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STATE OF NORTH DAKOTA

CASE NO. 20190027
BURLEIGH CTY. CASE NO. 08-2018-CV-02693

State of North Dakota

In Supreme Court

Wayne Munson,

***Plaintiff-Appellant*,**

vs.

Indigo Acquisition Holdings, LLC, Akoya Capital, LLC, and Denny Chandler

Defendants-Appellees.

BRIEF OF APPELLEES

IN RESPONSE TO APPEAL FROM JUDGMENT DATED JANUARY 16, 2019
OF BURLEIGH COUNTY DISTRICT COURT,
THE HONORABLE JUDGE JAMES HILL PRESIDING.

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUE

[¶1] Despite Appellant's attempts to convolute the matters involved in this appeal, the issue before this Court is singular, discrete, and narrowly-focused: whether the transaction by which Appellant purchased 12,500 limited liability company membership units—offered and issued to him *solely* by virtue of his voluntary exercise of employee benefit rights—constitutes a transaction that is exempt from securities registration requirements under Section 10-04-06(11) of the North Dakota Securities Act. The answer to that singular question is, as the district court correctly determined, *yes*.

STATEMENT OF THE CASE

[¶2] Appellant Wayne Munson ("Appellant" or "Munson") commenced the lawsuit below by "pocket-serving" Appellee Indigo Acquisition Holdings, LLC ("Indigo Holdings"), Akoya Capital, LLC and Denny Chandler (collectively, "Appellees") with the Summons and Complaint on September 10, 2018. (Appx.1, Dkt. Nos. 3-5.) Munson did not file the Summons and Complaint for more than a month after service. (*Id*.)

[¶3] On October 1, 2018, Appellees timely served Munson with their Verified Answer and exhibits (*id*., Dkt. Nos. 8-13), and a Motion for Judgment on the Pleadings (*id*., Dkt. Nos. 14-15) via U.S. Mail (*id*., Dkt. Nos. 16-17). Because Munson had not filed the lawsuit, Appellees did not file their Verified Answer or Motion for Judgment on the Pleadings. (Appx.2, Dkt. No. 18 ¶ 2.)

[¶4] Munson filed the Summons and Complaint on October 17, 2018. (Appx.1, Dkt. Nos. 1-2). Appellees received no notice that the case had been filed. (Appx.2, Dkt. Nos. 18 ¶ 3 and 43 ¶ 5.) On November 8, 2018, after reviewing the public docket, Appellees learned that Munson filed the action. (*Id*., Dkt. No. 43 ¶ 5.) The next day, Appellees electronically filed their Verified Answer and Motion for Judgment on the Pleadings.

(Appx.1, Dkt. Nos. 8-16; Appx.2, Dkt. Nos. 42 ¶ 3 and 43 ¶ 5.) Appellees then secured a hearing date for December 10, 2018 at 1:30 p.m., and filed an Amended Motion for Judgment on the Pleadings and Amended Notice of Hearing. (Appx.2, Dkt. Nos. 19-22.)

[¶5] When Appellees electronically filed their Verified Answer and original and Amended Motion for Judgment on the Pleadings, Munson's counsel did not appear as a service contact on the North Dakota Odyssey electronic filing system. (*Id*., Dkt. Nos. 42 ¶ 3 and 43 ¶ 5.) Accordingly, Appellees did not effectuate electronic service through the North Dakota Odyssey electronic filing system. (*Id*., Dkt. No. 43 ¶ 5.) Instead, upon electronically filing their Verified Answer, original Motion for Judgment on the Pleadings, and Amended Motion for Judgment on the Pleadings, Appellees served Munson's counsel via United States mail. (Appx.1, Dkt. No. 17; Appx.2, Dkt. Nos. 20, 42 ¶ 4 and 43 ¶ 5.) There is no dispute that Munson's counsel twice received Appellees' Motion for Judgment on the Pleadings—first on or around October 1, 2018, before the lawsuit was filed, and then again on or around November 9, 2018, after Munson without notice to Appellees filed the case with the district court. (*Id*., Dkt. Nos. 42 ¶¶ 2-3 and 43 ¶ 6.)

[¶6] Just one week before the December 10 hearing, Munson filed on December 3, 2018 an "Objection and Request to Strike All of Defendant's Pleadings and for Cancellation of the Hearing," complaining that, despite having been twice served with Appellees' pleadings via U.S. Mail, he had not been electronically served. (*Id*., Dkt. Nos. 39-40.) Appellees responded on December 4, 2018, explaining the above-described procedural history, including that, as of the service dates, Munson's counsel had not set himself as an electronic service contact (*Id*., Dkt. Nos. 42 ¶ 3 and 43 ¶ 5.)

On December 5, 2018, Munson filed another brief in support of his request to cancel the December 10 hearing. (*Id*., Dkt. Nos. 47, 49.)

[¶7] On December 6, 2018, at 10:54 a.m., the district court denied Munson's motion to strike and declined to cancel the December 10 hearing ("12/6/18 Order"). (Appx.218-219.) Less than four hours later, at 2:36 p.m., and just four days before the December 10 hearing, Munson filed "under protest" his response to Appellees' Motion for Judgment on the Pleadings, with seven exhibits. (Appx.2-3, Dkt. Nos. 51-59.)[1]

[¶8] On December 7, 2018, Appellees moved to strike Munson's response brief as untimely under N.D.Ct.R. 3.2(a)(2) because it was not filed within 14 days of Appellees' opening brief (either time it was served) and thereby effectively denied Appellees the ability to submit a reply brief before the scheduled hearing. (Appx.3, Dkt. Nos. 62 and 64.). The district court denied Appellees' motion to strike on the morning of December 10, 2018, prior to the scheduled hearing at 1:30 p.m. that day. (*Id*., Dkt. No. 67.)

[¶9] At the December 10, 2018 hearing, after hearing oral argument regarding an issue Munson raised in his late-filed response brief that his LLC membership unit purchase was not "contained in a record" as set forth in N.D.C.C. 10-04-06(11), the district court adjourned the hearing until January 7, 2019 and directed the parties to submit supplemental briefing. (Appx.220 ¶ 3). Appellees submitted a reply brief and two supporting affidavits on December 14, 2018. (Appx.3, Dkt. Nos. 69-71.) Munson submitted a surreply brief on January 2, 2019, but chose not to submit any affidavits or exhibits. (*Id*., Dkt. No. 77.)

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[1] Munson's suggestion that the 11-page response brief was "whip[ped] up" (App. Br. ¶ 8) in less than four hours after the district court denied his motion to strike strains credulity. Having had Appellees' motion papers for more than two full months, Munson clearly had long since prepared the response.

[¶10] On January 7, 2019, the district court resumed the adjourned hearing. (Appx.3.) On January 10, 2019, the district court issued its Memorandum and Decision Granting Motion by Defendants for Judgment on the Pleadings ("1/10/19 Order"). (Appx.220-227.) The district court held that Munson's single claim against Appellees warranted dismissal as a matter of law, regardless of whether Appellees' motion was considered as a Rule 12(c) motion for judgment on the pleadings or a Rule 56 motion for summary judgment. (*See* Appx.223 ¶¶ 16-17). The judgment of dismissal was entered on January 15, 2019. (Appx.228-229.) Munson appealed on January 23, 2019. (Appx.230-31.)

STATEMENT OF THE FACTS

A. THE PARTIES

[¶11] Indigo Holdings is a Delaware LLC and the parent of non-party Indigo Signworks, Inc. ("Indigo Signworks"), a North Dakota corporation. (Appx.5, Compl. ¶ 3; Appx.13, Ans. ¶ 3.) Both Indigo Holdings and Indigo Signworks are primarily engaged in the signage industry, designing, selling, fabricating, installing, and servicing commercial signs. (Appx.6, Compl. ¶ 8; Appx.13-14, Ans. ¶ 8.)

[¶12] Munson resides in Bismarck, North Dakota. (Appx.5, Compl. ¶ 2; Appx.12, Ans. ¶ 2.) From approximately February 2005 through July 13, 2018, Munson was an employee of Indigo Signworks and was its General Manager when his employment ended. (Appx.6, Compl. ¶ 6; Appx.13, Ans. ¶ 6.)

B. MUNSON'S SARS PROGRAM RIGHTS AS AN INDIGO SIGNWORKS EMPLOYEE

[¶13] While he was an Indigo Signworks employee, in January 2009, Munson and other employees entered into a Memorandum Agreement with Indigo Signworks. (Appx.6, Compl. ¶ 7; Appx.13, Ans. ¶ 7.) This Memorandum Agreement provided that participating

employees, including Munson, would forgo receiving bonuses in their capacity as employees in exchange for the right to participate in a Stock Appreciation Rights ("SARs") program. (Appx.6, Compl. ¶ 7; Appx.13, Ans. ¶ 7.) Under this SARs program, Munson would be entitled to be paid the value of the SARs upon any Indigo Signworks sale. (Appx.6, Compl. ¶ 7; Appx.13, Ans. ¶ 7.)

[¶14] That sale occurred on August 29, 2016; pursuant to a Stock Purchase Agreement, Indigo Holdings purchased all of Indigo Signworks' stock such that Indigo Signworks became (and currently remains) a wholly-owned subsidiary of Indigo Holdings. (Appx.6, Compl. ¶ 8; Appx.13-14, Ans. ¶ 8.)

[¶15] When the Indigo Signworks sale occurred in August 2016, via the Stock Purchase Agreement, Munson and his fellow SARs-holding Indigo Signworks employees were granted the right, *by virtue of their employment with Indigo Signworks*, to participate in a program whereby their SARs would be redeemed, and they could reinvest the proceeds to purchase Indigo Holdings' membership units. (Appx.6-7, Compl. ¶¶ 10-12; Appx.14-15, Ans. ¶¶ 10-12.)

[¶16] The first part of this redemption and reinvestment program involved executing a Share-Equivalents Termination and Payment Agreement ("SAR Termination Agreement"), pursuant to which the Indigo Signworks SARs held by Munson were purchased by Indigo Holdings for cash and thereby terminated. (Appx.6-7, Compl. ¶¶ 10-12; Appx.14-15, Ans. ¶¶ 10-12; Appx.22-25, Ans. Ex. A.)

[¶17] For the second part of the redemption and reinvestment program, Section 7.5 of the Stock Purchase Agreement outlined Munson's rights to reinvest the proceeds of the payments he received to purchase Class A Units of Indigo Holdings as follows:

> **7.5 SAR Employees Investment Right in the Purchaser.** Subject to any restrictions or limitations under applicable state and federal securities laws, *for a period of sixty (60) days* following the Closing, Erik L. Bagley, *Wayne T. Munson*, Bernard R. Schlosser, Robert Smesrud, and Jerry Nelson (each a **"SAR Employee"** and, collectively, the **"SAR Employees"**) *will be eligible to invest the after-tax proceed*s payable to each such SAR Employee *in connection with such SAR Employee's SAR Agreement in exchange for Class A Units of the Purchaser*, at a price per Class A Unit equal to the fair market value of a Class A Unit on the Closing Date as reasonably determined by the Purchaser; provided, however, the maximum aggregate amount the SAR Employees collectively will be eligible to invest will be $250,000. . . .

(Appx.14-15, Ans. ¶ 11 (bold in original; underlining and italics added).)

C. MUNSON VOLUNTARILY ELECTS TO EXERCISE HIS RIGHTS TO PURCHASE INDIGO HOLDINGS CLASS A UNITS

[¶18] On October 28, 2016—*i.e.*, the 60th day following the closing—Munson exercised his rights by reinvesting $12,500 of the proceeds he received under the SAR Termination Agreement to purchase 12,500 Class A Units of Indigo Holdings. (Appx.7, Compl. ¶ 12; Appx.15-18, Ans. ¶ 12.)

[¶19] As a consequence, the Company alleges that Munson is bound by Indigo Holdings' Amended LLC Agreement, which is governed by Delaware law. (Appx.7, Compl. ¶ 12; Appx.15-18, Ans. ¶ 12); Appx.91-94, Ans. Ex. B.)

D. MUNSON'S INDIGO SIGNWORKS EMPLOYMENT ENDS

[¶20] In July 2018, after voluntarily terminating his Indigo Signworks employment, Munson formed and began operating a competing sign company, and he recruited several Indigo Signworks employees to work there—in violation of, among other things, his obligations under the Amended LLC Agreement. (Appx.7, Compl. ¶ 12; Appx.15-18, Ans. ¶ 12.)

[¶21] On August 10, 2018, Indigo Holdings demanded in writing that Munson "cease and desist" from further breaches of his obligations to the company, including those in the

Amended LLC Agreement. (Appx.15-18, Ans. ¶ 12; Appx.100-181, Ans. Ex. C.) On August 17, 2018, Munson, through his counsel, summarily declined Indigo Holdings' request. (Appx.15-18, Ans. ¶ 12; Appx. 182, Ans. Ex. D.)

E. MUNSON COMMENCES THE LAWSUIT BELOW

[¶22] In anticipation of being sued in Delaware for breaching his duties and obligations under, among other things, the Amended LLC Agreement—which lawsuit was commenced on September 25, 2018 (Appx.15-18, Ans. ¶ 12; Appx.183-217, Ans. Ex. E)—Munson commenced the lawsuit. (Appx.1, Dkt. Nos. 1-5.)

[¶23] In his Complaint, Munson concedes that, as an Indigo Signworks employee, he participated in the SARs program and, as a result of the SARs termination and redemption offer, "***Munson opted to purchase 12,500 Units of [Indigo Holdings] for $12,500***." (Appx 6-7, Compl. ¶¶ 7, 10, & 12 (emphasis added).) Nonetheless, Munson alleges that the 12,500 Class A Units he voluntarily and indisputably purchased constituted securities that were required to be registered with the North Dakota Securities Commission. (Appx 8, Compl. ¶¶ 14-17.) Munson's Complaint asserted a single cause of action for declaratory and other relief under N.D.C.C. § 10-04-17 to void his purchase and return the consideration paid. (*Id*., Compl. ¶¶ 14-19.)

[¶24] Appellees answered and immediately moved for judgment on the pleadings on the grounds that, as a matter of law, Munson's purchase of 12,500 Class A Units of Indigo Holdings was a transaction exempt from registration because it occurred in connection with an employee stock purchase or similar employees' benefit plan under N.D.C.C. § 10-04-06(11). (*See* Appx.1, Dkt. Nos. 8-15; Appx.223, 1/10/19 Order ¶¶ 15-16.) The district court agreed, granting Appellees motion, and Munson now appeals.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED MUNSON'S COMPLAINT UNDER EITHER RULE 12(C) OR RULE 56

A. Standard of review

[¶25] This Court reviews *de novo* a district court's grant of judgment on the pleadings under North Dakota Rule of Civil Procedure 12(c). *Tibert v. Minto Grain, LLC*, 2004 ND 133, ¶ 6, 682 N.W.2d 294. Under Rule 12(c), a complaint should be dismissed if it "appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* ¶ 7 (internal quotation marks omitted); *see also Zundel v. Zundel*, 2017 ND 217, ¶ 10, 901 N.W.2d 731. The pleading is viewed in the light most favorable to the pleading party, and the allegations are taken as true. *See Nelson v. McAlester Fuel Co.*, 2017 ND 49, ¶ 20, 891 N.W.2d 126. The Rule 12(b)(3) judgment on the pleadings standard mirrors the requirements under Rule 12(b)(6).[2] *See Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009); N.D.R.Civ.P. 12(b)(6), 12(c).

[¶26] Where the district court goes outside the pleadings, the motion for judgment on the pleadings must be treated as a motion for summary judgment under Rule 56. *See* N.D.R.Civ.P. 12(d) (prescribing treatment of motion as one for summary judgment if the Court considers matters outside the pleadings); *see also Davidson v. State*, 2010 ND 68, ¶ 11, 781 N.W.2d 72 (defendant moved to dismiss before answering; because the court

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[2] On a N.D.R.Civ.P. 12(b)(6) motion to dismiss, the court's inquiry is directed to testing "the legal sufficiency of a claim." *Wheeler v. Burgum*, 2018 ND 109, ¶ 4, 910 N.W.2d 845 (citing *Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892). A complaint should be dismissed when, after accepting as true the factual allegations therein, "it is impossible to prove a claim upon which relief can be granted." *Id.* On appeal, this Court affirms dismissal for failure to state a claim if it cannot "discern a potential for proof to support" the claim. *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827.

considered video exhibits and testimony in ruling on the motion, it "effectively treated the motion as one for summary judgment under N.D.R.Civ.P. 56"); *Livingood v. Meece*, 477 N.W.2d 183, 187 (N.D. 1991) (same). This Court has articulated the standards for reviewing a grant of summary judgment as follows:

> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. A party resisting a motion for summary judgment cannot merely rely on the pleadings or other unsupported conclusory allegations. A resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. A district court's decision on a motion for summary judgment is a question of law that we review *de novo* on the record.

Trinity Hosps. v. Mattson, 2006 ND 231, ¶ 10, 723 N.W.2d 684 (citations omitted).

[¶27] The district court considered Appellees' motion both as one for judgment on the pleadings under Rule 12(c) and as one for summary judgment under Rule 56, and ruled that Appellees were entitled to judgment under either framework. Because Munson's Complaint fails to state a claim upon which relief can be granted under Rule 12(c), the Court should affirm the district court's dismissal of Munson's claims with prejudice. Alternatively, even if the Court were to consider Appellees' motion as one for summary judgment under Rule 56, there is no genuine dispute of material fact and Appellees are still entitled to judgment as a matter of law, and the Court should affirm.

B. The district court correctly determined that, based on the pleading allegations and undisputed material facts, Munson's purchase of the Indigo Holdings LLC membership interests was an exempt transaction under N.D.C.C. §10-04-06(11) as a matter of law

[¶28] As plainly demonstrated by Munson's Complaint, and as the district court articulated, "Munson commenced this case in North Dakota *on very narrow grounds* seeking to void his voluntary purchase of the 12,500 Class A Units of Indigo Holdings." Appx.222 (1/10/19 Order ¶ 13) (emphasis added); *see also* Appx.8-9 (Compl. ¶¶ 15-22). The sole legal question presented to the district court in connection with Appellees' motion for judgment on the pleadings was whether Munson's voluntary purchase of the 12,500 Class A Units of Indigo Holdings, effected via his right to redeem and reinvest his Indigo Signworks SARs redemption proceeds—a benefit conferred to him *only* by virtue of his status as an Indigo Signworks employee—was an exempt transaction. *See* Appx.1 (Dkt. Nos. 14-15).

[¶29] Section 10-04-06 of the North Dakota Century Code contains a list of 21 transactions that are exempt from securities registration requirements. *See* N.D.C.C. §§ 10-04-06(1)-(21). One such subset of exempt transactions applies in this case and is set forth, in relevant part, in section 10-04-06(11) as follows:

> [a]ny security issued ***in connection with an employees' stock purchase***, savings, option, profit-sharing, pension, ***or similar employees' benefit plan***, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees . . . .

(Emphasis added). Section 10-04-06(11) therefore exempts a broad category of transactions involving "[***a***]***ny*** *security* issued ***in connection with*** an employees' stock

purchase . . . ***or similar employees' benefit plan***" that is established by the issuing organization, its parents, or its subsidiaries. *Id*. (emphasis added).

[¶30] The primary objective of statutory construction is to ascertain the Legislature's intent. *Narum v. Faxx Foods, Inc*., 590 N.W.2d 454, 460 (N.D. 1999). Legislative intent is ascertained by giving words their ordinary, plain-language meaning. *Id.* Statutes are to be interpreted "to avoid absurd or ludicrous results." *Id.* And, "the word 'any' in statutes is generally used in the sense of 'all' or 'every' and its meaning is comprehensive in scope and inclusive in range." *State v. Zueger*, 459 N.W.2d 235, 237 (N.D. 1990). Accordingly, under Section 10-04-06(11), *any* security, including membership interests of a limited liability company such as Indigo Holdings, issued in connection with an employees' stock purchase or similar employees' benefit plan is exempt from registration.

[¶31] Here, a plain reading of the Complaint demonstrates that Munson's purchase of 12,500 Class A Units of Indigo Holdings, utilizing a portion of his SARs redemption proceeds, was an exempt transaction. The pleadings demonstrate no dispute—indeed, *only* by virtue of his status as an Indigo Signworks employee was Munson granted the right to participate in the SARs program, permitting him to reinvest a portion of his SARs redemption proceeds for 12,500 Class A Units of Indigo Holdings. The district court so held:

> [¶15] This Court concludes that Plaintiff Munson's purchase of 12,500 Class A Units of Indigo Holdings was in connection with, *inter alia*, an employee stock purchase, compensatory benefit plan, or compensation contract, which makes the transaction explicitly exempt from registration under N.D.C.C. Chapter 10-04, as a matter of law.
>
> [¶16] This Court concludes that by Plaintiff Munson's exercise of his benefit rights as an employee of Indigo Signworks to purchase the 12,500 Class A Units of Indigo Holdings made the purchase transaction an **exempt transaction** under N.D.C.C. § 10-04-06(11). This was a right exercised by the employee, Plaintiff Munson, and not an obligation to invest. This Court

> finds that the present Complaint fails to state a claim upon which relief can be granted and therefore much be dismissed pursuant to Rule 12(c) N.D.R.Civ.P.

Appx.223 (1/10/19 Order ¶¶ 15-16) (italics and bold in original). The district court's decision was legally correct.

[¶32] The Complaint alleges that Munson was granted the right to participate in the Indigo Signworks SARs program in 2009 *only* by virtue of his status as an Indigo Signworks employee, and he chose to participate in the SARs program "in lieu of receiving bonuses." Appx.6 (Compl. ¶ 7). Moreover, Munson was granted the right, in connection with the sale of Indigo Signworks to Indigo Holdings via the Stock Purchase Agreement, to participate in the redemption and reinvestment program *only* by virtue of being a SARs-holding Indigo Signworks' employee at the time of the sale. *Id*. (Compl. ¶ 10). And, Munson elected to proceed by (1) executing the SAR Termination Agreement and receiving the proceeds from the redemption of his SARs and (2) then reinvesting a portion of those proceeds in Indigo Holdings by purchasing 12,500 Class A Units as set forth in Section 7.5 of the Stock Purchase Agreement. Appx.7 (Compl. ¶ 12). Munson's Complaint specifically and expressly acknowledges that the transaction occurred: "Munson opted to purchase 12,500 Units of [Indigo Holdings] for $12,500." *Id.*

[¶33] Thus, the Complaint's allegations plainly demonstrate that the LLC membership-unit purchase transaction fits squarely within the category of transactions that are explicitly exempted from registration by Section 10-04-06(11).

[¶34] Munson failed to allege any contrary facts that might cast doubt on the this exemption. Munson did not allege that any person who agreed to participate in the SARs program was not an Indigo Signworks employee. *See generally* Appx.5-11 (Compl.). And, the Complaint is devoid of any allegation that Indigo Holdings' membership units were

offered to any individual other than those Indigo Signworks employees who participated in the SARs program. *See generally id*.

[¶35] Therefore, the Complaint only succeeds in alleging that the transaction was, in fact, exempt under N.D.C.C. § 10-04-06(11) and, therefore, registration was not required. Even accepting the allegations of the Complaint as true, "it is impossible [for Munson] to prove a claim upon which relief can be granted." *Wheeler,* 2018 ND 109, ¶ 4, 910 N.W.2d at 847-48.

[¶36] Although this Court does not appear to have directly interpreted or applied N.D.C.C. § 10-04-06(11), the conclusion that Munson's LLC membership unit purchase transaction was exempt from registration is reinforced by similar treatment of such securities by the Federal Securities & Exchange Commission ("SEC"). In 1988, the SEC "adopted Rule 701 under the Securities Act to allow private companies to sell securities to their employees without the need to file a registration statement, as public companies do." Securities Act Release No. 33-7645 (February 25, 1999) at § I-Executive Summary and Background. The SEC expressly decided "to require no specified disclosure requirements for sales up to $5 million" because "the additional burdens related to mandatory financial and risk disclosure for these limited offerings are unnecessary." *Id.* § IIB-Disclosure to Persons Covered by Rule 701; *see also* 17 C.F.R. § 230.701(c) (exempting offers and sales of securities under a written compensatory benefit plan and defining "compensatory benefit plan" as "any purchase, savings, option, bonus, *stock appreciation*, profit sharing, thrift, incentive, deferred compensation, pension or similar plan" (emphasis added)); 17 C.F.R. § 230.405 (defining "[e]mployee benefit plan" as "any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written

compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors . . . .").

[¶37] In accordance with this federal exemption, the North Dakota Legislature provided an even broader exemption at the state level by exempting any LLC membership unit issued "*in connection with*" an employee's compensation. N.D.C.C. § 10-04-06(11) (emphasis added). The district court correctly determined that the LLC membership unit purchase transaction challenged in the Complaint is exempt from registration as a matter of law.

C. Munson's appeal arguments do not demonstrate district court error

[¶38] On appeal, Munson attempts to revive two arguments he unsuccessfully made to the district court. *See* Munson Br. ¶¶ 44-53 ("contained in a record" argument) and ¶¶ 54-59 (Delaware law argument). Neither argument demonstrates reversible error.

1. ARGUMENT NO. 1: "Contained in a record"

[¶39] Munson complains that his 12,500 Class A Units of Indigo Holdings are not "contained in a record" as set forth in Section 10-04-06(11). *See* Munson Br. ¶¶ 44-53. The district court properly rejected this argument:

> [¶22] The second argument offered by Plaintiff Munson to assert non-applicability of N.D.C.C. § 10-04-06(11) is that there is no "record" that he actually purchased the 12,500 Class A Units of Indigo Holding. On the undisputed evidence, this argument fails. Plaintiff Munson, himself, declares his ownership of the limited liability company [membership units] in his Complaint.
>
> [¶23] This Court concludes that by his own admission Plaintiff Munson has established the "record" of ownership envisioned by N.D.C.C. § 10-04-02(17). The existence of a "record" of Plaintiff Munson's ownership of securities is not seriously in dispute. The parties agree the transaction occurred.
>
> [¶24] This Court finds that the pleadings herein undisputedly demonstrate that by virtue of his status as an Indigo Signworks employee, Plaintiff

> Munson exercised his right to reinvest a portion of his SARs redemption proceeds for 12,500 Class A Units of Indigo Holdings. The actual transaction is evidence, in and of itself, that the agreement did take place and is of "record".

Appx.224-225 (1/10/19 Order ¶¶ 22-24). The district court's determination was legally sound and should be affirmed.

a. The pleadings establish the existence of a "record"

[¶40] As a threshold matter, Munson impermissibly attempts to dispute that which he has already *affirmatively and specifically claimed* occurred. The fact that Munson purchased the LLC membership interests at issue is not disputed; indeed, it serves as the very basis of the only cause of action asserted in the Complaint.

[¶41] The Complaint alleges, and Appellees admit, that Munson purchased the LLC membership interests. *See* Appx.7 (Compl. ¶ 12); Appx.15-18 (Ans. ¶ 12). Munson affirmed, under penalty of perjury, that "[he] purchased $12,500 of Class A Units of [Indigo Holdings]." Appx.2 (Dkt. No. 56 ¶ 6). Munson cannot now dispute this purchase or claim that no such purchase occurred for lack of a "record." *See Dunn v. N. Dakota Dep't of Transp.*, 2010 ND 41, ¶ 10, 779 N.W.2d 628 ("Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation").

[¶42] Regardless, under the North Dakota Securities Act, a "record" need not be an official document, a certificate of sale, a signed acknowledgement, or a publicly-filed paper. Rather, a "record" in this context is merely a written information evidencing the transaction's existence. *See* N.D.C.C. § 10-04-02(17) ("'Record' except in phrases 'of record', 'official record', and 'public record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"). Section 10-04-06(11)'s "record" requirement serves a practical

purpose—to evidence that a transaction took place in the event of a dispute. Here, no dispute exists because all parties agree that the transaction occurred.

[¶43] Each of the Complaint, Appellees' Answer and Munson's Affidavit affirmatively states that the transaction occurred and thereby meets the minimal threshold of a "record" under the North Dakota Securities Act. *See* Appx.7 (Compl. ¶ 12); Appx.2 (Dkt. No. 56) ¶ 6; Appx.15-18 (Ans. ¶ 12). The district court correctly so determined. *See* Appx.224-25 (1/10/19 Order ¶¶ 23-24).

b. <u>The operative agreement documents unequivocally establish a "record" of the employees' stock purchase or similar employees' benefit plan</u>

[¶44] Munson characterizes N.D.C.C. § 10-04-06(11)'s record requirement as necessitating a record of Munson's *purchase* of the 12,500 Class A Units of Indigo Holdings (*i.e.*, a record that he purchased the securities themselves). *See* Munson Br. ¶ 51. The text of N.D.C.C. § 10-04-06(11), however, does not so clearly establish that the *transaction of the security itself* must be contained in a record.

[¶45] A plain reading of the statutory language demonstrates that the "contained in a record" clause applies to the last antecedent—"a compensatory benefit plan or compensation contract." *See* N.D.C.C. § 10-04-06(11). Accordingly, under the last-antecedent rule of statutory construction, the security itself (or purchase thereof) need not be "contained in a record." Rather, *the compensatory benefit plan or compensation contract* must be "contained in a record."

[¶46] The last-antecedent rule of statutory construction establishes that "[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." Antonin Scalia and Bryan A. Garner, *Reading Law* 144 (2012). This Court has explicitly adopted and applied this well-established canon of statutory construction.

See Backman v. Guy, 126 N.W.2d 910, 915 (N.D. 1964) (applying last-antecedent rule to hold that "[t]he words 'such transfer' are descriptive and relate back to the last antecedent, word or phrase," in that case, the nearest antecedent, "appropriations"); *Kohler v. Stephens*, 74 N.D. 655, 671, 24 N.W.2d 64, 72 (1946) ("A generally accepted rule in aid of the construction of statutes is that a limiting phrase or clause is to be restrained to the last antecedent unless the subject matter or context indicates a different legislative intent.").

[¶47] Here, as applied to Section 10-04-06(11), the last antecedent (and, indeed, the nearest reasonable antecedent) to which the phrase "contained in a record" refers is "a compensatory benefit plan or compensation contract." N.D.C.C. § 10-04-06(11). This construction comports with the writing requirement of SEC Rule 701, the federal analog of Section 10-04-06(11). *See* 17 C.F.R. §§ 230.701(c), 230.405. Accordingly, merely the benefit plan or compensation contract must be "contained in a record," not the security itself or the purchase thereof.

[¶48] Here, the operative agreement documents dispel any doubt raised about the existence of a "record," as broadly defined in Section 10-04-02(17). Munson's rights to redeem and reinvest his SARs proceeds to purchase Indigo Holdings Class A Units are memorialized in Section 7.5 of the Stock Purchase Agreement. Appx.15 (Ans. ¶ 11) (bold in original; underlining added). As the district court determined, the Stock Purchase Agreement unequivocally qualifies as a "record" of an employees' benefit plan, compensatory benefit plan, or compensation contract, as required by N.D.C.C. § 10-04-06(11). *See* Appx.225 (1/10/19 Order ¶ 25) ("The Court concludes the Stock Purchase Agreement [DE 70-71] is a record of an employees' benefit plan, compensatory benefit

plan. These materials are a record that unambiguously evidence the purchase by Plaintiff Munson of [the] limited liability company interest").

c. Munson's purchase of membership units is also "contained in a record," warranting summary judgment

[¶49] Even if "contained in a record" applied to the *purchase* of the security itself, Appellees still prevail because such a "record" exists, entitling Appellees to summary dismissal.[3]

[¶50] Munson's Complaint unequivocally established that "[he] opted to purchase 12,500 Units of [Indigo Holdings] for $12,500." Appx.7 (Compl. ¶ 12); *see also* Appx.2 (Dkt. No. 56 ¶ 6); Appx.15-18 (Ans. ¶ 12). There is no genuine dispute that Munson purchased the LLC membership units at issue. Even if Munson were able to aver that his purchase was not "contained in a record," it would fail to preclude summary judgment. *See Trinity Hosps.*, 2006 ND 231, ¶ 10, 723 N.W.2d at 688 ("A resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact").

[¶51] After the December 10, 2018 hearing, the district court requested supplemental briefing on the question of whether Appellees' motion should be converted to one for summary judgment under N.D.R.Civ.P. 12(d). *See* Appx.220 (1/10/19 Order ¶ 3). In its additional briefing, Appellees provided the district court with sworn affidavits and paper records that definitively memorialized Munson's purchase and ownership of 12,500 Class A Units of Indigo Holdings. *See* Appx.225 (1/10/19 Order ¶ 25) (citing Dkt. Nos. 70-71,

[3] The only reason such a record of Munson's *purchase* was not produced at the pleading stage is that this "contained in a record" argument was not presented as an allegation in the Complaint, but was instead only raised in response to Appellees' Motion for Judgment on the Pleadings. *See* Appx.2, Dkt. No. 51.

Indigo Holdings' October 31, 2016 bank statement and Indigo Holding's corporate record book).

[¶52] The bank statement and corporate record book clearly and unambiguously establish a "record" of Munson's purchase and ownership of the LLC membership interests at issue. Accordingly, should this Court rely on the October 31, 2016 Indigo Holdings bank statement and corporate record book as the basis of its decision, then—as the district court correctly discerned—Appellees' Motion for Judgment on the Pleadings should be considered as one for summary judgment. *See* N.D.R.Civ.P. 12(d); *see also* Appx.223 (1/10/19 Order ¶ 17).

[¶53] Because Munson failed to provide any competent admissible evidence, by affidavit or otherwise, which would cast the existence of such a "record" of his LLC membership interests in doubt, Appellees are entitled to summary judgment. *Anderson v. Meyer Broad. Co.*, 2001 ND 125, ¶ 14, 630 N.W.2d 46 (a party may neither rely upon the pleadings nor upon unsupported, conclusory allegations to resist summary judgment). Accordingly, whether Appellees' motion below was decided as being one for judgment on the pleadings or summary judgment, Appellees were entitled to judgment as a matter of law.

2. ARGUMENT NO. 2: Munson's arguments regarding the Amended LLC Agreement are outside the Court's subject-matter jurisdiction

[¶54] For his second appeal argument, Munson tries to misdirect this Court by seeking to litigate whether he is bound by the Amended LLC Agreement—matters over which this Court has no subject matter jurisdiction because they are not raised in the Complaint and instead are pending before the Delaware Chancery Court. *See* Munson Br. ¶¶ 54-59. The district court correctly disregarded Munson's Delaware-law arguments:

> [¶30] Plaintiff Munson argues intensely regarding a number of aspects of the Amended LLC Agreement, its applicability to him, and the validity of the confidentiality and non-compete provisions contained therein. Those matters are pending in the Delaware Chancery Court. They are not issues that Plaintiff Munson has specifically raised in his North Dakota Complaint. These matters must be resolved before the Delaware Chancery Court and presumably under Delaware law. This Court is without jurisdiction to consider the arguments Plaintiff Munson makes regarding the Amended LLC Agreement.
>
> [¶31] What this Court decides in this case is simply whether the purchase by Plaintiff Munson of 12,500 Class A Units of Indigo Holdings was a transaction exempt from registration under the North Dakota Securities Act. This Court affirmative concludes that the subject transaction was exempt from registration and consequently the Defendants are entitled to dismissal of this North Dakota action as a matter of law. Plaintiff Munson will certainly be allowed to litigate his claims regarding the Amended LLC Agreement before the Delaware Chancery Court.

Appx.226 (1/10/19 Order ¶¶ 30-31).

[¶55] This Court also should not entertain Munson's arguments regarding whether he is bound by the Amended LLC Agreement, under applicable Delaware law. To be clear, those issues are ***not*** raised in Munson's Complaint. They are the subject of the currently pending action before the Delaware Chancery Court, and they will be resolved under Delaware law. Under both the North Dakota Civil Rules and this Court's well-established precedent, Munson's claims regarding whether he is bound by the Amended LLC Agreement are outside the scope of his pleadings, and consequently, they are jurisdictionally improper for this Court to consider. *Trottier v. Bird*, 2001 ND 177, ¶ 6, 635 N.W.2d 157 ("For subject-matter jurisdiction to attach, ***the particular issue to be determined must be properly brought before the [C]ourt in the particular proceeding***." (internal quotations omitted) (emphasis added)); *Albrecht v. Metro Area Ambulance*, 1998 ND 32, ¶ 11, 580 N.W.2d 583 ("A judgment or order entered without the requisite

jurisdiction is void"); *see also Long v. Long*, 439 N.W.2d 523, 525 (N.D. 1989); *King v. Menz*, 75 N.W.2d 516, 522 (N.D. 1956); N.D.R.Civ.P. 12(h)(3).

[¶56] Here, the Complaint's allegations present just one issue: whether Munson's purchase of 12,500 Class A Units of Indigo Holdings was a transaction exempt from registration under the North Dakota Securities Act. *See* Appx.8 (Compl. ¶¶ 15-19). The Complaint contains no allegations regarding whether Munson is bound by the Amended LLC Agreement—***in fact, there is no mention of or reference to the Amended LLC Agreement at all***. *See* Appx.5-11 (Compl. ¶¶ 1-24); *Newman v. Hjelle*, 133 N.W.2d 549, 555 (N.D. 1965) (holding that both the lower court and this Court are limited in determining a motion to dismiss "to the matters appearing on the face of the complaint").

[¶57] The issues pertaining to whether Munson is bound by the Amended LLC Agreement are directly at issue and will be decided in the Delaware lawsuit, which has been stayed pending the resolution of this action. As Appellees have demonstrated, the securities transaction clearly is exempt from registration, and upon dismissal of Munson's claims herein, the parties will resume their dispute before the Delaware Chancery Court. The Delaware Chancery Court will then resolve the claims at issue in *that* action—namely whether, under applicable Delaware law, Munson is bound by the terms of the Amended and Restated LLC Agreement. Thus, the district court should be affirmed.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO DENY MUNSON'S MOTION TO STRIKE

A. Standard of review

[¶58] This Court reviews a district court's decision on a motion to strike a pleading for abuse of discretion. *Collection Ctr., Inc. v. Bydal*, 2011 ND 63, ¶ 29, 795 N.W.2d 667 (N.D.R.Civ.P. 12(f) specifically endows a district court with authority to consider a motion

to strike and concluding that district court did not abuse its discretion). "A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." *In re Estate of Loomer*, 2010 ND 93, ¶ 20, 782 N.W.2d 648; *see also Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (striking a party's pleadings is an "extreme measure," and such motions are "viewed with disfavor and are infrequently granted"); *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977) (Rule 12(f) motions are viewed with disfavor and infrequently granted).

B. The district court did not abuse its discretion

[¶59] As a corollary to his appeal, Munson challenges the district court's denial of his motion to strike all of Appellees' pleadings and cancel the December 10 hearing. *See* Munson Br. ¶¶ 18, 38-43. In an attempt to bolster his appeal argument, Munson seeks to characterize the issue as being jurisdictional, arguing that the district court did not have the authority to deviate from a formalistic application of N.D.R.Civ.P. 5(b) and N.D. R. Ct. 3.5 when it found that Appellees had shown good cause for not effecting electronic service on Munson's counsel. *Id.*[4] Because Munson's argument contravenes the fundamental premise that a district court has inherent authority to control its docket and stem abuses of

[4] Munson *entirely* fails to analyze the applicable provisions of N.D. R. Ct. 3.5, only selectively quoting that rule; nor does he challenge the district court's specific findings that Appellees had good cause for not conforming to the rules prescribing electronic service. *See* N.D. R. Ct. 3.5(e)(1) ("On a showing of exceptional circumstances in a particular case, anyone may be granted leave of court to serve paper documents"); N.D. R. Ct. 3.5(e)(4) ("Service made impossible due to an attorney's failure to provide an e-mail address must be shown by an affidavit or certificate of attempted service"); N.D. R. Ct. 3.5(f) ("On a showing of good cause, the court may grant appropriate relief if electronic filing or electronic service was not completed due to technical problems").

the judicial process, his efforts to mischaracterize fail. *See Holkesvig v. VandeWalle*, 2016 ND 107, ¶ 11, 879 N.W.2d 728.

[¶60] This is not a case of non-service. Munson's citation to *Farrington v. Swenson*, 210 N.W.2d 82, 85 (N.D. 1973) is inapposite. *See* Munson Br. ¶ 18. Instead, the district court *explicitly* found that Munson had *twice* been served with Appellees' Verified Answer and Motion for Judgment on the Pleadings via U.S. Mail—on October 1, 2018, and again on November 9, 2018. *See* Appx.218 (12/6/18 Order ¶ 2).

[¶61] The district court also explicitly found that Appellees had shown good cause for their failure to serve Munson electronically via the Odyssey system because Munson's counsel did not ensure that he was properly designated as a service contact. *Id*. ¶ 3 (citing N.D. R. Ct. 3.5(f)). As a result, Munson could not, by his own counsel's failure, seek to take advantage of Appellees' inability to accomplish electronic service via the Odyssey system. *See* N.D. R. Ct. 3.5(e)(1) ("On a showing of exceptional circumstances in a particular case, anyone may be granted leave of court to serve paper documents"); N.D. R. Ct. 3.5(e)(4) ("Service made impossible due to an attorney's failure to provide an e-mail address must be shown by an affidavit or certificate of attempted service"); *see also* Appx.218 (12/6/18 Order ¶ 4 (citing *Beavers v. Walters*, 537 N.W.2d 647, 650 (N.D. 1995)).

[¶62] The district court's reasoning in denying Munson's motion to strike was thorough, sound, and well-supported. *See State v. White*, 2018 ND 58, ¶ 15, 907 N.W.2d 765 (district court provided sufficient findings, and therefore did not abuse its discretion, in denying appellant's motion related to improper service). Accordingly, because motions to strike pleadings are generally disfavored and are rarely granted, and because the district

court's denial of Munson's motion to strike was not rendered arbitrarily, unreasonably, or in an unconscionable manner, the district court did not abuse its discretion.[5] *See In re Estate of Loomer*, 2010 ND 93, ¶ 20, 782 N.W.2d at 653 (providing that a district court abuses its discretion "when its decision is not the product of a rational mental process leading to a reasoned determination"); *see also Stanbury Law Firm*, 221 F.3d at 1063.

III. THE DISTRICT COURT DID NOT ERR IN DECLINING TO PERMIT MUNSON TO AMEND THE COMPLAINT OR CONDUCT DISCOVERY

[¶63] As his final argument, Munson contends that the district court erred when it (1) declined to permit Munson to amend his Complaint "to pursue other and/or additional valid claims," and (2) denied Munson's request to conduct discovery about whether the transaction was "contained in a record." *See* Munson Br. ¶ 59. Each argument lacks merit.

A. Motion to amend

[¶64] Although he did not file any motion to amend below, Munson raised the notion of a possible amendment at the hearing on Appellees' motion for judgment on the pleadings. *See* Appx.226 (1/10/19 Order ¶ 32). The district court rejected Munson's request:

> [¶33] Within his argument at the time of the hearing Plaintiff Munson requested that should the Court be inclined to grant the motion for judgment on the pleadings that he be granted the opportunity to amend his Complaint. He offers the Court no indication of what amendments he would propose to make nor what the amended Complaint would state. This Court will deny an appropriate motion based upon a theoretical and unmade motion to amend.

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[5] Even if the district court had erred (which it did not), it would certainly not have been an abuse of the district court's authority to so exercise its discretion. *See In re Estate of Loomer*, 2010 ND 93, ¶ 20, 782 N.W.2d at 653 (providing that a district court abuses its discretion "when its decision is not the product of a rational mental process leading to a reasoned determination").

Id. ¶ 33.

[¶65] "It is well settled that the decision on a motion to amend a pleading is within the sound discretion of the trial court and will not be overruled on appeal in the absence of an abuse of discretion by the trial court." *Hansen v. First Am. Bank & Tr. of Minot*, 452 N.W.2d 770, 772 (N.D. 1990); *see also Johnson v. Hovland*, 2011 ND 64, ¶ 8, 795 N.W.2d 294 ("We will not reverse the district court's decision whether to grant a party's motion to amend unless there is an abuse of discretion").

[¶66] Though Munson claims that he should have been permitted to amend his Complaint "to pursue other and/or additional valid claims" (Munson Br. ¶ 59), he once again gives no indication of what amendments he would propose to make. This alone justifies affirmance.

[¶67] Moreover, no amendment to his Complaint would remove the securities transaction at issue here from the category of transactions that are exempt from registration under N.D.C.C. 10-04-06(11). *See* N.D.R.Civ.P. 15(a) (providing that, after a responsive pleading is served, a party may amend a pleading "only by leave of court or by written consent of the adverse party"); *Ihli v. Lazzaretto*, 2015 ND 151, ¶ 18, 864 N.W.2d 483 ("A district court has broad discretion in deciding whether to allow a party to amend the pleadings after the time for amendments has passed" and holding that district court did not abuse its discretion when it rejected plaintiff's claim that she should have been permitted to amend her complaint because defendant was purportedly on notice of breach of contract claim and would not have been prejudiced).

[¶68] No amendment to Munson's Complaint can save his claims from the undisputed facts that (1) the 12,500 Class A Units of Indigo Holdings were issued to him solely by

virtue of his status as an Indigo Signworks employee, (2) were therefore issued in connection with an employees' stock purchase or other employees' benefit plan, and (3) consequently constituted a transaction exempt from securities registration under N.D.C.C. § 10-04-06(11). *See Thimjon Farms P'ship v. First Int'l Bank & Trust*, 2013 ND 160, ¶ 28, 837 N.W.2d 327 (it is not an abuse of discretion to deny amendment if the proposed amendment would be futile—*i.e.*, the proposed claim would not survive summary judgment).

[¶69] Because Munson, failed to move the district court to amend his complaint, failed to identify any proposed amendment, and no amendment he could make would remove the securities transaction from being exempt from registration, the district court did not abuse its discretion in summarily rejecting Munson's efforts to avoid dismissal.

B. Request to conduct discovery

[¶70] Like his amendment request, Munson failed to serve any discovery below or otherwise identify for the district court what discovery he intended to conduct and how such discovery would be material to Appellees' motion. Again, the district court denied Munson's request:

> [¶26] Although Plaintiff Munson offers that he would want to conduct discovery regarding these documents, he does not describe what discovery he would conduct. But most importantly he does not challenge the reality that DE 70-71 do "record" his purchase of 12,500 Class A Units of Indigo Holdings, an admission he makes in his Verified Complaint. [DE 6 ¶¶ 6-14].

Appx.225 (1/10/19 Order ¶ 26).

[¶71] The district court's denial was not an abuse of discretion. *Inv'rs Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 38, 788 N.W.2d 312, 325 ("A district court has broad discretion regarding the scope of discovery, and its discovery decisions will not be reversed on appeal

absent an abuse of discretion.") (quotations omitted). Again, Munson fatally failed to articulate any way in which he might conduct discovery regarding whether the securities transaction was "contained in a record," nor did he "describe what discovery he would conduct." *See* Appx.225 (1/10/19 Order ¶ 26). Even if Munson *had* described what discovery he would conduct, such discovery would be futile because Munson does not and cannot dispute that the subject transaction was exempt from registration.

CONCLUSION

[¶72] Appellees respectfully request that this Court affirm.

[¶73] Dated: April 2, 2019

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CERTIFICATE OF COMPLIANCE

[¶74] The undersigned, as attorney for Appellees and as the author of Appellees' Brief, hereby certifies that Appellees' Brief, excluding any addendum, contains a total of 7,992 words, excluding words in the table of contents, the table of citations, and any addendum, in compliance with the 8,000 word limit for a principal brief, as set forth in Rule 32(a)(8)(A) North Dakota Rules of Appellate Procedure (2018).

[¶75] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellees request oral argument in order to provide the Court with the appropriate background and context for the matters presented in this appeal.

[¶76] Dated: April 8, 2019

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CERTIFICATE OF SERVICE

[¶77] I hereby certify that a true and correct copy of the foregoing Appellees' Brief was served on April 8, 2019 by ending the same via electronic mail to the following:

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[¶78] Dated: April 8, 2019

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