffs' claims are barred by the Statute of Frauds and/or the Parol Evidence Rule.
- h. Plaintiffs' claims are barred for a failure of Plaintiffs to perform a material term of a contract or agreement.
- i. Plaintiffs' claims are barred as a result of Plaintiffs' own material breach of a contract or agreement.
- j. Plaintiffs' claims are barred by Plaintiffs' failure to satisfy a condition precedent.
- k. Plaintiffs' claims are barred because Plaintiffs would be unjustly enriched if Plaintiffs were to prevail in this action. Alternatively, Plaintiffs' claims are set off by unjust enrichment and/or quantum merit.
- l. Plaintiffs' prior breaches and/or misrepresentation made in connection with any agreement with Fredericks excused any conduct by Fredericks and/or bars recovery or relief to which Plaintiffs, if any, were due.
- m. Fredericks at all times acted properly, with due care and good faith, and in accordance with any obligations under each contract or agreement.
- n. If Plaintiffs have suffered any loss, it is a result of their own culpable conduct.
- o. If Plaintiffs have suffered any loss, they are responsible for the proportion of the total loss as was caused by their culpable conduct.
- p. Fredericks' alleged conduct was not the proximate cause of Plaintiffs' alleged damages.

q. This Court lacks subject matter jurisdiction.

2. Fredericks reserves the right to add additional affirmative defenses, should they become known during discovery.

COUNTERCLAIMS

Fredericks, for his counterclaim against McCormick and NIC, states and avers as follows:

PARTIES

1. Fredericks is a citizen of the State of North Dakota.

2. McCormick, Inc. is a North Dakota corporation with its principal offices in Fargo, North Dakota and Bismarck, North Dakota.

3. Northern Improvement Company is a North Dakota Corporation with its principal offices in Fargo, North Dakota, Bismarck, North Dakota and Dickinson, North Dakota.

4. NIC is a subsidiary of McCormick. Hereinafter McCormick, Inc. and Northern Improvement Company will be referred to collectively as McCormick.

FACTS

5. Fredericks and McCormick agreed to set up a North Dakota entity known as Native Energy Construction, LLC (“Native Energy”).

6. McCormick owned forty-nine percent (49%) of Native Energy.

7. Fredericks owned fifty-one percent (51%) of Native Energy. Prior to bringing this matter as a derivative action, Fredericks requested that Native Energy authorize him to bring suit directly on behalf of Native Energy. By letter dated December 8, 2017, Dave Schmitz and Steven McCormick, Jr. refused to authorize that suit.

8. Throughout the life of Native Energy, McCormick took five percent (5%) of the gross revenues as “consulting fees.” McCormick did little to no actual consulting and any such consulting was as part of its existing duties as a 49% owner.

9. No agreement, either written or oral, was entered into for the payment of consulting fees to McCormick, and no agreement, either written or oral, defines the services or other quid pro quo that McCormick was required to provide in exchange for any “consulting fee.”

10. Native Energy’s Operating Agreement did not allow a member to collect payments from the company’s gross revenues.

11. Over the life time of Native Energy, McCormick collected over one million dollars (\$1,000,000.00) in “consulting fees.”

12. McCormick has not disclosed to Native Energy or to Terrance Fredericks the time spent, wages and benefits paid, or value of the services it provided, or the amounts it paid for such services.

13. Upon information and belief, including the sworn testimony of Steven McCormick, McCormick, Inc. was required to provide and pay for legal, accounting, and other professional services for Native Energy, either in exchange for its 49% of profits or in exchange for the “consulting fee.” McCormick did retain multiple professionals to provide those services to Native Energy and that it then paid for those services.

14. McCormick used the services of Vogel Law Firm (Vogel) and other law firms for legal services to Native Energy. McCormick used other professional firms or individuals for other services, but it has unlawfully refused to provide the names of those other professionals. Neither McCormick nor Vogel nor any other professionals have disclosed to Native Energy or to Terrance

Fredericks the value of scope of the services that Vogel or other provisional provided related to Native Energy or the amount that was paid for such services.

15. McCormick subsequently claimed that it was authorized to take 5% of gross revenue because it was paying for Native Energy's legal expenses and other professional services and bills; and providing Native Energy's bidding, accounting, financial oversight, and other services. For each of those categories, McCormick failed to provide substantial services and failed to provide information to Native Energy or Fredericks sufficient to allow for review of McCormick's self-dealing. Even with discovery in this matter, Fredericks still does not know what services McCormick claimed it provided or the value of any such services. For each of those categories, McCormick provided services in McCormick's best interests, not in Native Energy's best interests. For each of those categories, McCormick breached its fiduciary duties in the performance of any such services and by failing to provide all such services.

16. McCormick had access to all of Native Energy's financial records. It improperly "deferred" the accounting of profits to McCormick, resulting in Native Energy and its members making incorrect federal and/or state tax payments and causing potential claims against Native Energy for tax fraud. McCormick failed to discover or failed to take corrective action regarding its own improper self-dealing.

17. McCormick failed to disclose and/or hid these failures from Native Energy and from Fredericks, and they were only uncovered during discovery and during an aborted trial in this matter.

18. McCormick failed to provide legal services regarding collection on an overdue account from Elmo Fredericks. Terrance Fredericks provided those services, but has wrongly not been compensated for the services.

19. In contracting for legal services for Native Energy, including services from Vogel (and, upon information and belief, from other law firms and professional services), McCormick had attorneys provide their fiduciary duty to McCormick, instead of to Native Energy. For all such services, Native Energy and/or Terrance Fredericks were clients of the law firms providing the services.

20. McCormick continued to take 5% of the gross revenue even when Native Energy lacked the funds to cover expenses.

21. As an owner, McCormick knew or should have known when Native Energy lacked the funds to cover expenses.

22. McCormick continued to take 5% of gross revenue even when it did not perform “consulting services.”

23. At all times relevant hereto, McCormick and Vogel knew that there was no agreement for McCormick to take consulting fees from Native Energy.

24. At all times relevant hereto, McCormick and Vogel knew that the Operating Agreement did not allow a member to collect payments from the company’s gross revenues.

25. During times when Native Energy lacked the funds to cover expenses, McCormick recommended and later “approved” that Native Energy take a loan from McCormick. The loan from McCormick had an interest rate of six percent (6%). Native Energy ended up taking approximately four hundred thousand dollars (\$400,000.00) in loans from McCormick.

26. McCormick's taking of "consulting fees" also required Native Energy to take loans from Wells Fargo to cover costs.

27. The six percent (6%) loan from McCormick and the loan from Wells Fargo would not have been necessary had McCormick not taken "consulting fees" from Native Energy.

28. McCormick's taking of "consulting fees" and offering the loans were done in self-interest and did not have the best interests of Native Energy in mind.

29. McCormick's taking of "consulting fees" and approval of loans from McCormick to Native Energy caused financial damage to Native Energy and to Fredericks.

30. During discussions for dissolution of Native Energy, McCormick agreed to sell the Water Transfer Department equipment on behalf of Native Energy privately rather than through an auctioneer.

31. McCormick received at least one offer on the Water Transfer Department equipment but refused to sell.

32. To date, McCormick has failed to sell the Water Transfer Department equipment.

33. The Water Transfer Department equipment continues to reside on land on which Fredericks pays rent.

34. The Water Transfer Department equipment has degraded and its future sale is either unlikely or will sell for a highly reduced price.

35. McCormick or NIC entered into sales contracts or "lease to own" contracts with Native Energy for equipment. All of those contracts were "self-dealing." Those contracts were in McCormick and NIC's interests and were not in Native Energy's interest. Through the contracts, McCormick or NIC guaranteed that Native Energy would pay more than the fair market value for

the goods, and locked Native Energy into disadvantageous fixed overhead contrary to Native Energy's interests. For all such contracts, McCormick or NIC failed to fully disclose to Terrance Fredericks and to Native Energy information necessary to determine whether the contracts were fair to Native Energy and to Terrance Fredericks.

36. McCormick or NIC also entered into multiple contracts with Native Energy to provide employees and services on Native Energy contracts. All of those contracts were "self-dealing." All of those contracts were in McCormick or NIC's best interests, but were not in Native Energy's best interests. Through the contracts, McCormick or NIC guaranteed that Native Energy would pay more than the fair market value for the services. For all such contracts, McCormick or NIC failed to fully disclose to Terrance Fredericks and to Native Energy information necessary to determine whether the contracts were fair to Native Energy and to Terrance Fredericks.

37. As part of its unlawful plan to take money from Native Energy, McCormick worked in conjunction with Vogel Law Firm.

38. As part of that work, Vogel Law Firm claimed to represent Native Energy in negotiation of contracts and other work. Vogel Law Firm now claims that when it was negotiating contracts for Native Energy, it was doing so to benefit McCormick, and owed its fiduciary duties to McCormick. It never disclosed to Native Energy that it was negotiating contracts for Native Energy for the benefit of McCormick.

39. Vogel Law Firm was Native Energy's attorney, but as shown by the affidavit of Maurice McCormick, Dkt. 228, Vogel Law Firm breached its fiduciary duties to Native Energy because it had conflicts of interests and acted for the benefit of McCormick, one of its clients, over the other, Native Energy. Vogel Law Firm provided its fiduciary duties to McCormick: in contract

negotiations ostensible for Native Energy, in assisting Vogel Law Firm on a motion to reconsider, and in providing information regarding its representation of Native Energy to McCormick for the benefit of McCormick.

40. As testified to by Native Energy officer Steven McCormick, Jr., Native Energy believed that Vogel Law Firm was providing its services to Native Energy and as an agent for Native Energy, and owed its fiduciary duties to Native Energy.

41. Neither McCormick, nor Northern Improvement, nor Vogel Law Firm disclosed to Mr. Fredericks that Vogel's attorneys had represented Native Energy. McCormick and Northern Improvement had legal duties to disclose that information to Mr. Fredericks, based upon fiduciary duties and based upon proper discovery requests seeking that information. They violated these legal duties.

42. Native Energy and Fredericks did not discover these breaches until the aborted trial in this matter.

COUNT I: BREACH OF FIDUCIARY DUTY AND/OR BREACH OF CONTRACT

43. Fredericks restates and realleges paragraphs 1-42.

44. McCormick, as a member of Native Energy, owed Native Energy and Fredericks fiduciary duties of loyalty; full disclosure of information, including but not limited to all information regarding self-dealings; and competency.

45. McCormick, acting through both itself and attorneys and other agents, including but not limited to Vogel Law Firm owed Native Energy and Fredericks the fiduciary duties discussed below. It also owed these same duties based upon its contract to provide and pay for legal services to Native Energy.

46. McCormick violated its fiduciary duties by causing Vogel Law Firm and others to review confidentially information of Native Energy and/or Fredericks to McCormick regarding contract negotiations it engaged in for Native Energy and costs or fees related to such work and by using Native Energy confidences and secrets for the benefit of McCormick.

47. On or around October 2017, Vogel Law Firm/Native Energy Attorney attorney Maurice McCormick discussed this case and his work for Native Energy with Vogel Law Firm/McCormick, Inc. attorneys Monte Rogneby and/or Diane Wehrman. He did so without legal authorization from Native Energy and without consent from Terry Fredericks. At the time all three of the Vogel attorneys knew that Vogel, through Rogneby and Wehrman, were the attorneys for McCormick, Inc. and Northern Improvement. This was a breach by McCormick of the duty of confidentiality owed to Fredericks and/or Native Energy.

48. McCormick owed Native Energy and Fredericks a duty of loyalty and a duty to not take action contrary to the interests of Native Energy or Fredericks.

49. McCormick violated its duty of loyalty and duty to not take action contrary to the interests of Native Energy or Fredericks. It violated those duties by using the services of Vogel Law Firm to negotiate contracts “for Native Energy,” with knowledge that Vogel Law Firm was doing that work consistent with its duty to McCormick, and not to Native Energy.

50. McCormick breached its duty of loyalty and a duty to not take action contrary to the interests of Native Energy or Fredericks when Maurice McCormick provided assistance, including an affidavit, Dkt. 228, to McCormick, Inc. and Northern Improvement’s attorney to assist McCormick, Inc., Northern Improvement, and Vogel Law Firm on a motion to reconsider, Dkt. 226, which each of them joined in.

51. McCormick owed Native Energy and Fredericks a duty to provide adequate disclosure of all information regarding its and its agents' services to Native Energy and/or Fredericks.

52. McCormick breached this duty to Native Energy or Fredericks by causing Vogel Law Firm to negotiate contracts for Native Energy without disclosing that Vogel Law Firm was acting on behalf of McCormick in those negotiations and without informing Native Energy or Fredericks of the scope and value of its services.

53. McCormick breached this duty when, without informing or obtaining approval from Native Energy or Fredericks, Maurice McCormick provided assistance, including an affidavit, Dkt. 229, to McCormick, Inc. and Northern Improvement's attorney, to assist McCormick, Inc., Northern Improvement, and Vogel Law Firm on a motion to reconsider, Dkt. 226, which each of them joined in.

54. McCormick breached its duty to provide adequate disclosure of information and its duty of loyalty when, with knowledge of the scope of the improper self-dealing between McCormick and Native Energy and the lack of lawful approval of such self-dealing by Native Energy or Fredericks, McCormick, both through its own actions and those of its attorney Vogel Law Firm, failed to inform Native Energy or Fredericks of that improper self-dealing.

55. McCormick owed Native Energy and Fredericks a duty of loyalty and duty to not take action without approval from Native Energy.

56. McCormick violated these duties to Native Energy or Fredericks by negotiating contracts for Native Energy without approval from Native Energy.

57. McCormick breached these duties when, without approval from Native Energy or Fredericks, Maurice McCormick provided assistance, including an affidavit, Dkt. 229, to McCormick, Inc. and Northern Improvement's attorney to assist McCormick, Inc., Northern Improvement, and Vogel Law Firm on a motion to reconsider, Dkt. 226, which each of them joined in.

58. McCormick's wrongful actions resulted in a mistrial which caused costs to Native Energy and/or Fredericks.

59. Terry Fredericks was harmed by McCormick's breaches of duty in an amount to be determined at trial.

60. McCormick installed two operating managers on Native Energy's Board of Managers, diluting Fredericks' majority control of Native Energy and resulting in the fraudulent representation of Native Energy as an Indian-owned and controlled company, allowing it to receive preferential treatment in the awarding of contracts on the Fort Berthold Indian Reservation as authorized under tribal and federal law.

61. McCormick breached its fiduciary duties of loyalty, competency, and to disclose information to Native Energy when it took money as a "consulting fee" in violation of Native Energy and Fredericks' rights under contracts between McCormick and Fredericks.

62. McCormick breached its fiduciary duties of loyalty, competency, and to disclose information by failing to provide Native Energy and Fredericks with information regarding the scope and value of the services it was agreeing to perform for the "consulting fees," by failing to perform those services, and by failing to provide Native Energy with information regarding the scope and value of the services that it did perform.

63. McCormick breached its fiduciary duties of loyalty, competency, and to disclose information to Native Energy and/or Fredericks through the taking of “consulting fees” when Native Energy lacked the funds to pay expenses.

64. McCormick has no contractual right to 5% of gross profits and must be ordered to return the funds to Native Energy. In the alternative, McCormick breached any contract which permitted it to take 5% of gross revenue by taking funds when Native Energy was not profitable and because it did not provide all of the required “consulting” services, and because any such contract was unconscionable.

65. McCormick breached its fiduciary duties of loyalty, competency, and to disclose information by increasing the debt obligations of Native Energy through the taking of loans from McCormick and/or Wells Fargo when debt would have been unnecessary had McCormick not taken its “consulting fees.”

66. McCormick breached its fiduciary duties of loyalty, competency, and to disclose information by taking its “consulting fees” and then recommending and approving a loan from McCormick to Native Energy to cover unpaid expenses created by the consulting fees.

67. McCormick breached its fiduciary duty of loyalty and competency by entering into contracts with Native Energy for sale of equipment or leases to own such equipment without providing adequate disclosure related to that self-dealing, because the terms of such contracts were not fair to Native Energy or Fredericks, and because any such contracts were not validly authorized by Native Energy.

68. McCormick breached its fiduciary duty of loyalty and competency by entering into contracts with Native Energy to use McCormick employees and equipment on Native Energy

contracts: without providing adequate disclosure related to that self-dealing, because the terms of such contracts were not fair to Native Energy or Fredericks, and because any such contracts were not validly authorized by Native Energy.

69. McCormick breached its fiduciary duty of loyalty and competency and its contractual agreement by failing to sell the Water Transfer Department equipment.

70. Native Energy and Fredericks were harmed by McCormick's breach of fiduciary duty and breaches of contract. Native Energy and Fredericks were harmed in an amount to be determined at trial but no less than the total of McCormick's loans (approximately \$400,000.00) and the "consulting fees" collected (approximately \$1,000,000.00) and the amounts taken by McCormick on contracts which were not authorized or on which the amount paid violated McCormick's duties to Native Energy or Fredericks.

71. Native Energy and Fredericks were harmed in an amount to be proven at trial by McCormick's breach of duty through its failure to sell equipment.

COUNT II: UNJUST ENRICHMENT

72. Fredericks restates and realleges paragraphs 1-71.

73. McCormick received over one million dollars (\$1,000,000.00) in "consulting fees" from Native Energy.

74. No contract for the payment of "consulting fees" exists nor does the Operating Agreement of Native Energy allow for such payments. In the alternative, no contract allows for such payments when Native Energy was not profitable and/or when McCormick was not providing the "consulting services" or in the alternative when the fees taken were in excess of the value of any such "consulting services."

75. McCormick's retention of "consulting fees" resulted in cash shortfalls for Native Energy and required the taking on of additional debt to cover expenses.

76. McCormick unjustly received excessive amounts of money on contracts for sale of equipment and for goods and services which it provided on Native Energy contracts.

77. Native Energy and Terrance Fredericks were harmed by unjust enrichment of McCormick in an amount to be proven at trial.

78. McCormick failed to sell the Water Transfer Department Equipment.

79. As a result of McCormick's failure to sell the Water Transfer Department Equipment, Fredericks incurred rent charges for the land upon which the equipment resides.

80. As a result of McCormick's failure to sell the Water Transfer Department Equipment, the property has decreased in value, causing harm to Native Energy and to Fredericks.

81. Native Energy and Fredericks were harmed in an amount to be proven at trial equal to the amount of rent paid and for the diminution in value of the Water Transfer Department equipment.

COUNT III: JUDICIALLY SUPERVISED WINDING UP

82. Fredericks restates and realleges paragraphs 1-81.

83. Fredericks is a member of Native Energy.

84. The members of Native Energy had previously agreed that Native Energy should be dissolved and its affairs wound up. That winding up has not yet occurred.

85. For the reasons stated in this complaint, good cause exists for this Court to supervise the winding up of Native Energy as provided for under North Dakota Century Code 10-32.1-51.

PRAYER FOR RELIEF

Wherefore, Fredericks requests the following relief:

A. For an award in favor of Native Energy and/or Fredericks, and against McCormick and/or NIC, for breach of fiduciary duty in an amount to be proven at trial plus any interest, costs, and attorneys' fees.

B. For an award in favor of Native Energy and/or Fredericks, and against McCormick and/or NIC, for breach of contract in an amount to be proven at trial plus any interest, costs, and attorneys' fees.

C. For an award in favor of Native Energy or Fredericks, and against McCormick and/or NIC, for unjust enrichment in an amount to be proven at trial plus any additional repairs, interest, costs, and attorneys' fees.

D. For an order that McCormick and/or NIC and/or Vogel disgorge all profits, consulting fees, or amounts unlawfully taken, or fees from Native Energy and/or an order imposing upon McCormick and/or NIC and/or Vogel a constructive trust in favor of Fredericks based upon breach of fiduciary duties.

E. For this Court to judicially supervise the winding up of Native Energy.

F. For such other and further relief as the Court finds just and equitable.

Respectfully submitted this 9th day of August, 2018.

FREDERICKS PEEBLES & MORGAN LLP

s/ Thomas W. Fredericks

Thomas W. Fredericks (ND Bar No. 03031)
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Attorney for Terrance Fredericks

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

McCormick, Inc.,)
Individually and)
Derivatively on Behalf of)
Native Energy)
Construction, LLC, and) Case No. 08-2016-CV-01107
Northern Improvement)
Company,) Supreme Ct. No. 20190254
)
Plaintiffs,)
)
vs.)
)
Terrance Fredericks, a/k/a)
Terry Fredericks,)
)
Defendant.)

JURY TRIAL - DAY 1

Before
The Honorable Thomas J. Schneider
District Judge

Wednesday, September 12, 2018
Burleigh County Courthouse
Bismarck, North Dakota

APPEARANCES:

FOR THE PLAINTIFF: MONTE ROGNEBY AND DIANE WEHRMAN
ATTORNEYS AT LAW
P.O. BOX 2097
BISMARCK, NORTH DAKOTA 58502-2097

FOR THE DEFENDANT: JEFFREY RASMUSSEN
ATTORNEY AT LAW
1900 PLAZA DR
LOUISVILLE, CO 80027

1 jar --

2 MR. RASMUSSEN: Objection, Your Honor. Argumentative.
3 He's gone way beyond.

4 THE COURT: That's correct, Mr. Rogneby.

5 MR. ROGNEBY: What the evidence will show is that when
6 Mr. Fredericks was found out, he started complaining about
7 these things. And that the whole time that it was happening,
8 the whole time that he was the president of this company, he
9 never objected to these things. He never had a problem with
10 them. Not any record, any document, any email, any minute
11 notation where he ever tried to change any of these things. It
12 was only after McCormick found out what he had been doing.

13 We're going to present to you, I think, all of that
14 evidence --

15 MR. RASMUSSEN: Objection, Your Honor. Inappropriate
16 personalization.

17 MR. ROGNEBY: The evidence is going to show all of
18 those things. And if you agree at the end of the case, we're
19 going to be asking for compensatory damages against Mr.
20 Fredericks and we're going to be asking for punitive damages
21 against Mr. Fredericks. Thank you.

22 THE COURT: Just a minute, Mr. Rasmussen, I need
23 something from the clerk here. I'm sorry.

24 Okay. You can go ahead. Thank you.

25 MR. RASMUSSEN: Thank you, Your Honor.

1 Good morning again. As I've told you before, my name
2 is Jeff Rasmussen, I'm the attorney for Mr. Fredericks who is
3 here with me today.

4 I think, and you've been instructed not to look in
5 outside sources and you won't be looking at outside sources
6 during the course of this, but I think if you did you would
7 find under the definition of chutzpa, you would find Mr.
8 McCormick's picture.

9 They took a bunch of money out of Native Energy, caused
10 it to fail, and then instead of walking away after taking over
11 a million dollars out of it, without a contract, and they will
12 tell you there wasn't a contract. They took a million dollars
13 out of that company without a contract and just said: Oh, we
14 get 5 percent of gross, not of net profit, of gross profits.
15 We get that.

16 But the contract doesn't have that in it, the contract
17 between these people doesn't have that 5 percent in it. And
18 yet after they do that, then they come to the court and say Mr.
19 Fredericks should pay us money. So yeah, we then brought our
20 counterclaims against them. And our counterclaims are for that
21 million dollars that they stole, they took out of the company
22 without a contract.

23 And that's much more what this case is about, is that
24 million dollars. They're very sophisticated, and so it will be
25 a lot of paperwork. They structured every deal so that they

1 got a guaranteed income, while Mr. Fredericks was doing the
2 work. Mr. Fredericks was out in the field doing the work.

3 And then when we say: What did you do for that million
4 dollars? They have no answer. They say: Oh, we provided
5 legal services, but we don't have any legal bills. We provided
6 accounting services, but we don't have any accounting bills.
7 We provided these other services, but we don't have any bills
8 for it. We didn't track our time. We can't tell you how many
9 hours we spent on any of these projects, but we get our million
10 dollars even without a contract.

11 The concern I think we have is that you'll say at the
12 end of this, a pox on both your houses, and that's not the
13 proper result here.

14 THE COURT: Okay. Mr. Rasmussen, this is what the
15 evidence will show in an opening statement, not an argument
16 now.

17 MR. RASMUSSEN: All right. So in this particular case
18 what we have, the evidence in this case is going to be the
19 contract document and that evidence, that contract is not going
20 to have that 5 percent in it. The evidence is going to be that
21 they structured their own lease agreements so they were
22 selling -- or leasing items to the company.

23 They structured those so they got a guaranteed profit
24 out of those, and yet the evidence is going to be that they're
25 going to be complaining about nickles and dimes regarding Mr.

1 Fredericks. We're not going to be telling you that everything
2 Mr. Fredericks did was correct, but what the evidence is going
3 to show here in this case is that the wrongs that Mr.
4 Fredericks did were pretty -- pretty open, pretty obvious. The
5 wrongs that McCormick did are much more complicated. The
6 evidence is going to show how much better at it they are.

7 There is no nice parties when we get to a situation
8 where the -- we come into court and we're trying to resolve
9 what happened. But the evidence in this case is really --
10 shows that they took the money without the contract, that they
11 are trying to assign liability to Mr. Fredericks for things
12 that is not his fault, and that, again, the evidence as far as
13 what they were doing for that million dollars.

14 One of the difficulties they are going to have is that
15 they're going to try to present to you this complicated case
16 where they get the million dollars for providing services, but
17 then every time that one of those services doesn't get
18 performed, they're going to try and blame Mr. Fredericks for
19 it. So they're going to say: We were the accountants, we were
20 supervising the accounting. That's what they're going to have
21 their witness testify to.

22 But then they're going to come back, as Mr. Rogneby
23 explained to you, and they're going to say: Oh, but when money
24 was going out of this company by the accountant from the
25 company, we're not responsible for that, that was Mr.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

McCormick, Inc.,)	
Individually and)	
Derivatively on Behalf of)	
Native Energy)	
Construction, LLC, and)	Case No. 08-2016-CV-01107
Northern Improvement)	
Company,)	Supreme Ct. No. 20190254
)	
Plaintiffs,)	
)	
vs.)	
)	
Terrance Fredericks, a/k/a)	
Terry Fredericks,)	
)	
Defendant.)	

JURY TRIAL - DAY 3

Before
The Honorable Thomas J. Schneider
District Judge

Friday, September 14, 2018
Burleigh County Courthouse
Bismarck, North Dakota

APPEARANCES:

FOR THE PLAINTIFF: MONTE ROGNEBY AND DIANE WEHRMAN
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FOR THE DEFENDANT: JEFFREY RASMUSSEN
 ATTORNEY AT LAW
 1900 PLAZA DR
 LOUISVILLE, CO 80027

1 512,282.38. And that's the amount that the judgment should be
2 in favor of Terry Fredericks. For \$512,282.37. This is the
3 document 8A, this is what should be awarded.

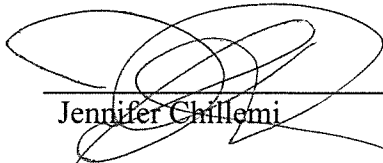
4 That is what Terry should have come down into profits
5 in the company, had they not taken the money out illegally.
6 Shouldn't have brought the case. Should have walked away.

7 Take a, you know, a million dollars out of a company
8 without authorization, you probably don't want to go to court,
9 but they chose to, it's their consequences. That's what the
10 law requires you to award now.

11 Give them nothing, give that to Terry. The Court's
12 already given them judgment on Terry's more obvious errors.
13 Theirs are a little more complicated. Taking a little bit
14 here, a little bit there. Selling scoria, getting a profit on
15 that. Using our own people -- using Northern people to work on
16 Native Energy projects, that's fine, but Terry using Native
17 Energy people to work on projects for Firetail, that's not
18 okay.

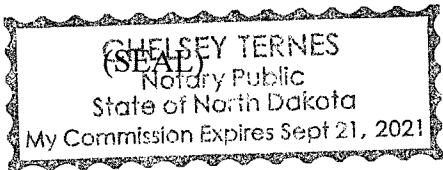
19 Having a written contract for everything that's like a
20 few dollars, that's required, but taking a million dollars, oh,
21 we don't need a contract for that. We don't want to put that
22 in writing. Again, you can use your common sense as to why.
23 Well, you don't even have to, they didn't put it in writing,
24 they weren't entitled to it.

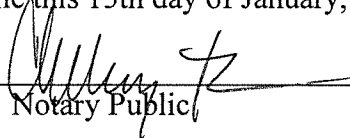
25 The document that gives them the money says 49 percent



Jennifer Chillemi

Subscribed and sworn to before me this 15th day of January, 2020.




Notary Public