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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 10, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

PLS Services, LLC,

Plaintiff and Appellant,

vs.

Valueplus Consulting, LLC,

Defendant and Appellee,

and

Clear Creek Retirement Plan LLC; John Wesley Johnson P.S. Defined Benefit Plan; 2011-12 Opportunity Fund 6-1, LLC; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Complaint; Robert L. Doremus and Shannon M. Doremus dba Sound Investments Company; Dale John Huysman and Anita Ruth Huysman; and Rusty Fields,

Defendants.

Supreme Court No. 20200270

Appeal from Order Granting Defendant Valueplus Consulting, LLC's Motion for Partial Summary Judgment dated January 9, 2020 (Doc. No. 77) and Order Granting Defendant Valueplus Consulting, LLC's Motion for an Award of Attorneys' Fees dated May 21, 2020 (Doc. No. 140) and Order Denying Plaintiff PLS Services, LLC's Motion to Amend/Correct Order Granting Summary Judgment dated May 21, 2020 (Doc. No. 141) and Summary Judgment as to Count I (Equitable Reformation) and Count X (Mortgage Foreclosure) and Dismissing Defendant Valueplus Consulting, LLC with Prejudice dated May 27, 2020 (Doc. No. 148) and Amended Summary Judgment as to Count I (Equitable Reformation) and Count X (Mortgage Foreclosure) and Dismissing Defendant Valueplus Consulting, LLC with Prejudice dated September 23, 2020 (Doc. No. 189)

Williams County District Court
Northwest Judicial District
The Honorable Paul Jacobson
Case No. 53-2019-CV-01120

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF FACTS

A. PLS's interest in the Subject Property.

[1] This action concerns the following real property located in Williams County, North Dakota, more particularly described as follows, to-wit:

> Lot 22R, Block 9, of the Madison Ridge Rearrangement #3, in Blocks 7, 9 & 10 in the E½ of Section 30, Township 154 North, Range 101 West of the 5th P.M., Williams County, North Dakota

(the "Subject Property").

[2] PLS offered to the district court the following documents recorded in the real estate records of Williams County, North Dakota in support of its purported interest in the Subject Property: (i) Mortgage dated June 29, 2012, recorded July 10, 2012, as Document No. 738880; (ii) Assignment of Mortgage dated February 19, 2014, recorded March 4, 2014, as Document No. 780996; (iii) Mortgage dated June 29, 2012, recorded July 10, 2012, as Document No. 738881; and (iv) Assignment of Mortgage dated February 19, 2014, recorded March 4, 2014, as Document No. 780995. *Appellant App. 28-43*. PLS also offered two unrecorded promissory notes and corresponding unrecorded promissory note endorsements described in paragraphs 10 and 16 of the Complaint (collectively, along with the documents described in this paragraph above, the "Alleged PLS Mortgages and Assignments"). PLS alleges it is the holder of the above-described mortgages by way of the above-described assignments of mortgages and the promissory note endorsements described in the Complaint. *Appellant App. 23-24*.

[3] PLS admits that the Alleged PLS Mortgages and Assignments do not identify the Subject Property on the face of any of the documents as the identified legal description is "Lot 22R, Block 9, Madison Ridge Rearrangement…" whereas the proper legal description for the Subject Property is "Lot 22R, Block 9, Madison Ridge Rearrangement

#3…" *Appellant App. 15-18*. Moreover, it is undisputed that while the Alleged PLS Mortgages and Assignments were recorded, they were neither recorded nor indexed against the Subject Property, so they do not appear in the corresponding tract index. *Appellee App. 40, 42-46*. In other words, none of the Alleged PLS Mortgages and Assignments appear in the chain of title for the Subject Property.

B. Valueplus' interest in the Subject Property.

[4] Valueplus' interest in the Subject Property is shown by the following documents recorded in the real estate records of Williams County, North Dakota, each of which were indexed against, and therefore appear in the chain of title for, the Subject Property: (i) Mortgage dated January 9, 2013, recorded August 1, 2013, as Document No. 765197 (the "Fidelity Capital Mortgage"); (ii) Assignment of Mortgage dated January 16, 2014, recorded January 30, 2014, as Document No. 778544 (the "Fidelity Capital Assignment"); (iii) Notice of Lis Pendens dated August 25, 2017, recorded August 28, 2017, as Document No. 839160; (iv) Notice of Levy dated April 16, 2019, recorded April 17, 2019, as Document No. 860023; (v) Sheriff's Certificate of Sale dated June 7, 2019, recorded June 10, 2019, as Document No. 861951; (vi) Sheriff's Deed dated August 7, 2019, recorded August 22, 2019, as Document No. 864768. *Appellee App. 33-36, 40, 42-46*; *Appellant App. 60-70*.

[5] Based on the above, Valueplus had an interest in the Subject Property as the holder of the Fidelity Capital Mortgage between January 2014 and August 2019, and it has an interest in the Subject Property as the record title owner from August 2019 to date.

C. PLS's unsuccessful attempt to intervene in prior foreclosure action concerning the Subject Property.

[6] Valueplus was the plaintiff in a prior foreclosure action concerning the Subject Property which proceeded before the district court as Case No. 53-2017-CV-00898 (the "2017 Foreclosure Action"). *Appellee App. 36-37, 40*. Many of the named parties in this action were also parties in the 2017 Foreclosure Action. *Appellee App. 40*. On October 18, 2018, PLS attempted to intervene in the 2017 Foreclosure Action. *Appellee App. 40*. On November 8, 2018, the district court entered an order denying PLS's motion to intervene. *Appellee App. 41*; *Appellant App. 75-77*.

[7] Following a bench trial, the district court entered its Findings of Fact, Conclusions of Law, and Order for Judgment in the 2017 Foreclosure Action which determined, among many other things, that (1) the Fidelity Capital Mortgage was assigned to Valueplus by the Fidelity Capital Assignment; (2) the Fidelity Capital Assignment was properly recorded and indexed against the Subject Property on January 30, 2014, and appears in the tract index for the Subject Property; (3) Valueplus was entitled to foreclose the Fidelity Capital Mortgage; (4) Valueplus was entitled to a judgment as a matter of law on its mortgage foreclosure claim. *Appellee App. 41*; *Appellant App. 78-100*. A Judgment of Foreclosure was entered in the 2017 Foreclosure Action in favor of Valueplus on March 27, 2019. *Appellee App. 41*; *Appellant App. 101-103*.

D. Valueplus' prior, unrelated, potential transaction concerning the Subject Property.

[8] On June 6, 2012, Defendant Clear Creek Retirement Plan LLC ("Clear Creek"), as seller, and Valueplus, as buyer, entered into a Residential Purchase and Sale Agreement Manufactured Home & Real Estate (the "Purchase Agreement"), whereby Valueplus agreed to purchase certain real property owned by Clear Creek located in the

City of Williston, Williams County, North Dakota, more particularly described as follows, to-wit:

> Lots 21R and 22R, Block 9 of the Madison Ridge Rearrangement #3, in Blocks 7, 9 & 10 in the E½ of Section 30, Township 154 North, Range 101 West of the 5th P.M., Williams County, North Dakota.

(individually, "Lot 21R" and/or "Lot 22R") and the manufactured duplexes with garages located thereon, with one duplex located on each Lot. *Appellant App. 145, 151*.

[9] On June 19, 2012, Clear Creek and Valueplus entered into an Addendum "A" to the Purchase Agreement ("Addendum A") which, among other things, granted to Valueplus the right to encumber each Lot with a $225,000.00 mortgage as security for Clear Creek's completion of the duplexes and its performance of the Purchase Agreement (the "Security Mortgage"). *Appellant App. 159-161*. Clear Creek delivered to Valueplus, and handled the recording of, a Mortgage dated July 12, 2012, recorded September 26, 2012, as Document No. 744509, in the principal amount of $225,000.00, as the Security Mortgage for Lot 22R (hereinafter, the "Security Mortgage for Lot 22R"). *Appellant App. 129-134, 146*. Clear Creek did not deliver a Security Mortgage to Valueplus for Lot 21R despite its obligation to do so under Addendum A. *Appellant App. 146*. Clear Creek instead delivered a Security Mortgage to Valueplus against Lot 23R in the same subdivision. *Appellant App. 146.*

[10] On January 31, 2013, Clear Creek and Valueplus entered into an Addendum "B" to the Purchase Agreement ("Addendum B") which, among other things, revised the real property to be purchased by Valueplus from Lot 21R and Lot 22R to:

> Lots 14R and 15R, Block 9 of the Madison Ridge Rearrangement #3, in Blocks 7, 9 & 10 in the E½ of Section 30, Township 154

North, Range 101 West of the 5th P.M., Williams County, North Dakota.

(individually, "Lot 14R" and/or "Lot 15R"). *Appellant App. 146, 162*. Per the terms of Addendum B, Valueplus agreed to release the Security Mortgage against Lot 22R and the Security Mortgage against Lot 23R, given that Lot 14R and Lot 15R had been substituted in place of Lot 21R and Lot 22R. *Appellant App. 147, 162*. Valueplus delivered to Clear Creek a Satisfaction of Mortgage dated March 15, 2013, recorded April 24, 2013, as Document No. 758888, which released the Security Mortgage for Lot 22R (the "March 2013 Satisfaction") and which satisfied the release obligation contemplated by Addendum B. *Appellant App. 135, 147, 162*. Clear Creek, and not Valueplus, handled the recording of the March 2013 Satisfaction. *Appellant App. 147*. Valueplus also released the Security Mortgage against Lot 23R around the same time as the March 2013 Satisfaction. *Appellant App. 147*.

[11] Clear Creek refused to grant a mortgage in favor of Valueplus against Lot 14R and Lot 15R despite its obligation to do so per Addendum B. *Appellant App. 147, 162*. Clear Creek did, however, erroneously recorded a mortgage in favor of Valueplus and against Lot 22R dated March 14, 2013, recorded August 2, 2013, as Document No. 765268 ("March 2013 Mortgage for Lot 22R"). *Appellant App. 137-142, 147*. The March 2013 Mortgage for Lot 22R was erroneous as Addendum B granted Valueplus rights to Lot 14R and Lot 15R, and not Lot 22R. *Appellant App. 147, 162*. Clear Creek, and not Valueplus, handled the recording of the March 2013 Mortgage for Lot 22R. *Appellant App. 147*. Valueplus then delivered to Clear Creek a Satisfaction of Mortgage dated November 19, 2013, recorded December 2, 2013, as Document No. 775111, which released the March 2013 Mortgage for Lot 22R (the "November 2013 Satisfaction").

Appellant App. 148, 163-164. Clear Creek, and not Valueplus, handled the recording of the November 2013 Satisfaction. *Appellant App. 148*.

[12] Addendum B also (1) extended the completion dates for the duplexes to March 15, 2013, for Lot 14R, and to April 15, 2013, for Lot 15R, and (2) extended the closing dates were also extended and were to occur within thirty (30) days following the completion dates, such closing dates then being April 14, 2013, for Lot 14R, and May 15, 2013, for Lot 15R. *Appellant App. 148, 162*. Despite its obligations under the Purchase Agreement, as amended by Addendum A and Addendum B, Clear Creek failed to complete the duplex on Lot 15R and that closing never occurred. *Appellant App. 148, 162*. On or about February 17, 2017, Valueplus commenced an action against Clear Creek in the district court as Case No. 53-2017-CV-00188, alleging breach of contract. *Appellant App. 148*. A judgment in favor of Valueplus was entered in that action on July 24, 2018. *Appellant App. 148, 165-166*.

[13] Valueplus does not trace its present interest in the Subject Property to the prior, unrelated potential, transaction described above and contemplated by the Purchase Agreement as subsequently modified by Addendum A and Addendum B. Rather, Valueplus is the record title owner of the Subject Property following its successful foreclosure of the Fidelity Capital Mortgage, and the issuance of the Sheriff's Deed to it on August 7, 2019, in connection with the 2017 Foreclosure Action. *Appellee App. 37*.

II. STANDARD OF REVIEW

[14] Summary judgment is reviewed de novo. Hild v. Johnson, 2006 ND 217, ¶ 6, 723 N.W.2d 389, 392. On appeal, the North Dakota Supreme Court decides whether the

information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Id.

III. ARGUMENT

A. The district court did not abuse its discretion in denying PLS's request for additional time for discovery under Rule 56(f), N.D.R.Civ.P.

[15] The district court did not abuse its discretion in denying PLS's request for additional time for discovery under Rule 56(f), N.D.R.Civ.P. Application of Rule 56(f) is within the district court's discretion. Choice Fin. Grp. v. Schellpfeffer, 2006 ND 87, ¶ 9, 712 N.W.2d 855, 858. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law." Sec. Nat. Bank, Edgeley v. Wald, 536 N.W.2d 924, 928 (N.D. 1995). This is a deferential standard. The record before the district court did not meet the standard for relief under this Rule which requires identification of the particular information sought, an explanation of how that information would prevent summary judgment, and an explanation for why it has not yet obtained the information. Alerus Fin., N.A. v. Erwin, 2018 ND 119, ¶ 25, 911 N.W.2d 296, 303. This information must be presented by affidavit. See N.D.R.Civ.P. 56(f).

[16] PLS argues that it had insufficient time between the commencement of the case and the date of service of Valueplus' Motion for Partial Summary Judgment. While the circumstances of each case are different, this Court held on at least one occasion that lack of time for discovery was not a sufficient reason to grant a continuance under Rule 56(f). See Luallin v. Koehler, 2002 ND 80, ¶ 30, 644 N.W.2d 591, 600. One treatise explains the Rule 56(f) analysis as follows:

> The district courts have a duty under Rule 56(f) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment. To this end, it has been said that Rule 56(f) should be liberally construed. **On the other hand, a party seeking a Rule 56(f) continuance is generally required to demonstrate due diligence both in pursuing discovery before the summary judgment motion is made** and in pursuing the extension of time after the motion is made.

11 James Wm. Moore, *Moore's Federal Practice* ¶ 56.10(8)(a) (1997) (emphasis added). The record before the district court demonstrates that PLS was not diligent in pursuing discovery as explained below.

[17] As noted above, PLS unsuccessfully attempted to intervene in the 2017 Foreclosure Action. PLS sought to hold the summary judgment proceedings in that action in abeyance under Rule 56(f), N.D.R.Civ.P. *Appellant App. 75-77*; *Appellee App. 40*. PLS has argued it needs time to conduct discovery against Valueplus since as early as October 2018 and yet it inexplicably did not do so prior to or even during the pendency of Valueplus' Motion for Partial Summary Judgment or PLS's Motion to Amend/Correct Order. PLS could have, for example, served written discovery requests or noticed depositions during the pendency of these motions. Written discovery in the form of interrogatories or requests for admission can be served on a party immediately after service of the summons and complaint on that party. N.D.R.Civ.P. 33(a)(1) (as to interrogatories); N.D.R.Civ.P. 36(a)(2) (as to requests for admission). Written discovery in the form of requests for production of documents can be served on a party 45 days after service of the summons and complaint. N.D.R.Civ.P. 34(b)(2)(A). A plaintiff can take a deposition 30 days after service of the summons and complaint on a defendant. N.D.R.Civ.P. 30(a)(1). A subpoena to a third-party can be issued any time after commencement of an action. N.D.R.Civ.P. 45. PLS did none of these things.

[18] To date, it appears the only formal discovery device PLS employed to prosecute any of its claims was through a single set of written discovery requests to the Doremus defendants. *Appellee App. 155*. By its own admission, PLS began to "learn some of the details about the drafting and circumstances" of the Alleged PLS Mortgages and Assignments in August 2018. *Appellant App. 128*. Yet, it filed the district court action in July 2019 and did not engage any formal discovery device as to Valueplus in the nearly 6 month period before the Order Granting Motion for Summary Judgment was entered or in the additional 4 month period between entry of that order and the order denying PLS's Motion to Amend/Correct Order. See Erwin, 2018 ND 119 at ¶¶ 27, 30 (holding that the district court did not abuse its discretion in denying a party's request for a continuance under Rule 56(f) where 8 months elapsed between commencement of the action and the filing of a motion for summary judgment).

[19] Moreover, the affidavits PLS offered ostensibly in support of its Rule 56(f) argument make conclusory statements that it needs to conduct discovery "to present essential facts justifying its position." *Appellant App. 106*. However, such affidavits do not offer any explanation on the critical element of "**why** it has not yet obtained the information." Erwin, 2018 ND 119 at ¶ 25 (emphasis added). Given this critical failure, this Court is left to potentially imply a reason and therefore substitute its own discretion for that of the district court. See Choice Fin. Grp., 2006 ND 87 at ¶ 30 (Maring, J., dissenting). Based on the above, the district court did not abuse its discretion in determining that PLS was not entitled to relief under Rule 56(f), N.D.R.Civ.P.

B. The district court did not err in granting Valueplus' Motion for Partial Summary Judgment.

[20] In granting Valueplus' Motion for Partial Summary Judgment, the district court properly determined there were no genuine issues of material fact.

> A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e)." "Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion."
>
> In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.

Zuger v. State, 2004 ND 16, ¶¶ 7-8, 673 N.W.2d 615, 619-20 (citations omitted).

1. The equitable remedy of reformation based upon a purported mutual mistake is not available to PLS as a matter of law as such reformation cannot be done without prejudicing Valueplus.

[21] PLS's first claim applicable to Valueplus seeks reformation of the Alleged PLS Mortgages and Assignments to describe, and therefore encumber, the Subject Property with its correct legal description. *Appellant App. 19*. Reformation is an equitable remedy used to rewrite a contract to accurately reflect the parties' intended agreement. Spitzer v. Bartelson, 2009 ND 179, ¶ 22, 773 N.W.2d 798, 805. Section 32-04-17, N.D.C.C., is the pertinent statutory authority which provides for the equitable remedy of reformation, and it provides

> When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done **without prejudice to rights acquired by third persons in good faith and for value**.

N.D.C.C. § 32-04-17 (emphasis added). Similarly, the Restatement (Second) of Contracts § 155 provides

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, **except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected**.

Restatement (Second) of Contracts § 155 (emphasis added).

[22] The above statute and the Restatement reflect the general rule that reformation may be allowed in certain circumstances as against the original parties to the instrument and all those in privity with the original parties. However, reformation clearly cannot be granted where it would prejudice a third-party such as a subsequent bona fide purchaser or encumbrancer for value and without notice. See, e.g., Ell v. Ell, 295 N.W.2d 143, 153 (N.D. 1980). This is true even if the written contract is based on mutual mistake as alleged by PLS in this action.

[23] A "mistake" is commonly understood to mean "an error, misconception, or misunderstanding; an erroneous belief." BLACK'S LAW DICTIONARY 1153 (10th ed. 2014); see Restatement (Second) of Contracts § 151, cmt. a. N.D.C.C. § 9-03-13 defines a "mistake of facts" as a "mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in: (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed." N.D.C.C. § 9-03-13. "Reformation may be inappropriate if a mistake was caused by a party's failure to read a contract." Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 769 (N.D. 1996).

[24] The burden of proof is on the party seeking reformation to "prove that the written instrument does not fully or truly state the agreement that the parties intended to make." Ell, 295 N.W.2d at 150. When considering whether to reform a written instrument, "courts should exercise great caution and require a high degree of proof." Ives v. Hanson, 66 N.W.2d 802, 805 (N.D. 1954). Reformation is a "high remedy" and will not be granted "upon a mere preponderance of the evidence, but only upon the certainty of error." Oliver-Mercer Electric Coop., Inc. v. Fisher, 146 N.W.2d 346, 355 (N.D. 1966).

a. Valueplus is a third-party and is also a bona fide purchaser for value.

[25] Based on the material undisputed facts, the district court determined that Valueplus was not a party to the Alleged PLS Mortgages and Assignments, so it was a "third-party" for purposes of section 32-04-17, N.D.C.C. This conclusion must be undisputed as PLS's appellant brief is silent on this element of the analysis. As such, Valueplus' argument on this point is not restated herein.

[26] Valueplus is also a bona fide purchaser for value. A bona fide purchaser is one who gives valuable consideration in exchange for the conveyance of the real estate, acts in good faith, and has no actual knowledge or constructive notice of outstanding rights of others (a "BFP"). See Rosenquist v. Harris, 138 F.Supp. 21, 27 (1953); N.D.C.C. § 47-19-41 ("An unrecorded conveyance of real estate is void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate…before the recording of the conveyance"); see also N.D.C.C. § 47-19-43 (providing that "purchaser" includes every person to whom any estate or interest in real estate is conveyed for a valuable consideration and also every assignee of a mortgage). Hence, a subsequent purchaser is only protected against a prior conveyance of the same real estate

if: (1) the purchaser has neither actual knowledge or constructive notice of the earlier conveyance; (2) gave valuable consideration for the real estate conveyed; and (3) recorded their instrument before the earlier instrument was recorded. See N.D.C.C. § 47-19-42 (a mortgage is a "conveyance" for purposes of section 47-19-41, N.D.C.C.); see Putnam v. Broten, 232 N.W. 749, 752 (N.D. 1930) (determining that an assignment of mortgage is a "conveyance" subject to the recording statutes). One can only claim the protection of a BFP if all three requirements are met.

i. Valueplus gave valuable consideration in exchange for both its mortgage interest and its record title ownership interest in the Subject Property.

[27] Based on the material undisputed facts, the district court determined that Valueplus gave valuable consideration in exchange for both its mortgage interest and its record title ownership interest in the Subject Property. *Appellant App. 185*. This conclusion must be undisputed as PLS's appellant brief is silent on this element of the analysis. As such, Valueplus' argument on this point is not restated herein.

ii. Valueplus acted in good faith and the documents by which it acquired its interest in the Subject Property were properly indexed against the Subject Property and appear in the tract index for the same.

[28] Based on the material undisputed facts, the district court determined that Valueplus acted in good faith and the documents by which it acquired its interest in the Subject Property were properly indexed against the same and appear in the tract index for the same. *Appellant App. 186*. This conclusion must be undisputed as PLS's appellant brief is silent on this element of the analysis. As such, Valueplus' argument on this point is not restated herein.

iii. Valueplus did not have knowledge or notice of PLS's purported interest in the Subject Property.

[29] Under N.D.C.C. § 32-04-17, a good faith purchaser must acquire rights without actual or constructive notice of another's rights. Ramada, Inc., 553 N.W.2d at 768. Other than its Rule 56(f) argument addressed above, PLS's sole argument on appeal is that the district court erred in determining that there was no genuine issue as to whether Valueplus had actual knowledge or constructive notice of PLS's purported interest in the Subject Property. The district court did not err as analyzed below.

A. No actual knowledge.

[30] The district court did not err in determining that Valueplus did not have any actual knowledge of PLS's purported interest in the Subject Property. Actual notice consists of express information of fact. N.D.C.C. § 1-01-23. By his affidavits, Rakesh Gupta ("Gupta"), the manager of Valueplus, testified and made clear that, among other things, (1) he did not have knowledge, actual or otherwise, of any of the Alleged PLS Notes, Mortgages, and Assignments at any time prior to the date the Fidelity Capital Assignment was delivered to Valueplus, recorded, and indexed against the Subject Property; and (2) he first learned of the Alleged PLS Notes, Mortgages, and Assignments and that PLS claimed any interest whatsoever in the Subject Property sometime during the pendency of the 2017 Foreclosure Action, which was commenced on or about August 2017. *Appellee App. 36-37*. In other words, Valueplus only learned of PLS's purported interest in the Subject Property several years after Valueplus acquired an interest in the Subject Property. Valueplus did not have actual knowledge of PLS's purported interest in the Subject Property prior to Valueplus acquiring an interest in the Subject Property.

[31] PLS offers various inferences it believes can be drawn from the record which it asserts suggest Valueplus had actual knowledge of PLS's interest in the Subject Property or at least demonstrate why there are disputed material facts on this point. A party opposing summary judgment will be "given the benefit of all favorable inferences which can reasonably be drawn from the record." Desert Partners IV, L.P. v. Benson, 2016 ND 37, ¶ 9, 875 N.W.2d 510 (quoting Tibert V. Nodak Mut. Ins. Co., 2012 ND 81, ¶ 8, 816 N.W.2d 31. It is true that "summary judgment may be inappropriate if reasonable differences of opinion exist regarding inferences that may be drawn from undisputed facts." Sundance Oil and Gas, LLC v. Hess Corp., 2017 ND 269, ¶ 9, 903 N.W.2d 712, 717. Most of PLS's inferences center around the Purchase Agreement. Valueplus does not trace its present interest in the Subject Property back to the Security Mortgage for Lot 22R, the March 2013 Mortgage, or the transaction contemplated by the Purchase Agreement at all. The inferences offered by PLS in its appellant brief are not **reasonable** inferences.

[32] First, PLS argues that because the Security Mortgage for Lot 22R contains the "same errant legal description" as the Alleged PLS Mortgages and Assignments, Valueplus must have had actual knowledge of the other documents recorded in the "exact same errant tract index." *Appellant Br., ¶ 57*. Second, PLS argues that Valueplus "learned of the errant legal description" and "immediately worked together with Clear Creek to correct it." *Appellant Br., ¶¶ 26, 57*. Third, PLS asserts that Clear Creek's delivery of the March 2013 Mortgage for Lot 22R to Valueplus is evidence of its actual knowledge given that such document contained the correct legal description for the

Subject Property unlike the previously satisfied Security Mortgage for Lot 22R. *Appellant Br., ¶¶ 26, 57*.

[33] The above assertions are mere conjecture and are nothing more than deductive conclusions unsupported by any competent admissible evidence. According to uncontradicted testimony before the district court, Valueplus delivered the March 2013 Satisfaction to Clear Creek solely because of the terms of Addendum B. *Appellant App. 147, 162*. PLS was not a party to this transaction nor does it even allege that it has any personal knowledge of the same. Furthermore, the change in the legal description between the Security Mortgage for Lot 22R and the March 2013 Mortgage for Lot 22R was not done by Valueplus nor was such change made at Valueplus' insistence. *Appellant App. 149*. In fact, Valueplus testified that Clear Creek recorded the March 2013 Mortgage for Lot 22R without Valueplus' knowledge. See *Appellant App. 147*. PLS disregards this uncontradicted testimony even though it seeks cover for its own failure to ensure proper indexing of the Alleged PLS Mortgages and Assignments by laying the recording responsibility on the assignor and not on PLS. *Appellant Br., ¶ 18*. Valueplus' execution and delivery of the March 2013 Satisfaction to Clear Creek was unrelated to the "same errant legal description" or its indexing in the "errant tract index."

[34] PLS's also points to two clauses in the Purchase Agreement as purported circumstantial evidence that Valueplus was aware of the Alleged PLS Mortgages and Assignments given the Purchase Agreement's reference to potential "monetary encumbrances" and potential "existing mortgages." *Appellant App. 153*. It is important to note that there were at least two mortgages which encumbered the Subject Property at the time of the Purchase Agreement and both of which appear in the correct tract index

for the same. *Appellant App. 117*. Assuming for the sake of argument that the above-referenced contractual provisions were intended to refer to actual existing mortgages, PLS provides no rationale to support its conclusion that those provisions gave notice of the Alleged PLS Mortgages and Assignments (which do not accurately describe the Subject Property and do not appear in the tract index for the Subject Property) and did not instead give notice of the two outstanding mortgages against the Subject Property at the time of the Purchase Agreement (both of which accurately described the Subject Property, both of which appear in the tract index for the Subject Property, and neither of which PLS had any interest in). While PLS is entitled to reasonable inferences, it is not entitled to unreasonable and extremely tenuous inferences such as this.

[35] In defense of a summary judgment motion, "the non-moving party cannot simply rely upon the pleadings or unsupported, conclusory allegations. That party must present competent, admissible evidence raising an issue of material fact." Reimers v. City of Grand Forks, 2006 ND 224, ¶ 7, 723 N.W.2d 518, 521 (internal citations omitted). PLS did not present anything more than deductive conclusions based on unreasonable inferences. Gupta's affidavits, along with PLS's failure to contradict the same with reasonable inferences or competent admissible evidence, demonstrate why the district court did not err in concluding that Valueplus did not have actual knowledge of the Alleged PLS Mortgages and Assignments.

B. No constructive notice.

[36] The district court did not err in determining that Valueplus did not have constructive notice of PLS's purported interest in the Subject Property. Constructive notice is that which is imputed by the law to a person not having actual knowledge.

N.D.C.C. § 1-01-24. "The issues of good faith and constructive notice are similar in that they both require an examination of the information possessed by the person." Ramada, Inc., 553 N.W.2d at 768. The North Dakota recording statute imparts constructive notice of all documents filed in the real estate records of a given county provided that the document is indexed against, and appears in the tract index for, a particular piece of property. N.D.C.C. §§ 47-19-08, 47-19-19, 47-19-41, and 47-19-45; see also 66 Am. Jur. 2d *Records and Recording Laws* § 99 (2010) (providing that when a statute requires a tract index by kept, a subsequent purchaser is under a duty to examine that index).

[37] The Alleged PLS Mortgages and Assignments were not indexed against the Subject Property and do not appear in the tract index for the same. *Appellee App. 42-46*. PLS freely concedes and admits this critical point. *Appellant Br., ¶ 5*. A tract index is the only official record for the underlying tract. See N.D.C.C. § 11-18-01 (requiring a recorder to keep a full and true record of all mortgages, among other instruments, required to be filed or admitted to record); see also N.D.C.C. § 11-18-07 (requiring a recorder to keep a tract index of all deeds and other instruments, including mortgages, that affect the title to the real property); see also Swanson v. Swanson, 2011 ND 74, ¶ 15, 796 N.W.2d 614, 619 (stating that "North Dakota uses a tract index system for recording real estate transactions, which makes all instruments easily accessible by focusing on the tract of land in question…"); see also Hanson v. Zoller, 187 N.W.2d 47, 56 (N.D. 1971) (noting that "[i]n our state, today, the tract index is the only practical index through which instruments on record can be located").

[38] Similar to its actual knowledge arguments discussed above, PLS also asserts that because the Security Mortgage for Lot 22R, the March 2013 Satisfaction, and the March

2013 Mortgage for Lot 22R were "recorded and indexed in the exact same errant tract index" as the Alleged PLS Mortgages and Assignments, Valueplus was therefore charged with constructive notice of all other documents appearing in that errant index. See *Appellant Br., ¶ 57*. This position is not supported by North Dakota law and the district court was not persuaded by this argument. This Court held that a prospective purchaser or encumbrancer "**cannot** be deemed to have constructive notice of instruments that are not indexed in the tract index under the specific tract of real estate to which they pertain." Hanson, 187 N.W.2d at 56 (emphasis added).

[39] The documents indexed in the "errant tract index" at best only impart constructive notice to subsequent encumbrancers or purchasers that such indexed documents may encumber "Lot 22R, Block 9, Madison Ridge Rearrangement…" See N.D.C.C. § 47-19-19 ("The record of any instrument shall be notice of the contents of the instrument, **as it appears of record**, as to all persons") (emphasis added). In other words, if one somehow discovered the Alleged PLS Mortgages and Assignments in whatever chain of title they appear, that person would only have constructive notice that they encumbered "Lot 22R, Block 9, Madison Ridge Rearrangement…" and not the Subject Property given the legal description on the face of the documents. Therefore, the Alleged PLS Mortgages and Assignments cannot impart constructive notice of a purported interest in the Subject Property held by PLS to Valueplus (or anyone else) as a matter of law.

[40] PLS must be arguing that such subsequent encumbrancers and purchasers also had constructive notice that such documents were both (1) indexed against a nonexistent property, (2) indexed in an "errant tract index," and (3) intended to encumber a different property. This argument takes the concepts of constructive notice and the duty of inquiry

much further than they are intended. This is evident by PLS's failure to offer any authority in support of extending these concepts in such a way. If PLS's argument is correct, then each time a document contains an error in a legal description or is recorded in a different tract index than intended, the parties to such documents would be charged with a duty to determine whether that property exists and further charged with constructive notice of all other documents recorded in the incorrect tract index for that property. This cannot be the case. Therefore, the district court did not err in determining that Valueplus did not have constructive notice as a matter of law.

C. No duty to inquire.

[41] A similar concept to constructive notice is the duty to inquire. Where a party has constructive notice of certain facts, the law imposes a duty of inquiry to acquire knowledge of the fact in question. E.g., Nw. Mut. Savings & Loan Ass'n v. Hanson, 10 N.W.2d 599, 602 (N.D. 1943). When a duty of inquiry is imposed, the person bound to make it is affected with knowledge of all that would have been discovered had the inquiry been performed. When those inquiries are not made, the person is chargeable with knowledge that would have been acquired through diligent inquiry. Germany v. Murdock, 662 P.2d 1346, 1348 (1983). As such, where there is a duty to find out and know, negligent ignorance has the same effect in law as actual knowledge. See Lamke v. Lynn, 680 S.W.2d 285, 288-89 (Mo. Ct. App. E.D. 1984).

[42] PLS's unreasonable inferences set forth above do not suggest that Valueplus had "actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact…" N.D.C.C. § 1-01-25. PLS's argument assumes, without support, that Valueplus was aware of the "errant legal description" in such documents. The mere fact

that the Security Mortgage for Lot 22R, the March 2013 Satisfaction, and the March 2013 Mortgage for Lot 22R contained the "same errant legal description" alone is insufficient to charge Valueplus with a duty to inquire regarding other documents that may have been of record in the "errant tract index." If this were the case, then every person who noticed an error in the legal description and then sought to remedy it with a corrective document would be charged with a duty to inquire as to every document recorded with the same error in the legal description.

[43] Assuming for the sake of argument that Valueplus did have a duty to inquire as to documents recorded in the "errant tract index" and further assuming it then failed to do so, then the law would only charge Valueplus with constructive notice of all facts that such inquiry would have revealed. Swanson, 2011 ND 74 at ¶¶ 10, 14 (holding that conducting a record search would be a "reasonably diligent inquiry"). Here, such an inquiry made by examining the "errant tract index" would only have revealed certain encumbrances against "Lot 22R, Block 9, Madison Ridge Rearrangement…" and not the Subject Property. PLS's argument would extend the duty of inquiry beyond the face of an unambiguous document to also impose a duty on the examiner to, among other things, determine the intent of the parties to the document and review the underlying plat to determine if the property exists and whether it was described correctly. Applying the duty to inquire in this way would completely undo section 47-19-19, N.D.C.C., which permits any examiner of title to rely upon the contents of a recorded instrument "as it appears of record." N.D.C.C. § 47-19-19. Again, PLS does not cite to any authority which permits the application of the duty of inquiry to such an extent.

[44] Given that the Alleged PLS Mortgages and Assignments do not accurately describe the Subject Property, were not indexed against the Subject Property, and they do not appear in the tract index or the chain of title for the Subject Property, they cannot impart constructive notice to Valueplus. Given that the Alleged PLS Mortgages and Assignments cannot impart constructive notice, no duty of inquiry to acquire knowledge was imposed on Valueplus. The competent admissible evidence before the district court was that Valueplus had no knowledge that the legal description on the Security Mortgage for Lot 22R was errant nor did it have any knowledge that it was apparently recorded in the wrong tract index. *Appellee App. 36*; *Appellant App. 148*. PLS's mere allegation does not create a genuine issue of material fact. See N.D.R.Civ.P. 56(e)(2) (providing that in defending a motion for summary judgment, "an opposing party may not rely merely on allegations or denials in its own pleading; rather its responses must, by affidavits or otherwise…set out **specific facts** showing a **genuine issue** for trial") (emphasis added). Therefore, the district court did not err in determining that Valueplus did not have a duty to inquire as a matter of law.

iv. Application of Hanson v. Zoller.

[45] The facts here are analogous to the facts before the North Dakota Supreme Court in Hanson v. Zoller. 187 N.W.2d 47 (N.D. 1971). Hanson involved an attempt to foreclose a mortgage that while recorded, was not properly indexed against the property it was intended to encumber. Hanson, 187 N.W.2d at 51. Specifically, the face of the mortgage described that it encumbered the S½NE¼ of certain property, but the mortgage was only indexed against the NW¼ of that same property. Id. at 49-51. Because of this, the subsequent owners and encumbrances of S½NE¼ successfully defended against the

foreclosure action by arguing they had neither actual knowledge nor constructive notice of the existence of the mortgage. Id. at 50-51. The Court reasoned that "the tract index is the only practical index through which instruments of record can be located." Id. at 56. Because the mortgage at issue did not appear in the tract index for the parcel it purported to encumber, the Court determined that "a prospective purchaser cannot be deemed to have constructive notice of instruments that are not indexed in the tract index under the specific tract of real estate to which they pertain." Id. at 56. Therefore, merely recording an instrument cannot constitute constructive notice of that instrument unless it is also indexed in the tract index of the property intended to be encumbered. See id.

[46] The Court in Hanson also noted that the consequences of the failure to properly index an instrument should fall on the beneficiary of the interest granted by that instrument. Specifically,

> The beneficiary of any interest in any real estate conveyance has a duty to protect his interest against the subsequent purchasers by making certain that the instrument conveying his interest is properly recorded, because he is the only person that by exercising some diligence can discover errors in the recording which a subsequent purchaser even by the exercise of the greatest diligence could not possibly do.

Id. at 57-58. Just like in Hanson, while the Alleged PLS Mortgages and Assignments were recorded, they were not indexed against, nor do they appear in the tract index for, the Subject Property so no subsequent purchaser or encumbrancer, including Valueplus, could have constructive notice of these documents. Further applying Hanson here, PLS had a duty to confirm the accuracy of the legal descriptions in the Alleged PLS Mortgages and Assignments, and to make sure that the same were properly indexed against the Subject Property. See Ramada, Inc., 553 N.W.2d at 769 ("Generally, a party has a legal obligation to know the contents of a contract before signing it"). PLS failed to

do so. The "errant" legal description was plainly stated in the Alleged PLS Mortgages and Assignments and PLS failed to conduct sufficient due diligence and investigation to ensure the legal description was accurate at the time it accepted delivery. Its failure should not flow to nor prejudice Valueplus.

2. The Alleged PLS Mortgages and Assignments cannot be reformed without prejudicing Valueplus' rights.

[47] Again, while equitable reformation of a contract is a recognized remedy in certain circumstances of mutual mistake, such a remedy is not available where such reformation will prejudice "rights acquired by third persons in good faith and for value." N.D.C.C. § 32-04-17 (emphasis added). Reformation of the Alleged PLS Mortgages and Assignments cannot be done here without prejudicing Valueplus' rights as the practical effect of such reformation is to encumber the Subject Property with two mortgages that currently do not encumber it. These encumbrances would both erode any equity in the Subject Property and would then presumably grant PLS the right to foreclose the same and extinguish Valueplus' entire interest in the Subject Property. This result is highly prejudicial to Valueplus.

[48] Regardless of whether the purported error was in fact the result of a mutual mistake, reformation of the Alleged PLS Mortgages and Assignments cannot be granted here as Valueplus is not a party to any contract with PLS, it is a bona fide purchaser for value, and it would be prejudiced by such reformation. The apparent admission of the mutuality of this mistake does not change the underlying analysis. Therefore, the district court did not err in determining that PLS's equitable reformation claim fails as a matter of law as it cannot satisfy the statutory requirements of N.D.C.C. § 32-04-17.

3. PLS's purported claims are limited to parties it may be in privity with but cannot extend to Valueplus or to the Subject Property as a matter of law.

[49] Again, it cannot be disputed that the Alleged PLS Mortgages and Assignments do not appear in the chain of title for the Subject Property as they were not indexed against the same. *Appellee App. 42-46*. A document recorded outside of the chain of title for a particular property is treated the same as an unrecorded document in that it is valid and enforceable only between the parties to the document. See N.D.C.C. § 47-19-46 ("An unrecorded instrument is valid as between the parties thereto and those who have notice thereof"). Therefore, PLS's claims in this action, must be limited to counterparties to the Alleged PLS Mortgages and Assignments and any parties it is in privity with. See, e.g., Ell, 295 N.W.2d at 153. Valueplus is not a counterparty to any of the Alleged PLS Mortgages and Assignments nor is it in privity with any of those parties. As such, the district court did not err in determining that PLS's claims are not enforceable against Valueplus or the Subject Property as a matter of law.

4. Because the Alleged PLS Mortgages and Assignments cannot be reformed as desired by PLS and therefore cannot be enforced against the Subject Property, the district court did not err in dismissing PLS's foreclosure claim.

[50] As analyzed above, PLS's equitable reformation claim does not lie against Valueplus or the Subject Property. As such, the only other claim by PLS which is applicable to Valueplus in this action is PLS's claim for foreclosure of the Clear Creek Mortgages against the Subject Property. *Appellant App. 23-24*. This claim must be contingent on PLS first successfully reforming the Clear Creek Mortgages to actually encumber the Subject Property as it is undisputed that they currently do not accurately describe the Subject Property and they were not recorded or indexed against the Subject

Property. Section 32-04-20, N.D.C.C., provides that "[a] contract may be revised first and then specifically enforced." N.D.C.C. § 32-04-20. Here, PLS's foreclosure claim fails as it cannot first equitably reform the Clear Creek Mortgages as analyzed above. Because the Alleged PLS Mortgages and Assignments cannot be reformed as desired by PLS and therefore cannot be enforced against the Subject Property, the district court did not err in also dismissing PLS's foreclosure claim.

C. The district court did not abuse its discretion in awarding Valueplus its expenses, including costs and reasonable attorneys' fees, incurred in the action.

[51] North Dakota follows the American Rule in that, absent statutory or contractual authority, each party to a lawsuit bears its own attorney fees. See, e.g., Danzl v. Heidinger, 2004 ND 74, ¶ 6, 677 N.W.2d 924, 926. This Court has held that being "forced to incur 'attorney's fees and expenses' to prosecute or defend a legal action does not alone justify an award of attorney fees." See id. at ¶ 9. While there is no contract between PLS and Valueplus giving rise to recovery of attorney's fees, there is statutory authority for such recovery by Valueplus under sections 28-26-01(2) and 28-26-31, N.D.C.C., given that PLS's claims against it are frivolous and PLS has made untruthful allegations in the Complaint without reasonable cause. A trial court's discretionary determinations under either of these statutes will not be overturned on appeal absent an abuse of discretion. See Sagebrush Res., LLC v. Peterson, 2014 ND 3, ¶¶ 15-16, 841 N.W.2d 705, 712.

1. The district court did not abuse its discretion in determining that PLS's claims for relief against Valueplus were frivolous.

[52] "In civil actions the court shall, upon a finding that claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the

prevailing party." N.D.C.C. § 28-26-01(2). "A claim is frivolous when there is such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in his favor." Peterson v. Zerr, 477 N.W.2d 230, 236 (N.D. 1991) (citing Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 84 (N.D. 1991); Larson v. Baer, 418 N.W.2d 282, 290 (N.D. 1988)). The statute requires a party to allege the frivolity of the claim in a responsive pleading. See N.D.C.C. § 28-26-01(2).

[53] As set forth in detail above, by its Complaint, PLS sought to equitably reform the Alleged PLS Mortgages and Assignments to encumber the Subject Property and then to foreclose the same. **First**, the district court found there was a complete absence of facts to support this claim and PLS could not have expected a favorable judgment. PLS attempted to intervene in the 2017 Foreclosure Action which Valueplus resisted and the district court ultimately denied. As part of Valueplus' opposition, Gupta filed an affidavit in the 2017 Foreclosure Action on November 1, 2018, and therein testified as follows:

> I did not have knowledge, actual or otherwise, of any of the Alleged PLS Notes and Mortgages at any time prior to the date the [Fidelity Capital Assignment] was delivered to Valueplus, recorded, and indexed against the Subject Property.

Appellee App. 35, 41. In other words, PLS has been aware since at least November 1, 2018, that Valueplus did not have any actual knowledge of the Alleged PLS Mortgages and Assignment before taking delivery of the Fidelity Capital Assignment. PLS was also aware that Valueplus did not have, nor could it have, constructive knowledge of the Alleged PLS Mortgages and Assignment as the same were not indexed against and did not appear in the chain of title for, the Subject Property. Therefore, PLS undeniably

knew at the time it commenced this action that equitable reformation was not available to it as Valueplus was protected from such a claim by statute.

[54] **Second**, there is also a complete absence of law to support the equitable reformation claim and PLS could not have expected a favorable judgment. While equitable reformation is a recognized remedy, North Dakota statute makes it undeniably clear that such relief is not available where it would prejudice the rights acquired by third persons in good faith and for value. See N.D.C.C. § 32-04-17. PLS could not have reasonably believed that the Alleged PLS Mortgages and Assignments could be reformed to encumber the Subject Property without prejudicing Valueplus given that PLS was aware that Valueplus had to take the 2017 Foreclosure Action all the way through trial in order to complete a foreclosure action of the Fidelity Capital Mortgage (a first priority position mortgage based on the record title) and then become the record title owner of the Subject Property only for PLS to then assert that it has a superior right to the Subject Property despite its interest not appearing of record.

[55] **Third**, Valueplus satisfied the pleading requirement of N.D.C.C. § 28-26-01(2) as it alleged the frivolous nature of PLS claims against it in its Answer to the Complaint, which is a responsive pleading as required by statute. *Appellant App. 58-59*; see also N.D.R.Civ.P. 7(a)(2) (noting that an answer to a complaint is a pleading). Therefore, the district court did not abuse its discretion in determining PLS's claims to be frivolous which entitled Valueplus to recover its "reasonable actual and statutory costs, including reasonable attorney's fees," pursuant to section 28-26-01(2), N.D.C.C., from PLS.

2. The district court did not abuse its discretion in determining that PLS made untruthful allegations in the Complaint without reasonable cause.

[56] In the Complaint, PLS alleges that "[t]he Defendants had actual and/or constructive notice of Clear Creek Mortgages #1 and #2" and that "[t]he Defendants had inquiry notice of PLS's interests in the Subject Property." *Appellant App. 24*. Section 28-26-31, N.D.C.C., provides as follows:

> Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

N.D.C.C. § 28-26-31.

[57] The district court determined that the above cited allegations of the Complaint were untrue and PLS was—and is—well aware of that fact. **First**, PLS was and is aware that Valueplus did not have actual knowledge of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property based upon Gupta's affidavit filed in the 2017 Foreclosure Action and the other testimony from the parties as part of PLS's unsuccessful attempt to intervene in that action. **Second**, PLS was and is aware that Valueplus did not have constructive notice of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property as it is undeniable that the Alleged PLS Mortgages and Assignments do not accurately describe the Subject Property, were not indexed against the Subject Property, and they do not appear in the tract index or the chain of title for the Subject Property. See N.D.C.C. § 1-01-24; see also N.D.C.C. § 47-19-45. **Third**, PLS was and is aware that Valueplus did not have inquiry notice of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property. Therefore, the district court did not abuse its discretion in determining

that PLS made untrue pleadings which entitled Valueplus to recover "all expenses" pursuant to section 28-26-31, N.D.C.C.

[58] Once a court has decided to award reasonable attorneys' fees to a prevailing party, the court then retains discretion to decide the "amount and reasonableness" of the award. Strand v. Cass Cnty., 2008 ND 149, ¶ 12, 753 N.W.2d 872, 877. The factors listed in N.D.R. Prof. Conduct 1.5(a) are intended to guide a district court in determining the reasonableness of an award of attorney fees. On appeal, it appears PLS challenged Valueplus' entitlement to an award of attorneys' fees and not the "amount and reasonableness" of the award. As such, Valueplus' argument on the "amount and reasonableness" under City of Bismarck v. Thom, 261 N.W.2d 640, 646 (N.D. 1977), and Rule 1.5(a), N.D.R. Prof. Conduct, is not restated herein.

D. The district court did not err in denying PLS's Motion to Amend/Correct the Order Granting Partial Summary Judgment.

[59] PLS argues that the district court erred in denying the Motion to Amend/Correct Order because it abused its discretion in "[r]efusing PLS the opportunity to conduct discovery in this case." *Appellant Br. ¶ 78*. Valueplus' argument as to why the district court did not abuse its discretion in denying PLS's request for additional time for discovery under Rule 56(f), N.D.R.Civ.P, is set forth above in section (A) of this brief and is not restated herein in the interest of judicial economy. However, the district court's analysis in denying the Motion to Amend/Correct Order was not limited to PLS's Rule 56(f), N.D.R.Civ.P., argument. The district court also determined that PLS failed to meet its burden of proof to entitle it to any relief under Rules 59(j) and 60(b) given that motions for reconsideration are not recognized but must be interpreted as either motions to alter or amend a judgment under Rule 59(j), N.D.R.Civ.P., or motions for relief from a

judgment or order under Rule 60(b), N.D.R.Civ.P. E.g., Hammeren v. Hammeren, 2012 ND 225, ¶ 28, 823 N.W.2d 482, 491. However, PLS did not address these issues on appeal so Valueplus is also not addressing the same here.

E. Rule 54(b) certification by the district court was improper.

[60] The district court improperly granted Rule 54(b) certification in the Amended Judgment. Such a certification is the exception to the general rule that an interlocutory order is not appealable until the end of a case. N.D.R.Civ.P. 54(b). Certification "should not be routinely granted and is reserved for cases involving unusual circumstances where failure to allow an immediate appeal would create a demonstrated prejudice or hardship." Tharaldson Ethanol Plant, LLC v. VEI Global Inc., 2014 ND 94, ¶ 14, 845 N.W.2d 900, 905 (internal citations omitted). This Court is not bound by the district court's certification under Rule 54(b) and such a certification is reviewed under an abuse of discretion standard. Id. at ¶ 15. On appeal, this Court must determine whether this case is an "'infrequent harsh case' warranting the extraordinary remedy of an otherwise interlocutory appeal." Id. (quoting Pifer v. McDermott, 2012 ND 90, ¶ 8, 816 N.W.2d 88, 92).

[61] Only "out of the ordinary" circumstances or "cognizable, unusual hardships" warrant certification. If an alleged prejudice is one that applies to all cases under similar circumstances, certification is improper. Tharaldson, 2014 ND at ¶ 21 (internal citations omitted). In evaluating a Rule 54(b) motion, the court "must weigh the competing equities and take into account judicial administrative interests." Id. at ¶ 16. The "trial court is to weigh the policy against piecemeal appeals with whatever exigencies the case may present, and the burden is on the proponent to establish prejudice and hardship

which would result if certification were denied." Peterson v. Zerr, 443 N.W.2d 293, 297 (N.D. 1989). The factors a trial court should analyze when considering certification were set forth in Peterson v. Zerr and are discussed below.

1. The relationship between the adjudicated and unadjudicated parties.

[62] In the Complaint, PLS alleges that it is entitled to money damages from the other named defendants in this action. *Appellant App. 19-23*. PLS purported claims against Valueplus and the Subject Property arise from the same series of underlying transactions and occurrences between PLS and the named defendants. Certification under these circumstances is error. As a general matter, a court errs by "direct[ing] the entry of a final judgment pursuant to Rule 54(b) if the same or closely related issues remain to be litigated against the undismissed defendants." Peterson, 443 N.W.2d at 298 (internal citations omitted). The reasons for that are two-fold: first, the "undismissed" defendant(s) cannot participate in the interlocutory appeal and so may be prejudiced by the decision on appeal; and second, facts adduced at trial of undismissed defendants could undermine any decision on that earlier appeal. Id. Moreover, certification is not appropriate where, like here, claims against both dismissed and undismissed parties "arise from the same series of underlying transactions and occurrences and are related both factually and legally." Id. Therefore, this consideration does not support certification.

2. Likelihood of mootness by future developments in the trial court.

[63] This prong addresses the possibility that the outcome of a trial may render moot any issue this Court decides on an earlier, certified appeal. Here, there is a possibility that future developments in the trial court with the remaining, undismissed defendants

may make the issues PLS appealed moot. These developments include what was intended by the parties to the underlying promissory notes and mortgages, and various assignments thereof, giving rise to the Alleged PLS Mortgages and Assignments. "'Potential mootness is a just reason for delay' in N.D.R.Civ.P. 54(b) analysis" which supports the normal postponement of review until the entire case is decided. Tharaldson, 2014 ND 94 at ¶ 20 (quoting Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240, 241 (N.D.1993)). The absence of a likelihood of mootness does not alone support certification. See Peterson, 443 N.W.2d at 299 (noting that the absence of possibility that appellate review may be mooted "is not, standing alone, reason to certify under Rule 54(b)"). Therefore, this consideration does not support certification.

3. Possibility of duplicative review.

[64] The third factor in a Rule 54(b) assessment is whether this Court may be required to consider the same issue a second time. Again, the facts and circumstances which PLS allege give rise to its claims against Valueplus and the Subject Property are the same facts and circumstances which give rise to its alleged claims (although enumerated as different causes of action) against the remaining, undismissed defendants. Specifically, how it came to take an assignment of, and become the ostensible owner and holder of, the Alleged PLS Mortgages and Assignments. Therefore, the prospect of an appeal on the same or substantially similar issues is a realistic possibility, arguing against certification.

4. The presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final.

[65] The Judgment stems from the frivolous and untrue nature of PLS allegations against Valueplus, and there is no unresolved or pending counterclaim from Valueplus against PLS. Therefore, setoff against the Judgment here does not appear to be an issue.

5. Miscellaneous factors.

[66] As to delay, a mere delay in conduct of trial does not warrant certification. PLS argued that delay will occur here. However, PLS created this scenario itself by including all of the defendants it did in this suit. In fact, the appeal may delay progression of this case towards trial against the remaining defendants whom PLS chose to include in the action. Any delay here would arise from the appeal, not the trial against those defendants remaining after Valueplus' dismissal. Such circumstances exist in every case involving dismissal of less than all defendants. There is no extraordinary circumstance or unusual hardships at issue here.

[67] As to economic considerations, PLS argues the possibility that Valueplus may dispose of the Subject Property if certification is not granted which would damage PLS as the Subject Property serves as its only security for its claims in this action (an assertion Valueplus denies). If PLS's argument was correct, then every case involving real property would receive a Rule 54(b) certification. PLS appears to be either concerned about the strength of its remaining claims against the undismissed defendants or in the solvency of the undismissed defendants should it prevail. Again, PLS chose to bring its "unsecured" claims against the remaining defendants and its concerns do not rise to an "extremely harsh outcome" which supports certification. PLS did not cite any authority which stands for the proposition that cases involving real property are somehow inherently appropriate for 54(b) certification given the perceived risk that the same could be disposed of until such time a final, appealable judgment is entered in a given action.

[68] As to length of trial, bringing Valueplus back into the action would do nothing but lengthen and complicate the trial. As to the frivolity of competing claims, the

"competing claims" here are those PLS filed against the remaining, undismissed defendants. PLS can hardly characterize those claims as frivolous, having maintained its suit against those defendants since commencement.

[69] As to relative expense, PLS argued that the specter of a second trial and the associated expense merit certification. However, that proposition has been routinely rejected. See, e.g., Peterson, 443 N.W.2d at 299 (citing cases). In Peterson, the North Dakota Supreme Court agreed with the reasoning of the First Circuit Court of Appeals in Spiegel v. Trustees of Tufts Coll., 843 F.2d 38, 45–46 (1st Cir.1988), which rejected a similar assertion:

> "Nothing in the papers before us suggests a pressing, exceptional need for immediate appellate intervention, or grave injustice of the sort remediable only by allowing an appeal to be taken forthwith, or dire hardship of a unique kind. The hypothetical portrait of additional trials painted by plaintiff looks to us to be not only speculative, but sophistic. Virtually *any* interlocutory appeal from a dispositive ruling said to be erroneous contains the potential for requiring a retrial. Moreover, interpretations of Rule 54(b) must take into account systemic effects as well as individualized ones. To entertain an early appeal just because reversal of a ruling made by the district court *might* transpire and *might* expedite a particular appellant's case would defoliate Rule 54(b)'s protective copse. This would leave the way clear for the four horsemen of too easily available piecemeal appellate review: congestion, duplication, delay, and added expenses. The path, we think, should not be so unobstructed."

Peterson, 443 N.W.2d at 299 *(*quoting Spiegel, 843 F.2d at 45–46) (emphasis in original). Here, as in Peterson, PLS demonstrated no out-of-the-ordinary circumstance or hardship that might result from deferral of resolution. If the Court were to accept PLS rationale, just like in Peterson, such an interpretation "would sanction [this Court's] review of virtually every appeal from an otherwise interlocutory judgment. Such an interpretation and application of Rule

54(b) would emasculate its purpose." Peterson, 443 N.W.2d at 300. Therefore, Rule 54(b) certification was improper and this Court, consequently, need not reach the merits of this appeal.

IV. ORAL ARGUMENT REQUESTED

[70] Oral argument will likely assist the Court in its understanding of the issues presented including the timeline of underlying events at issue in this action.

V. CONCLUSION

[71] For the foregoing reasons, Valueplus respectfully requests this Court affirm the Order Granting Defendant Valueplus Consulting, LLC's Motion for Partial Summary Judgment dated January 9, 2020 (Doc. No. 77), the Order Granting Defendant Valueplus Consulting, LLC's Motion for an Award of Attorneys' Fees dated May 21, 2020 (Doc. No. 140), the Order Denying Plaintiff PLS Services, LLC's Motion to Amend/Correct Order Granting Summary Judgment dated May 21, 2020 (Doc. No. 141), the Summary Judgment as to Count I (Equitable Reformation) and Count X (Mortgage Foreclosure) and Dismissing Defendant Valueplus Consulting, LLC with Prejudice dated May 27, 2020 (Doc. No. 148), and the Amended Summary Judgment as to Count I (Equitable Reformation) and Count X (Mortgage Foreclosure) and Dismissing Defendant Valueplus Consulting, LLC with Prejudice dated September 23, 2020 (Doc. No. 189).

[72] DATED this 10th day of February, 2021.

CROWLEY FLECK PLLP
Attorneys for Defendant/Appellant Valueplus

By: */s/ Trevor A. Hunter*
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VI. CERTIFICATE OF COMPLIANCE

[73] I, Trevor A. Hunter, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certify that the foregoing brief complies with the page limitation in Rule 32, N.D.R.App.P., as it is a total of 43 pages (from the cover page through the signature line after the Conclusion) and the argument on the appropriateness of N.D.R.Civ.P. 54(b) certification does not exceed 5 of the 43 total pages.

/s/ Trevor A. Hunter
TREVOR A. HUNTER (ND Bar ID #07959)

VII. CERTIFICATE OF SERVICE

[74] I, Trevor A. Hunter, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certifies that on this 10th day of February, 2021, true and correct copies of the **BRIEF OF APPELLEE** and **APPENDIX OF APPELLEE** were served by **E-Mail** and by **North Dakota Supreme Court E-Filing** as follows:

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and by depositing the same, with postage prepaid, by **first class mail** in the United States mail at Williston, North Dakota in envelopes addressed as follows:

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