20130245
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 10, 2014
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20130245

Northstar Founders, LLC, f/k/a Northstar Agri Industries, LLC,

Plaintiff, Appellee and Cross-Appellant,

v.

Hayden Capital USA, LLC, Hayden Capital Corp., Irish Financial Group, Inc., MDL Consulting Group, LLC, Peter Williams, Stephen Hayden, Robert Liebig, and Andrew Zweig,

Defendants,

Hayden Capital USA, LLC, Irish Financial Group, Inc., MDL Consulting Group, LLC, Robert Liebig, and Andrew Zweig,

Third-Party Plaintiffs,

v.

PICO Northstar, LLC, and PICO Northstar Hallock, LLC,

Third-Party Defendants and Appellees,

Hayden Capital USA, LLC, Hayden Capital Corp., MDL Consulting Group, LLC, Peter Williams, Stephen Hayden, and Andrew Zweig,

Defendants, Appellants and Cross-Appellees.

Appeal from Memorandum Opinion and Order dated April 28, 2011, Order dated July 20, 2011, Memorandum Opinion and Order dated August 24, 2012, Memorandum Opinion and Order dated November 30, 2012, Order dated February 1, 2013, and Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment dated April 25, 2013
Civil No. 09-2011-CV-00192
Cass County Courthouse, East Central Judicial District
The Honorable Steven L. Marquart, Presiding

BRIEF OF APPELLANTS

Ronald H. McLean (ND# 03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph No.

CASES

North Dakota

Other Jurisdictions

RULES

I. STATEMENT OF ISSUES

[1] Whether the District Court erred in concluding that it had personal jurisdiction over Hayden Capital USA and Hayden Capital Corp.

[2] Whether the District Court's determination that Peter Williams acted in his capacity as an employee of Oppenheimer rather than as a member of Hayden Capital USA when he introduced Northstar to a source of financing for its plan to build a canola plant, is clearly erroneous when, among other things, Northstar never entered into a finder's agreement with Oppenheimer and refused to authorize Oppenheimer to introduce investors or act on its behalf in any manner.

II. STATEMENT OF THE CASE

[3] In 2008, Northstar Agri Industries, LLC ("Northstar"), acting through its agent MDL Consulting Group, LLC ("MDL", and together with Irish Financial Group, Inc., "Irish/MDL") approached Peter Williams ("Williams") of Hayden Capital USA, LLC ("Hayden USA") to find Northstar financing to build a canola processing facility in Minnesota. Hayden USA delivered. Shortly after being engaged, Hayden USA (acting through its member, Williams) introduced Northstar to PICO Holdings ("PICO"), which led to Northstar securing $160 million to build the plant. In doing so, Hayden USA succeeded where some 17 other finders had tried and failed. Yet rather than rewarding Hayden USA for its success by paying the finder's fee that Northstar had contractually agreed to in its written finder's agreement with Hayden USA (the "Hayden Agreement"), Northstar instead brought this action. And rather than bringing the action in New York (the forum selected in the Hayden Agreement), Northstar brought it in North Dakota in a transparent effort to avoid or at least delay paying the fee Hayden USA earned by forcing Hayden USA to

litigate this matter in an inconvenient jurisdiction having barely any contact with the underlying dispute.

[4] When it became apparent that Northstar's original complaint would not suffice to establish personal jurisdiction in North Dakota over Hayden USA and Hayden Capital Corp. ("HCC") (collectively, the "Hayden Defendants"), Northstar moved to amend its complaint to add an absurd fraud claim to anchor its personal jurisdiction arguments. Rather than seeing this for what it was – a disingenuous attempt by Northstar to artificially manufacture personal jurisdiction – the District Court erred by finding, without even the benefit of a proposed amended complaint, that personal jurisdiction was proper under subsection (2)(C) of the long-arm statute (which applies only to torts). Ultimately these tort claims were pled and later dismissed by the Court, yet the District Court retained the case, effectively rewarding Northstar's near-frivolous pleading and blatant forum shopping.

* * *

[5] Northstar commenced this action on January 14, 2011 against Hayden USA, HCC, and Irish/MDL, just days after Hayden USA threatened to bring suit against Northstar in New York to recover the agreed upon fee.[1] Northstar's original Complaint sought a declaratory judgment that it did not owe any fees to the defendants. Northstar alleged no fraud, misrepresentation, or deceit in the original Complaint. (Appendix[2] at 31-34).

[6] On February 18, 2011, the Hayden Defendants moved to dismiss the Complaint for lack of personal jurisdiction. (Doc. 9). In response, Northstar sought to amend its complaint to add a fraudulent inducement claim so as to avail itself of North

[1] On January 28, 2011, Hayden USA commenced an action against Northstar in the United States District Court for the Southern District of New York seeking payment. That action remains pending.

[2] Hereinafter, the Appendix will be referenced as "App."

Dakota's long-arm statute with respect to torts. (Doc. 32). Northstar did not include a proposed amended pleading with its motion, but instead relied on factual allegations contained in a pair of affidavits which Northstar argued were sufficient to confer personal jurisdiction because they averred that the Hayden Defendants had engaged in "tortious conduct expressly aimed at North Dakota … knowing that the harm caused was likely to be suffered in North Dakota." (Doc. 32 at 20). Nowhere in these motion papers did Northstar explain how the alleged tortious conduct had damaged it or even mention the word "damage" at all.

[7] The Hayden Defendants opposed Northstar's motion to amend on the ground that the proposed fraud claim – premised on Northstar's President's assertion that Williams had held himself out as an agent for Oppenheimer & Co. ("Oppenheimer") rather than Hayden USA when he sought to secure a source of financing for Northstar – was implausible on its face. (Docs. 73-74). The court, on April 28, 2011, granted Northstar's motion to amend and denied Hayden USA's motion to dismiss. The court determined that jurisdiction was appropriate under subsection (2)(C) of the long-arm statute, based solely upon Northstar's unpled tort claim. (App. 51-55). On May 20, 2011, Northstar subsequently filed its amended complaint, asserting a second cause of action for "fraud." (App. 56-61).

[8] The Hayden Defendants thereafter asserted a cross-claim for breach of contract against Northstar, as well as equitable claims against third-party defendants PICO-Northstar, LLC and PICO-Northstar-Hallock, LLC (collectively "PICO-Northstar"). (Doc. 127; *see* App. 137-71).

[9] In March 2012, Northstar again amended its complaint, adding Williams, Stephen Hayden ("Hayden"), Robert Liebig ("Liebig"), and Andrew Zweig ("Zweig") as parties and asserting additional claims. In sum, Northstar (1) maintained its count for declaratory judgment; (2) amended its fraud claim to fraudulent inducement against Hayden USA; (3) asserted fraud and deceit against the Hayden Defendants, Williams, Hayden, Irish/MDL, Liebig, and Zweig; (4) asserted wrongful/tortious interference against the Hayden Defendants, Williams, and Hayden; (5) asserted piercing the corporate veil against the Hayden Defendants, Williams, and Hayden; (6) asserted punitive damages against the Hayden Defendants, Williams, Hayden, Irish/MDL, Liebig, and Zweig; and (7) asserted negligent misrepresentation against the Hayden Defendants, Williams, Hayden, Irish/MDL, Liebig, and Zweig. (App. 89-109).

[10] All parties moved for summary judgment. During the pendency of the motions, the New York federal court granted the Hayden Defendants' motion to dismiss Northstar's counterclaims, which were identical to Northstar's tort claims in this action, with prejudice and without leave to replead on the ground that Northstar had not and could not allege an actionable tort claim. (App. 358-72). On August 24, 2012, the District Court applied collateral estoppel to dismiss all of the tort claims asserted by Northstar against the Hayden Defendants. (App. 181-83).

[11] In light of the dismissal of Northstar's tort claim for fraud – which was the sole basis for the Court's finding of personal jurisdiction – the Hayden Defendants renewed their motion to dismiss the action (now consisting exclusively of non-tort claims) for lack of personal jurisdiction. (Doc. 557). The District Court denied the motion. (App. 190-94).

[12] The case proceeded to a bench trial on February 15, 2013. On April 25, 2013, the District Court issued a Memorandum Opinion containing its findings of fact and conclusions of law. Among other things, the Court found that Williams had acted on behalf of Oppenheimer rather than Hayden USA when he introduced Northstar to PICO, and therefore dismissed Hayden USA's counterclaim for breach of contract and granted Northstar's request for declaratory relief. (App. 336-544).

III. STATEMENT OF FACTS

[13] In 2006, Northstar, led by its President, Neil Juhnke ("Juhnke"), and CFO, Tom Persson ("Persson"), began a search for financing to build a canola plant in Hallock, Minnesota. Initially, Northstar focused on engaging exclusive finders to seek debt and equity for its plant. After several unsuccessful exclusive engagements, Northstar resolved to focus on non-exclusive finders' agreements to gain broader exposure to investors. (Trial Transcript[3] at 1309-39).

[14] In April 2008, Northstar entered into a non-exclusive finders' agreement with Irish/MDL, headed by Liebig and Zweig. (Tr. 1339-50). Zweig contacted Williams and asked if he would assist Northstar in raising capital. (Tr. 155-59). Williams, who grew up in Canada and resides in New York, was a member of Hayden USA and a director of its company manager, HCC. (Tr. 84-85, 96). He was also employed at that time at Oppenheimer. (Tr. 89-90). Zweig was familiar with Williams through Zweig's work earlier that year as an advisor to a company called Ecology Coatings ("Ecology"), for which Hayden USA had a secured a $350,000 bridge loan. Liebig was a member of Ecology's board of directors. (Tr. 123-35).

[3] Hereinafter, the Trial Transcript will be referenced as "Tr."

[15] Hayden USA was formed in February 2008, and organized under the laws of Delaware, for the purpose of finding sources of capital for companies in the United States. (Tr. 105-08). Hayden is the President of Hayden USA. The company manager of Hayden USA is HCC, a Canadian corporation. (Tr. 107, 719-22). Prior to accepting his position as a director of HCC in 2005, Williams sought and received approval from his then employer, CIBC World Markets ("CIBC") – Oppenheimer's predecessor – to act in a dual capacity for both HCC and CIBC. (Tr. 92-95). Williams thereafter annually updated CIBC and later Oppenheimer about his continued dual capacity role at HCC. This information was disclosed annually to FINRA, a regulatory body, which made it publicly available. (Tr. 103-04).

[16] On April 23, 2008, Zweig introduced Williams to Juhnke on a conference call. At this time, Williams thought that Oppenheimer might be interested in the project. (Tr. 160-61). Juhnke forwarded to Williams a financial model for the project along with a draft non-disclosure agreement ("NDA"). (App. 195-201). Williams ultimately entered into the NDA on Oppenheimer's behalf. (App. 203).

[17] It quickly became apparent to Williams that Oppenheimer would not be interested in the project. First, the engagement would be non-exclusive, which itself almost certainly eliminated any chance Oppenheimer would be interested. During the entire time that Williams was at Oppenheimer/CIBC, he had never been involved in a non-exclusive engagement. Second, Williams learned that the head of Oppenheimer's regional office in Minneapolis had a negative view of the transaction, and had not become engaged when the opportunity was offered a year prior. Third, the venture had already been shopped to

investors for a year with no success and was therefore "tainted." Fourth, the market for investments such as this had deteriorated significantly over the prior year. (Tr. 161-71)

[18] Based upon these factors, Williams was virtually certain that Oppenheimer's new deal committee – which needed to approve any new engagements – would pass on the project, and he didn't want to embarrass himself presenting an opportunity guaranteed to garner a cold reception. Because of the authority granted to him by CIBC to represent HCC on transactions, Williams contacted Hayden regarding Northstar. Hayden agreed that Williams should negotiate a contract with Northstar on behalf of Hayden USA, the American side of HCC's business. (Tr. 171-72).

[19] On April 27, 2008, Williams sent Zweig documents related to Hayden USA (proposed engagement agreement and NDA) and instructed Zweig that Williams' personal "earthlink.net" email account should be used for communications "related to Hayden Capital." (App. 204-18). At this time, Williams proposed splitting a 3.0% fee between Hayden USA and Oppenheimer, with 2.5% for Hayden USA and the remaining 0.5% for Oppenheimer as sort of a "tip of the hat". (Tr. 172; App. 204-18). To this end, Williams sent Zwieg on April 28, 2008, a proposed Oppenheimer engagement agreement giving it a 0.5% fee. (App. 324-31).

[20] The next morning, Zweig communicated to Williams that Liebig had some minor comments that would ensure the matter went smoothly with Juhnke. (App. 239). Liebig conveyed his concerns to Williams that evening. Liebig's email discloses that he spoke with Persson and identifies Persson's concerns that he did not want multiple engagements with a perceived layering of fees. Liebig wrote "As I explained earlier, it is important to try to merge Opp[enheimer]/Hay[den USA] into one agreement so as to

remove the thought they are being layered with fees." (App. 240-41). Williams understood this to mean that Northstar wanted a single agreement with either Hayden USA or Oppenheimer, thus Williams drafted a proposed agreement which excluded Oppenheimer and provided the full 3.0% fee would be earned by Hayden USA. (App. 243-51).

[21] The next day, Zweig sent Williams an email stating that he believed the breakdown of fees in the proposed agreement was reasonable. Zweig noted that, by proposing a fee of only 3.0% for Hayden USA, Williams was "actually discounting his services." (App. 252). Liebig wrote to Williams a short time later, stating:

> Thanks I think that this, coupled with your walking them [Northstar] through who they [Hayden USA] are and how you are tied to them [Hayden USA], will give them comfort that they are not being brokered to death.

(App. 254). Thereafter, Liebig and Zweig arranged a conference call, at the request of Williams, for May 1, 2008. (App. 255-56). Prior to the call, Zweig sent Williams an email stating:

> On the call you need to characterize Hayden more as having relationship/experience with the end investor rather than as a broker.

(App. 258-59).

[22] During the call, Williams communicated to Juhnke that Hayden USA was well positioned to succeed with the transaction. Williams explained the 3.0% success fee for Hayden USA and made it clear that he would be working under the Hayden Agreement, which would be forthcoming. (Tr. 189-91).

[23] On May 2, 2008, Zweig then sent the proposed Hayden USA engagement agreement to Juhnke and wrote:

> Neil, Here you go. Please return to me. *This will trigger Peter's efforts* to garner Term Sheet(s) [from investors]. I will call you shortly to discuss structure.

(App. 267) (emphasis added). Juhnke executed the Hayden Agreement later that day. (App. 334-42). Juhnke testified at trial that Northstar never engaged Oppenheimer and never authorized Oppenheimer to make any introductions to investors or seek financing on Northstar's behalf. (Tr. 1260).

[24] Consistent with Williams' testimony that he would not have made any introductions for Northstar without a signed finders' agreement, only after Northstar executed the Hayden Agreement did Williams begin introducing potential investors to it. On May 5, Williams forwarded a list of potential financing sources to Juhnke. (Tr. 213, 254; App. 277-78). In the weeks that followed, Williams and Juhnke remained in contact and multiple NDAs were executed with sources showing initial interest in the project. (App. 279-97).

[25] In June 2008, Williams learned that another Oppenheimer employee, Paul Parhar ("Parhar"), had a contact at PICO. Parhar arranged an introductory call between his contact, Damian Georgino ("Georgino"), and Williams. Parhar initiated the call but then did not participate. He stayed in the room but worked from his Blackberry while Williams and Georgino spoke. (Tr. 232-36; App. 338-39).

[26] Williams introduced Northstar and PICO on a conference call on July 25, 2008. (Tr. 244-45). Two days later, a Non-Binding Memorandum of Understanding ("MOU") expressing PICO's desire to invest in the equity of Northstar was prepared. (App. 300-06).

[27] After Williams learned of the proposed MOU, he considered how the situation had changed from April 2008 when he was confident the Oppenheimer committee would have shown no interest in the Northstar project. As a transaction now looked more

probable, he determined to present Northstar with an Oppenheimer engagement letter with the same 3.0% fee, on the condition that he would tear up the existing Hayden Agreement if Northstar engaged Oppenheimer. In other words, it was Northstar's option. This proposed Oppenheimer agreement was sent via email from Williams to Juhnke on August 11, 2008. (App. 306-12). Ultimately, the proposed Oppenheimer agreement was not executed by any of the parties. More importantly, the Hayden Agreement was never "torn up" or terminated, and remained in full force and effect until Northstar terminated it as part of its initial complaint in this action.

[28] Throughout the summer of 2008, it was contemplated that ING Capital LLC ("ING") would finance a loan for the project with PICO providing the equity. Unfortunately, the deepening economic crises, spurred by the failure of Lehman Brothers and AIG, stalled the transaction in September 2008. (Tr. 268-69).

[29] Northstar was unable to secure an alternate source of financing throughout 2009. In February 2010, a year after Williams had left the employ of Oppenheimer, Juhnke reached out to Williams, seeking his continued assistance in searching for financing. (Tr. 321-23). At that time, PICO and Northstar resumed their negotiations. On July 6, 2010, a memorandum of understanding was entered between PICO and Northstar which set out that PICO would invest $60 million of equity capital for the purpose of constructing the canola plant. In September 2010, PICO announced the intended transaction. (Tr. 326-327, 1434-35; App. 318). Williams contacted Juhnke and Webb seeking payment of the 3.0% finder's fee due under the Hayden Agreement, but was rebuffed. (Tr. 347-49; App. 322-23). In December 2010, Northstar closed on the equity investment by PICO and debt facility arranged by ING. (Tr. 1294-95).

IV. ARGUMENT

[30] The District Court made two errors that mandate reversal. First, it wrongly concluded that it had personal jurisdiction. Second, it wrongly concluded that – against all common sense – Williams introduced Northstar to PICO as an agent for Oppenheimer, not Hayden USA. As a result of these errors, Northstar now gets what it sought all along, the $160 million in financing, without ever having to pay Hayden USA a dollar.

[31] Because the District Court never had personal jurisdiction over the Hayden Defendants, this case should be dismissed and all proceedings involving the Hayden Defendants voided. This case involves a contract between two *Delaware* entities, Hayden USA and Northstar, governed by *New York* law, to be performed in *New York*, solicited by MDL, a *Michigan* entity, that sought Hayden USA's assistance in raising financing for a canola plant, to be built in *Minnesota*, where the financing in fact came from PICO, a firm domiciled in *California*. The sole contacts with North Dakota arise from telephone calls and emails among persons in New York, Michigan and North Dakota. Under these circumstances application of long-arm jurisdiction here clearly does not comport with – but plainly offends – due process.

[32] To avoid this obvious conclusion, Northstar sought to amend its complaint to allege fraud and thus avail itself of North Dakota's long-arm statute applicable to torts. The District Court erred in finding personal jurisdiction based on the proposed fraud claim because, even accepting all the allegations made by Northstar, Northstar never made a prima facie case supporting its claim – as demonstrated by the New York court's subsequent dismissal of Northstar's tort counter-claims on their face. Indeed, not only did Northstar fail to properly plead its fraud claims, these claims were fundamentally impossible: Northstar claimed that Hayden USA defrauded it into entering a non-exclusive engagement with no

upfront fee that provided Northstar the very financing it had sought unsuccessfully for years – in essence 'tricking' Northstar into the very thing it sought all along. Since Northstar never established a prima facie case of fraud, the District Court erred by applying the North Dakota long-arm statute applicable to tort claims. And, as set forth below, the remaining non-tort portions of the long-arm statute do not support personal jurisdiction here under the well-settled precedent of this Court.

[33] But even if the District Court had personal jurisdiction over the Hayden Defendants, and it did not, the final decision of the District Court must nevertheless be overturned as the court was clearly and obviously mistaken in concluding that Williams acted for Oppenheimer rather than Hayden USA when he introduced Northstar to PICO. Namely, the District Court concluded that Williams secured the Hayden Agreement, then discarded Northstar's authorization, indemnification and promise of compensation in that agreement, to instead perform the same services as an agent of Oppenheimer (which Northstar unequivocally confirmed it never engaged) for free. This conclusion defies all common sense and must be overturned.

A. THE DISTRICT COURT LACKED PERSONAL JURISDICTION OVER THE HAYDEN DEFENDANTS.

1. Standard of Review and Applicable Law

[34] Analysis of a trial court's ruling regarding personal jurisdiction is a question of law, subject to the de novo standard of review for legal conclusions and a clearly erroneous standard for factual findings. *Bolinske v. Herd*, 2004 ND 217, 689 N.W.2d 397, 400. "If the defendant challenges the court's jurisdiction, the plaintiff bears the burden of proving jurisdiction exists." *Id.* (quoting *Ensign v. Bank of Baker*, 2004 ND 56, 676 N.W.2d 786, 790.

[35] A two-part test applies for deciding when a court may properly exercise personal jurisdiction over a nonresident defendant. "The court first must decide whether the requirements of the state's long-arm provision, N.D. R. Civ. P. 4(b)(2), are satisfied and, if so, then must decide whether the exercise of personal jurisdiction comports with due process." *Lund v. Lund*, 2012 ND 255, 825 N.W.2d 852, 854. "To satisfy due process concerns, the nonresident defendant must have sufficient minimum contacts with North Dakota so the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice." *Id.*

2. Discussion

[36] The District Court erred when it concluded that it had personal jurisdiction over the Hayden Defendants based on an unpled tort claim. (App. 53-54). Even accepting that the Court could find personal jurisdiction based upon a cause of action *that had never been pled*, the factual allegations contained in Northstar's affidavits were wholly insufficient to state a cause of action in tort for fraudulent inducement as a matter of law. Since Northstar never stated a viable tort claim for fraudulent inducement, the District Court's analysis of personal jurisdiction under subsection (2)(C) was improper as that section only applies to claims based in tort. Instead, only subsections (2)(A) and (2)(B) had any application to this case, and those provisions do not confer personal jurisdiction over Hayden USA or HCC.

a. The District Court Erred In Concluding That It Had Personal Jurisdiction Over the Hayden Defendants Under Subsection (2)(C) of North Dakota's Long-Arm Statute Because Northstar Never Established A Prima Facie Tort Claim.

[37] In order to establish jurisdiction under subsection (2)(C) of North Dakota's long-arm statute, "a plaintiff need not prove a defendant committed a tort by a

preponderance of evidence; rather, the plaintiff satisfies his burden as to the first prong of the personal jurisdiction test by establishing a prima facie cause of action." *Hansen v. Scott*, 2002 ND 101, 645 N.W.2d 223, 230. To state a prima facie cause of action for fraud, a plaintiff must demonstrate a misrepresentation or suppression of fact, reliance, and damages. *See Charlson v. Charlson Estate*, 75 N.W.2d 321, 328 (N.D. 1956). North Dakota's Rule 9(b) requires a heightened pleading standard for fraud: "the circumstances constituting averments of fraud must be stated with particularity." N.D. R. Civ. P. 9(b).

[38] Here, the affidavits and supporting exhibits submitted by Northstar and relied on by the Court failed to establish the essential elements of Northstar's fraudulent inducement claim with any degree of particularity. Nor could they, as Northstar's entire fraud claim was nonsensical: Northstar claimed the Hayden Defendants duped Northstar into believing Williams was acting on behalf of Oppenheimer, rather than Hayden USA, in order to cause Northstar to enter into a contract with Hayden USA; a contract that required no payments whatsoever from Northstar unless Hayden USA succeeded in finding the financing for Northstar. Thus even if the Hayden Defendants had somehow (absurdly) mislead Northstar by this, and they did not, Northstar could not establish damages, which is an "essential element" of a claim for fraud, *Schneider v. Shaaf*, 1999 ND 235, 603 N.W.2d 869, 874, because it was impossible for Northstar to suffer any harm under the contract, as it owed nothing unless Hayden USA delivered, and Northstar accepted, financing.

[39] Naturally, the affidavits of Juhnke and Webb do not contain a single allegation relating to damages. Indeed, the word "damage" does not appear in either affidavit, or anywhere in Northstar's 17-page Motion to Amend. Certainly, neither affidavit alleges, as Northstar later alleged in its second amended complaint and in its cross-

complaint in the New York federal action, that Northstar suffered a "detriment to [its] ability to effectively continue its operations, including to raise additional capital, and amounts [it] must pay the PICO entities to indemnify them from the fraudulent and meritless claims asserted against them." (App. 174-75, 365). Of course, even if the affidavits had contained such allegations, they would not have sufficed to establish the element of damages, as the New York court found when it dismissed Northstar's counterclaims. (App. 364) ("'[D]amages attributable solely to the existence of litigation are clearly insufficient to sustain the necessary element of damages' in a fraud claim.") (citations omitted).[4] Likewise, the District Court, in analyzing whether the factual allegations set forth by Northstar were sufficient to confer jurisdiction based on its fraudulent inducement claim, never even addressed the issue of damages.

[40] Damages are not the only element missing from Northstar's allegations of fraud. The affidavits also fail to allege any misrepresentation or suppression of fact by the Hayden Defendants that occurred prior to the execution of the Hayden Agreement and which therefore could have induced Northstar to enter into that agreement. Juhnke's affidavit contains only six paragraphs relating to events occurring prior to the agreement's execution. Specifically, the affidavit alleges that: (1) "Zweig introduced [Juhnke] to Peter Williams of Oppenheimer," (2) Williams, on behalf of Oppenheimer, negotiated and entered into an NDA with Northstar on April 28, 2008, (3) Zweig "introduced [Juhnke] to Hayden Capital" on May 2, 2008 and "encouraged Northstar to sign up with Hayden Capital because

[4] The District Court in this action ultimately adopted the New York court's findings and gave collateral estoppel effect to its dismissal of Northstar's fraud claim. Certainly, if the detailed allegations regarding damages in the New York cross-complaint and second amended complaint were insufficient to state a viable cause of action for fraud, then Northstar's utter failure to allege any damages at all when it sought to amend its complaint should have doomed its bid to assert its fraud claim in the first instance.

it was a competitor of Oppenheimer and having a competitor on contract would trigger Peter Williams' increased efforts on behalf of Oppenheimer," and (4) "Hayden Capital prepared a nonexclusive finders agreement and sent it to Northstar via Mr. Zweig." (App. 36-37).

[41] Absent from Juhnke's averment of facts is any allegation of a misrepresentation or omission by Williams or any other person affiliated with the Hayden Defendants. Crucially, when Zweig introduced Williams to Juhnke, Williams ***was*** an employee of Oppenheimer. When Williams negotiated and executed the NDA with Northstar, Williams ***was*** acting on behalf of Oppenheimer. These facts have never been in dispute. To the extent any misrepresentation is alleged at all, it was made by Zweig when he allegedly (and nonsensically) told Northstar that executing the Hayden Agreement would somehow "trigger Peter Williams' increased efforts on behalf of Oppenheimer", i.e. *trigger Williams efforts on behalf of a company Northstar never engaged*. (App. 36).

[42] Having failed to allege that the Hayden Defendants made any misrepresentations prior to the execution of the Hayden Agreement, Northstar of course cannot demonstrate that it relied on any such misrepresentations when it entered into the agreement. Not surprisingly, the only allegation in Juhnke's affidavit regarding Northstar's reliance is directed to statements made by Zweig. (App. 39) ("We had entered into the Hayden Capital Finders Agreement **because of Mr. Zweig's representation**.") (emphasis added). Thus while Northstar's reliance on Zweig's alleged misrepresentation is established, what is missing – of course – is any allegation that Northstar relied on a similar misrepresentation by the Hayden Defendants.

[43] Likewise, the District Court did not identify in its decision any misstatement or omission by the Hayden Defendants prior to the execution of the Hayden Agreement that

could possibly have induced Northstar to enter the agreement. Instead, the court pointed out simply that Williams had "sent emails to Northstar here in North Dakota representing himself to be associated with Oppenheimer," and concluded that this "arguably constituted a misrepresentation." (App. 54). However, the emails to which the court refers are those between Williams and Juhnke leading to the execution of the NDA between Oppenheimer and Northstar on April 28, 2008.[5] (App. 44-50). These communicate nothing more than the fact that Williams was employed as an Executive Director at Oppenheimer and that he was acting in that capacity when he negotiated and executed the non-disclosure agreement between Oppenheimer and Northstar three days prior to the introduction of Juhnke to Hayden USA on May 1, 2008. As previously stated, these facts were never in dispute. The District Court's conclusion that the content of Williams' emails "arguably constituted a misrepresentation" is therefore clearly erroneous. The undisputed facts before the court were that Williams was, indeed, employed by Oppenheimer, and that he acted for Oppenheimer when he executed the NDA on April 28, 2008. There is simply no basis in the record for any other finding.

[44] In sum, the District Court erred in finding that it had personal jurisdiction over Hayden USA and HCC pursuant to subsection (2)(C) of North Dakota's long-arm statute. Northstar failed to establish a prima facie cause of action in tort for its claim of

[5] These emails – which were attached to Juhnke and Webb's affidavits as Exhibit 2 – were the only emails exchanged between Williams and Juhnke prior to the execution of the Hayden Agreement. From the date of the Oppenheimer/Northstar NDA, April 28, 2008, through May 2, 2008, the date the Hayden Agreement was executed, Williams communicated via email only with Liebig and Zweig, and notably did so using his "earthlink.net" email address rather than his Oppenheimer email address (Exs. 33-53); these emails were not before the District Court when it decided the issue of personal jurisdiction. Williams and Juhnke did not resume their email communications until three days after the Hayden Agreement was executed, on May 5, 2008. (App. 343-44).

fraudulent inducement, and jurisdiction was therefore improper on the basis of that claim. The District Court's ruling should be reversed.

b. The Exercise of Personal Jurisdiction Over the Hayden Defendants Pursuant to Subsections (2)(A) and (2)(B) of North Dakota's Long-Arm Statute Does Not Comport with Due Process.

[45] Having erroneously ruled that personal jurisdiction over Hayden USA and HCC was authorized pursuant to subsection (2)(C) of the long-arm statute on the basis of Northstar's fraud claim, the District Court did not reach the issue of whether personal jurisdiction is proper under any other provision of the long-arm statute on the basis of the remaining contract claim. As the Hayden Defendants argued before the District Court, it is not.

[46] Subsections (2)(A) and (2)(B) of the long-arm statute only allow for the exercise of jurisdiction over "a person who acts directly or by an agent as to any claim for relief" arising from the person's "transacting any business" or "contracting to supply or supplying service, goods, or other things" within the state. N.D. R. Civ. P. 4(2)(A), (B). The reach of the statute is limited further by due process concerns.

[47] To satisfy due process a "nonresident defendant must have sufficient minimum contacts with North Dakota so the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice." *Ensign*, 2004 ND 56, 676 N.W.2d at 790. To find sufficient minimum contacts supporting specific personal jurisdiction, a court must find that the defendants "purposefully directed their activities towards North Dakota and the [cause] of action arises out of or relates to the defendant's activities in the state." *Ensign*, 2004 ND 56, 676 N.W.2d at 791-92 (internal quotations and citations omitted). The "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."

Beaudoin v. S. Texas Blood & Tissue Ctr., 2005 ND 120, 699 N.W.2d 421, 426 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). It is well settled that merely contracting with a resident is insufficient to confer personal jurisdiction over a defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.")

[48] North Dakota has incorporated these principles into a five-factor test to determine whether personal jurisdiction over a nonresident defendant is appropriate: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of the defendant's contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. *Ensign*, 2004 ND 56, ¶ 12, 676 N.W.2d 786. The "first three factors are of primary concern," but "the fourth and fifth factors are of only secondary importance and are not determinative." *Id.* Thus, North Dakota courts make an overall assessment of the nonresident defendant's contacts with the state rather than conducting a detailed analysis of each individual enumerated factor. *Id.*

[49] Repeatedly, in cases where the nonresident defendant had significantly more contacts with the state than the Hayden Defendants did here, this Court has refused to exercise personal jurisdiction over the nonresident defendants:

[50] *Ensign*. The Court rejected the exercise of personal jurisdiction over the defendant, a Montana bank, in an action by a North Dakota buffalo-feeding business to gain priority over a check from the sale of buffalo fed at the plaintiff's lot, concluding

that the defendant bank never "purposefully directed its activities toward North Dakota." 2004 ND 56, ¶¶ 4, 17, 676 N.W.2d 786. The Court did so despite the fact that loans at issue were to North Dakota customers, the bank had knowledge that the collateral was located in North Dakota, performed inspections of the collateral in North Dakota, and filed financing statements in North Dakota. *Id.* at ¶¶ 16-17.

[51] If the District Court lacked personal jurisdiction over the defendant bank in *Ensign*, then the Court should find the same here. Like the defendant bank in *Ensign*, the Hayden Defendants have never had any physical presence in North Dakota. They never transacted any business in this state. They do not maintain any offices in North Dakota, do not have any employees in North Dakota, do not own property in this state, never solicited business in North Dakota, never contracted to perform services in North Dakota, never approached Northstar in connection with this matter, and enjoy no legal status or capacity in this state. (Doc. 12 [Affidavit of Peter Williams] [hereinafter, "Williams Aff."] ¶ 29).

[52] Hust. In *Hust v. Northern Log Inc.*, the Court rejected personal jurisdiction over a defendant, a Minnesota log cabin supplier, finding that an exercise of jurisdiction would "offend against the traditional notions of justice and fair play under due process." 297 N.W.2d 429, 433 (N.D. 1980). There the defendant had sent the plaintiffs in North Dakota a brochure explaining the procedure for purchasing logs, contracted with the North Dakota resident defendant, sent materials to North Dakota, sent one of its agents into North Dakota to assist in the construction of the plaintiffs' home (multiple times). *Id.* at 430. The Court found that these contacts were insufficient, noting that the defendant "solicits no business in North Dakota through salespersons or

through advertising", and did not "directly serve the North Dakota market." *Id*. at 432-33.

[53] The Court's holding in *Hust* demonstrates there is also no personal jurisdiction over the Hayden Defendants. Indeed, even a number of trips by the *Hust* defendant into North Dakota were not enough to confer jurisdiction over the defendant company. Here, Hayden USA, like the *Hust* defendant, never solicited business in North Dakota and does not "serve" the North Dakota market. Unlike the defendant in *Hust*, Hayden USA representatives *never* set foot in North Dakota. Williams had never heard of Northstar and was not even brought into the matter by Northstar. Williams Aff. ¶ 7. Rather, it was MDL, a Michigan entity, which enlisted Hayden USA's assistance in raising capital for the Minnesota facility and that sent the Hayden Agreement to Northstar for execution. Williams Aff. ¶¶ 5-18. It was coincidence or "fortuitous circumstance" that the entity wanting to build a canola processing plant in Minnesota had an office in North Dakota. Certainly, the Hayden Agreement was not due to any effort by Hayden USA to direct its activities toward North Dakota.

[54] *Bolinske*. In *Bolinske* the Court rejected personal jurisdiction over the defendant, a Colorado law firm, retained by the North Dakota plaintiff to represent two North Dakota residents who had been involved in a car accident in Colorado, because the North Dakota resident initiated contact with the defendant. *Id.* at ¶ 2. The Court reached this decision notwithstanding that the defendant law firm contacted persons or entities in North Dakota at least 168 times by mail and telephone in connection with the matter. *Id.* at ¶ 3.

[55] Here, of course, the Hayden Defendants never initiated any contact with Northstar nor anyone else in North Dakota. Williams Aff. ¶¶ 5-6. Rather, Hayden USA was brought to Northstar by MDL, with the contacts initiating from Michigan. And as in *Bolinske*, all of Hayden USA's services were directed out of state: Hayden USA, from *New York*, secured financing from *California* to build a plant in *Minnesota*. *See also Baron & Co. v. Bank of New Jersey*, 497 F. Supp. 534 (E.D. Pa. 1980) ("subject matter of the contract was in New Jersey. . . . The Bank's only contacts with Pennsylvania were the phone calls and correspondence discussed above. There is no indication that the defendant, through these contacts, intended to invoke the protection of Pennsylvania law.").

* * *

[56] In sum, the well-established precedent from this Court establishes that the exercise of personal jurisdiction over the Hayden Defendants does not comport with due process.

B. THE DISTRICT COURT'S DETERMINATION THAT PETER WILLIAMS ACTED ON BEHALF OF OPPENHEIMER RATHER THAN HAYDEN USA WHEN HE INTRODUCED NORTHSTAR TO PICO IS CLEARLY ERRONEOUS.

1. Standard of Review and Applicable Law

[57] "This Court's review of a district court's findings of fact in a bench trial is governed by the clearly erroneous standard under N.D. R. Civ. P. 52(a)." *Wheeler v. Southport Seven Planned Unit Dev.*, 2012 ND 201, ¶ 23, 821 N.W.2d 746. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if ... on the entire evidence this Court is left with a definite and firm conviction a mistake has been made." *Id.* (quotation omitted).

2. Discussion

[58] The evidence at trial established overwhelmingly that Williams performed the Hayden Agreement on behalf of Hayden USA:

- It was undisputed that Williams had the authority to act on behalf of Hayden USA in connection with Northstar.
- Acting within this authority, Williams testified that he negotiated the terms of the Hayden Agreement. This is confirmed by the extensive email record.
- Acting on behalf of Hayden USA, and as authorized by the Hayden Agreement, Williams sought out investors for Northstar. Critically, Williams testified that he would have never done so without the signed Hayden Agreement and this is corroborated by the contemporaneous email record, which shows that Williams did not provide a single potential investor name until the business day after the Hayden Agreement was signed.
- Oppenheimer, Williams' other employer at the time, had no finder's agreement and Juhnke testified that Northstar never engaged or authorized Oppenheimer to seek funding or contact investors on its behalf.

[59] The District Court's conclusion that, despite having obtained a promise of compensation from Northstar for Hayden USA, Williams cast aside the Hayden Agreement and instead made the PICO introduction on behalf of Oppenheimer is completely illogical and unsupported by the evidence at trial. The evidence was indisputable that it was Williams' efforts that garnered the Hayden Agreement in the first place. Having done so, it would have defied common sense for Williams to then perform the very same services on behalf of Oppenheimer, given that Northstar never engaged or authorized Oppenheimer to find it financing and Oppenheimer had no written agreement with Northstar promising any fee for doing so. There was simply no basis for concluding that Williams would act against his own interest in this manner. Further, what is demonstrably clear from the evidence is that Williams would not have, and did not make any introductions without the Hayden Agreement in place. Therefore all introductions

were made in reliance upon the Hayden Agreement – there would have been no introduction to PICO without it.

[60] Indeed, Williams testified credibly that he made the introduction of Northstar and PICO on behalf of Hayden USA and only later offered to transfer that performance to Oppenheimer – an offer ignored by Northstar. Williams' testimony not only conformed with common sense, but was corroborated by the contemporaneous email record, including an e-mail in which Williams explicitly stated that he saw the Hayden Agreement as way to get "independent" of Oppenheimer, and another in which Zweig confirmed that executing the Hayden Agreement would "trigger Peter's efforts to garner Term Sheet(s)." (App. 264, 267).

[61] One only had to examine Williams' motives to know that he had every reason to perform the Hayden Agreement for Hayden USA and none to perform the non-existent Oppenheimer agreement. Williams' unrebutted testimony established that, for investment bankers such as him, a signed engagement agreement was critical because it was the only means to be paid and because it provided indemnification for potential liability if Williams inadvertently passed on disputed information prepared by Northstar. (Tr. 115). Had Williams chosen to act on behalf of Oppenheimer rather than Hayden USA after securing the Hayden Agreement, he would have needlessly exposed himself to liability and jeopardized his ability to receive compensation for his services. No rational actor would make such a choice.

[62] The District Court, ignoring the obvious irrationality of such a decision, concluded that Williams made the PICO introduction for Oppenheimer based on mere fragments of the evidence presented at trial. None of the evidence identified by the

District Court was capable of supporting its ultimate conclusion. For example, the Court ascribed great weight to the fact that Williams communicated with Juhnke and Georgino using his Oppenheimer email account after the Hayden Agreement was in place, and that those emails contained an automated signature line which identified Williams as an Executive Director at Oppenheimer. (App. 341-42). But, as the trial evidence demonstrated, many parties in this case communicated using email accounts that suggested an organizational affiliation at odds with their true affiliation with respect to the Northstar transaction. For example, Juhnke and Persson frequently sent emails from accounts at "bioenergydevelopmentgroup.com" rather than using their "northstaragri.com" addresses. (*See* Tr. 136-138, 187). Of course, it would be absurd to suggest that Juhnke and Persson's efforts with respect to the Northstar deal were made on behalf of an entity other than Northstar simply because they utilized email addresses other than their "northstaragri.com" addresses. To draw a similar conclusion about Williams from his use of his Oppenheimer account is likewise absurd, particularly since Williams testified that he used the Oppenheimer account simply as a matter of convenience because his "earthlink.net" account was inaccessible during the workday as a result of Oppenheimer's firewall restrictions, and such use was compliant with Oppenheimer's email policy. (Tr. 213-14). Notably, Williams never had a Hayden email address. (Tr. 434).

[63] In its decision, the court pointed out that Williams originally obtained Georgino's name from Parhar, that Parhar initiated the call between Williams and Georgino, and that Williams introduced himself on that call as "Williams from Oppenheimer & Co." (App. 342). These benign facts do not support a finding that Williams acted on behalf of Oppenheimer. First, Parhar conceded that he did nothing more than introduce Williams and

Georgino at the start of the phone call, after which he proceeded to "work[] on his Blackberry while Peter [Williams] talked." Parhar had "no further personal involvement" and did not "know the nature of what went on after that." (App. 334-35). There is no argument that Parhar introduced PICO to Northstar, and nothing in the Hayden Agreement restricted the means by which Williams could initiate contact with potential investors. Second, given that Williams' connection to Georgino was through a fellow Oppenheimer employee, and the introductory phone call took place at Oppenheimer's offices, it is entirely sensible that Williams would have introduced himself at the start of the phone call as an employee of Oppenheimer. In any event, whether Williams initially represented himself to Georgino as working for Oppenheimer is of little relevance to the ultimate question before the court: whether Williams was acting on Hayden USA's behalf when he introduced Georgino to Juhnke over a month later, on July 25, 2008. As described above, there is simply no logical basis to conclude that he was not.

[64] Finally, the District Court apparently ascribed great significance to Juhnke's testimony that he did not recall Williams identifying his affiliation with Hayden USA during their conference call on May 1, 2008. Williams, of course, testified that he made his affiliation clear – something entirely consistent with the undisputed fact that it was Williams (and only Williams) who pitched Hayden USA on this call. (Tr. 1381). The District Court determined that Williams' testimony on this score was not credible, although it did not explain its reasoning beyond stating that the testimony was at odds with Juhnke's and was not directly corroborated by a "confirming memo, letter, or email evidenc[ing] th[e] conversation." (App. 342).

[65] The District Court's findings regarding credibility are entitled to deference, but the fact that the court apparently concluded that Williams did not affirmatively state his affiliation with Hayden USA on the May 1, 2008 phone call does not mean that the court was correct in concluding that Williams was therefore working for Oppenheimer. The contemporaneous email record makes clear that Williams was acting on behalf of Hayden USA on that very call. Several emails leading up to the call demonstrate that Williams was joining the call as an agent of Hayden USA (App. 254) (urging Williams to walk through who Hayden USA is and his affiliation with it) and that he wanted ensure that Northstar was fully informed about Hayden USA's involvement (App. 242) (in which Williams expresses his willingness to go over Hayden USA's fee structure directly with Northstar). The emails immediately following the May 1 call also establish that Williams' was acting for Hayden USA. The day after the call, Juhnke received the proposed Hayden Agreement by email from Zweig, in which Zweig wrote "This will trigger Peter's efforts to garner Term Sheet(s);" Northstar then reviewed and executed the agreement. (App. 267-76). The District Court did not mention these emails in its decision, nor did it mention that Williams did not provide a single potential investor name until after the Hayden Agreement was signed.

[66] In short, the evidence at trial, and basic common sense, overwhelmingly established that Williams performed under the Hayden USA contract: (i) Hayden and Williams, the only two relevant witnesses, both testified that Williams performed for Hayden USA; (ii) their testimony was corroborated by an extensive email record; (iii) Northstar refused to retain or authorize Oppenheimer to work on its behalf; and (iv) Williams' incentives were to solely perform for Hayden USA. The District Court's

finding to the contrary is unsupported by the evidence and therefore clearly erroneous. The District Court's decision should be reversed.

VI. CONCLUSION

[67] For the foregoing reasons, the order of District Court finding personal jurisdiction over the Hayden Defendants should be reversed and the case dismissed. In the alternative, should this Court determine that the District Court's order on personal jurisdiction was correct, the District Court's order dismissing the Hayden Defendant's cross-claim for breach of contract should be reversed and the case remanded to the District Court for further proceedings.

Dated this 10th day of January, 2014.

/s/ Ronald H. McLean
Ronald H. McLean (#03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,928.

Ronald H. McLean (#03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

By: /s/ Ronald H. McLean
Ronald H. McLean

AFFIDAVIT OF SERVICE BY EMAIL

Northstar Founders, LLC, f/k/a Northstar Agri Industries, LLC
vs.
Hayden Capital USA, LLC, *et al.*
District Court Civil No. 09-2011-CV-00192
Supreme Court No. 20130245

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

The undersigned, being first duly sworn, deposes and says that she served the attached:

BRIEF OF APPELLANTS; and
APPENDIX OF APPELLANTS

on January 10, 2014, by email as follows, to-wit:

Todd Zimmerman
Benjamin J. Hasbrouck
Fredrikson & Byron, P.A.
51B Broadway, Suite 402
Fargo, ND 58102
TZimmerman@fredlaw.com
BHasbrouck@fredlaw.com

James K. Langdon
Shannon L. Bjorklund
Dorsey & Whitney, LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Langdon.Jim@dorsey.com
Bjorklund.Shannon@dorsey.com

Sarah A. Herman
Ross Nilson
Dorsey & Whitney, LLP
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Herman.Sarah@dorsey.com
Nilson.Ross@dorsey.com

M. Ray Hartman, III
Shannon Sorrells
Cooley, LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
rhartman@cooley.com
ssorrells@cooley.com

Robert J. Udland
Vogel Law Firm
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
rudland@vogellaw.com

To the best of affiant's knowledge, the email addresses above given are the actual email addresses of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Katie Rudnick
Katie Rudnick

Subscribed and sworn to before me this 10th day of January, 2014.

/s/ Lacey A. Hruby
Lacey A. Hruby, Notary Public
Cass County, North Dakota
Commission Expires: 9-21-16