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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,
Appellants.

On Appeal From Judgment After Bench Trial
District Court of the County of Cass

~~Appellant~~ ~~Appellee~~

BRIEF OF ~~APPELLEE~~/CROSS-~~APPELLANT~~
MDL CONSULTING GROUP, LLC

DORSEY & WHITNEY LLP
James K. Langdon (# MN-0171931)
Shannon L. Bjorklund (# MN-0389932)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

DORSEY & WHITNEY LLP
Sarah A. Herman (#03399)
Ross Nilson (#06784)
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Telephone: (701) 235-6000

Appellant
Attorneys for Appellee MDL Consulting Group, LLC

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STATEMENT OF THE ISSUES

[1] Whether the trial court erred in dismissing MDL Consulting, LLC's breach of contract claim by finding the contract ambiguous and concluding that Peter Williams was not a first introduced party, where, as a matter of Minnesota law and as the trial court had held in denying Northstar's motion for summary judgment, the language is not ambiguous and does encompass Mr. Williams.

[2] Whether the trial court erred in dismissing MDL Consulting, LLC's unjust enrichment and quantum meruit claims against PICO Northstar Hallock, LLC in that it failed to consider the entity received the benefit of MDL's services by having the transaction introduced to it through MDL's efforts.

STATEMENT OF THE CASE

[3] The case began in January 2011 as a declaratory judgment action by which Northstar Founders, LLC f/k/a Northstar Agri Industries, LLC ("Northstar") sought a declaration that in connection with its financing of a canola processing plant in Minnesota it did not owe any fees to Irish Financial Group, Inc. and Appellant MDL Consulting, LLC (separately, "Irish" and "MDL" and together "Irish/MDL"), with which it had contracted to find financing, or to Hayden Capital USA, with which it had also contracted.[1] Irish/MDL counterclaimed for breach of contract, seeking contractual fees for introducing Northstar to Peter Williams, who led Northstar to the party that provided financing. Irish/MDL later brought third-party claims against PICO Northstar Hallock, LLC, the entity which ultimately owned the financed plant. Northstar also brought fraud claims against Irish/MDL and their principals.

[4] After extensive discovery, Irish/MDL and Northstar cross-moved for summary judgment on the declaratory judgment and breach of contract claims. Both parties submitted extensive evidentiary material, including the contract in question and testimony and emails of the parties regarding its formation and performance. In a ruling dated August 24, 2012, the court denied both motions and set the matter on for trial. Order on Summary Judgment (APP.MDL0129). [2]

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[1] The claims against and by Hayden Capital USA and related entities are not material to the issues raised on appeal by MDL and therefore are not set out or further discussed herein.

[2] References to pages in MDL's appendix are noted as APP.MDL___. For this Court's convenience, references to the trial court's Order on Summary Judgment ("SJ Order) and Trial Order ("Tr. Order"), and the Northstar-MDL Contract ("Contract") will refer both to the document and to the appendix page number. All other citations will include the appendix page number only.

[5] In denying Northstar's motion for summary judgment, the court found that the contract language in question was not ambiguous and that Mr. Williams was a first introduced party. It held, however, that there was a question of fact as to whether "the financing was consummated as a result of the introduction of [Mr.] Williams to Northstar." APP.MDL0135 (SJ Order).

[6] A trial to the court occurred from February 5, 2013 to February 15, 2013. The court entered its ruling on April 25, 2013 granting Northstar declaratory relief that it did not owe fees to Irish/MDL, dismissing Irish/MDL's breach of contract claim, and dismissing Northstar's fraud claims. APP.MDL0144 (Tr. Order). Judgment was entered on June 7, 2013. APP.MDL0163. By order dated July 23, 2013, the trial court awarded costs to Northstar. APP.MDL0165.

[7] Northstar and MDL each filed a timely notice of appeal. Irish did not appeal. APP.MDL0172-179.

STATEMENT OF FACTS

I. NORTHSTAR AND MDL ENTER INTO A BINDING CONTRACT.

[8] This dispute arises out of the financing of a canola processing plant in Hallock, Minnesota ("Hallock plant"). APP.MDL0144 (Tr. Order). Northstar had plans to build the Hallock plant, but was not successful on its own in raising the substantial capital needed to construct the plant. APP.MDL0190-91.[3] Northstar engaged over a dozen consultants and brokers on a non-exclusive basis to search for the $160 million in equity and debt financing needed to build the Hallock plant. APP.MDL0193, 0281-308. One of these agreements was with MDL.[4] APP.MDL0159 ¶ 8 (Tr. Order). After negotiations, review by counsel on both sides, and authorization by Northstar's Board of Governors, the contract was executed. APP.MDL0192, 0334. The trial court found that Northstar and MDL entered into an enforceable contract. APP.MDL0159 ¶ 8 (Tr. Order).

[9] The contract states that Northstar retained MDL as "its independent financial advisor" to "perform consulting services related to corporate finance and other financial services" for "funding the development and construction of an integrated canola processing and refining facility near Hallock, Minnesota." Contract ¶¶ 3, 4 (APP.MDL0261). In return for these consulting services, Northstar agreed to pay MDL a success fee if MDL "first introduce[d] . . . another party or entity, and that as a result of such introduction, a Financing is consummated." *Id.*; APP.MDL0151 (Tr. Order).

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[3] The trial court accepted the parties' joint designations of excerpts of certain deposition transcripts. APP.MDL0215-16. References to exhibits and transcripts in this Statement of Facts are included only to give this Court context for the facts. MDL does not challenge any of the trial court's factual findings.

[4] The contract was between Northstar and Irish/MDL. Because Irish is not appealing, all later references to the Irish/MDL contract or actions taken by Irish/MDL are attributed to MDL only.

[10] The MDL success fee of two percent is similar to other fee agreements Northstar entered. *Compare* Contract ¶ 3 (APP.MDL0261) *with* APP.MDL0292 (5% fee), 0296 (2% fee), and 0299 ¶ 3(b) (4% fee). In addition to the two percent fee, MDL was also promised "a certificate representing five (5%) percent of the then-outstanding capital stock of the Company" in the event of a qualified "Financing." Contract ¶ 4 (APP.MDL0261); APP.MDL0152 (Tr. Order).

[11] Finally, the contract called for the application of Minnesota law to any disputes arising out of it terms. Contract ¶ 13 (APP.MDL0263).

II. MDL FIRST INTRODUCES NORTHSTAR TO WILLIAMS WHO INTRODUCES IT TO PICO.

[12] Within weeks, MDL introduced Northstar to Peter Williams, an investment banker who had recently joined Oppenheimer & Co.'s New York office. APP.MDL0149, 0160 ¶ 10 (Tr. Order).[5] Williams thereafter contacted PICO Holding, Inc. ("PICO"), a company that "seeks to acquire, build and operate businesses where significant value can be created from the development of unique assets." APP.MDL0249. Williams described the Hallock plant investment opportunity and, shortly thereafter, Williams introduced Northstar to PICO. APP.MDL0150, 0159 ¶ 4 (Tr. Order).[6] Northstar and PICO were not acquainted with each other before then. APP.MDL0335.

[13] Northstar and PICO entered into a Memorandum of Understanding ("MOU") in August 2008, setting out a proposed deal structure. However, the collapse

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[5] The District Court expressly found that "MDL introduced Williams to Northstar." APP.MDL0160 ¶ 10 (Tr. Order).

[6] The dispute about whether Williams was working for Oppenheimer or Hayden Capital USA in introducing Northstar to PICO consumed most of the trial testimony and exhibits. That dispute is not material to MDL's claims on appeal.

of AIG and Lehman Brothers put the deal on hold. APP.MDL0194. In July 2010, the economy improved sufficiently to allow the deal to move forward, and in September 2010, PICO and Northstar publicly announced that they had reached a formal agreement. The trial court expressly found that PICO provided financing "[a]s a result of that introduction" of PICO and Northstar by Williams in 2008. APP.MDL0159 ¶ 5 (Tr. Order).[7]

III. PICO PROVIDES "FINANCING" WITHIN THE MEANING OF THE MDL CONTRACT.

[14] Northstar and PICO entered into an Amended Contribution Agreement in December 2010. The trial court properly described the terms of the Agreement as follows:

> PICO Holdings, Inc., contributed $60,000,000.00 to a new corporation, PICO Northstar Management, LLC, wholly owned by PICO Holdings, Inc. PICO Northstar Management, LLC, in turn contributed its $60,000,000.00 to another new corporation, PICO Northstar, LLC. In turn, PICO Northstar Management owned 87.66 percent of PICO Northstar, LLC shares. The other 12.34 percent of the shares of the PICO Northstar, LLC was owned by Northstar Agri Industries, LLC, which had contributed approximately $8,400,000 in assets. PICO Northstar, LLC then formed a new corporation, PICO Northstar Hallock, LLC. All the assets contributed by Northstar Agri Industries, as well as the $60,000,000.00 contributed by PICO Northstar Management, was placed into PICO Northstar Hallock. ING in turn invested $100,000,000.00 in PICO Northstar Hallock, LLC, secured by a guarantee and equity pledge from PICO Northstar, LLC, and a guarantee from PICO Holdings, Inc.

APP.MDL0147-48 (Tr. Order). Although the corporate structure is convoluted, the result of the transaction is simple: in the words of the trial court, "the fact that new corporations

[7] Between September 2008 and April 2010, Northstar frequently referred to PICO as an investor standing by for when a debt provider could be found. APP.MDL0239, 0243, 0270.

to fund the money through were created, does not change what the funding was. PICO Holdings . . . contributed $60,000,000.00 toward the building of a canola plant. It, in return, received securities or stock. Northstar contributed $8,400,000.00 in return for receiving securities or stock." APP.MDL0148 (Tr. Order).

[15] The trial court expressly found "that there was a 'Financing' as that term is defined in the Irish and MDL contract." APP.MDL0152 (Tr. Order).

IV. THE PLANT IS BUILT.

[16] Northstar broke ground on the plant in early 2011, began crushing canola in 2012, and is at full operating capacity and has been generating revenue ever since. APP.MDL0202, 0206-07. The trial court noted that Northstar has "a 12.34 percent share ownership in the $160,000,000.00 canola plant that has projections of doing very well in the future." APP.MDL0148 (Tr. Order).

[17] Neither Northstar nor any PICO entity have paid any fee to MDL or any outside entity for bringing PICO to the table as the source of the financing, both equity and debt, for the project. However, Northstar paid success fees to Neil Juhnke, its CEO, and Tom Persson, its former CFO. APP.MDL0252.

ARGUMENT

I. STANDARD OF REVIEW.

[18] This Court reviews a trial court's determination that contract language is ambiguous de novo. *Kortum v. Johnson*, 2008 ND 154 ¶ 43, 755 N.W.2d 432, 447 ("Whether a contract is ambiguous is also a question of law."). If the language of a contract is not ambiguous, its interpretation is a matter of law. *Sorlie v. Ness*, 323 N.W.2d 841, 844 (N.D. 1982). This Court also reviews a trial court's determination of the proper interpretation of unambiguous language de novo. *Kortum*, 2008 ND 154 ¶ 43.

[19] "A trial court's finding of unjust enrichment is a matter of law and is fully reviewable by this court." *Opp v. Matzke*, 1997 ND 32 ¶ 8, 559 N.W.2d 837, 839-40.

II. THE TRIAL COURT ERRED IN DISMISSING MDL'S CONTRACT CLAIM.

[20] The MDL contract states:

> The Company and Advisor further acknowledge and agree that Advisor may act as a finder of potential ***sources of Financing***. The Company hereby agrees that in the event Advisor shall first introduce to the Company another ***party or entity***, and that as a result of such introduction, a Financing is consummated (the "Introduced Financing"), the Company shall pay to Advisor a fee equal to two (2%) percent of the total amount of the Financing.

Contract ¶ 3 (APP.MDL0261) (emphasis added). The trial court correctly found that MDL first introduced Peter Williams to Northstar; that Mr. Williams introduced Northstar to PICO; that as a result of this introduction, Northstar received funding from PICO; and that PICO's investment was a "Financing" as defined in the MDL contract. APP.MDL0152, 0159 ¶¶ 4 & 5, 0160 ¶ 10 (Tr. Order). These are questions of fact, and the trial court's judgment is upheld unless the court abused its discretion. As described below, there was no abuse of discretion in deciding these factual issues.

[21] However, the trial court erred as a matter of law when it decided that the MDL contract was ambiguous and that Mr. Williams was not a first introduced "party or entity" within the meaning of the contract. The contract is unambiguous and its terms apply to the introduction of Mr. Williams.

A. Peter Williams Is A "First Introduced Party."

[22] The trial court ruled that the MDL contract was ambiguous and, based on certain parol evidence, that the parties had intended that MDL be compensated under the contract only if it introduced Northstar to a source of funding and that Williams was not a source. On summary judgment, however, the court had held the opposite – that the contract was not ambiguous and Williams need not be a source of funding in order for MDL to earn its fee. APP.MDL0132 (SJ Order) ("The Court concludes that the phrase 'another party or entity' does include Williams.").][8]

[23] The court got it right the first time. In any event, the first ruling, as the law of the case, should have controlled at trial. *Cf. Tom Beuchler Constr., Inc. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987) (applying the law of the case doctrine).

1. The Provision Is Not Ambiguous.

[24] The interpretation of a contract is a matter of law unless the contract is ambiguous, and whether a contract is ambiguous is also a question of law. *Minn. Teamster Pub. & Law Enforcement Employees Union v. Cnty. of St. Louis*, 726 N.W.2d 843, 847 (Minn. Ct. App. 2007); *see also Kortum*, 2008 ND 154 ¶ 43. Although the trial

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[8] In its trial order, the trial court stated that it "held in the Order denying Northstar's Motion for Summary Judgment on this issue, the second sentence of paragraph three *could* include Williams, and that was the basis of the Court's ruling." APP.MDL0153 (Tr. Order) (emphasis added). However, the Court, in its summary judgment order, "conclude[d] that the phrase 'another party or entity' *does* include Williams." APP.MDL0132 (SJ Order) (emphasis added).

court cited North Dakota cases only in its order, the MDL contract is governed by Minnesota law. Contract ¶ 13 (ADD.MDL0263).

[25] Under Minnesota law, a "contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The unambiguous language of one provision is not changed by a different or more restrictive term elsewhere in the contract. *Mauer v. Kircher*, 587 N.W.2d 512, 514 (Minn. Ct. App. 1998).

[26] Contractual language is given its "plain and ordinary meaning," and will be enforced even if it produces a harsh result. *Minneapolis Pub. Housing Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999); *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979). Courts will not relieve a party from its contractual obligations simply because the party, in hindsight, thinks the contract is a bad bargain. "In the interpretation of . . . contract[s], we start with the principles that parties are free to contract as they see fit and that the language of the contract is to be given its plain and ordinary meaning." *Employers Mut. Liab. Ins. Co. of Wisc. v. Eagles Lodge of Hallock, Minn.*, 165 N.W.2d 554, 556 (Minn. 1969).

[27] The MDL contract has two different terms: "sources of Financing," and "party or entity." The use of two different terms illustrates that these provisions have different meanings. The first sentence describes a general goal: that MDL "may act as a finder of potential sources of Financing." Contract ¶ 3 (APP.MDL0261). The second sentence describes the conditions under which MDL would be compensated: "in the event Advisor shall first introduce to the Company another party or entity, and that as a

result of such introduction, a Financing is consummated." *Id.* If the term "party or entity" simply meant "sources of Financing," there would be no need for two different terms.

[28] The Random House Webster's Dictionary defines "party" as "a person or group that participates in some action, affair, plan, etc.," a "participant" or "the person under consideration; a specific individual." Random House Webster's Unabridged Dictionary at 1416 (2d ed. 2011); *see Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 301 (Minn. Ct. App. 1997) (using Webster's dictionary to interpret contractual term); *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (using Random House dictionary to interpret contractual term). An "entity" is defined even more broadly: it is "something that has a real or distinct existence," "a thing" or an "existence or being." Random House Webster's Dictionary 649. As the trial court correctly noted on summary judgment, these common definitions contain no hint of a restriction to sources of financing. APP.MDL0131-32 (SJ Order). Indeed, because that interpretation is contrary to the plain meaning of the terms, it is unreasonable as a matter of law. *See Carlson*, 749 N.W.2d at 46.

[29] Moreover, the term "as a result of such introduction" would have no purpose if "party or entity" merely means "source of Financing." The contract states that MDL is entitled to payment if it "first introduce[s] to the Company another party or entity, and *that as a result of such introduction*, a Financing is consummated." Contract ¶ 3 (APP.MDL0261) (emphasis added). The contract does not state that MDL will introduce the Company to "a party or entity who provides Financing" or that Northstar will accept "Financing from an introduced party or entity" – phrases that are much

simpler and would show that "party or entity" meant "source of Financing." Rather, the language of the contract – by creating two separate terms and by emphasizing that payment is due if Financing occurs "as a result of" the introduction (not "with" the party introduced) – covers introductions to third parties as well as to sources of Financing.

[30] The trial court's reliance on North Dakota law is problematic, because the Minnesota Court of Appeals addressed precisely this issue in a similar case and held that a contract was not ambiguous even if reliance on the plain language yields an unexpected result. In *Mauer v. Kircher*, the Minnesota Court of Appeals held that the terms "majority of shares" and "majority of shareholders" had different meanings, even when they were both used in a section describing the requirements for holding a meeting. 587 N.W.2d 512, 514 (Minn. Ct. App. 1998). Rather than equating the two different terms – as the trial court (there and here) did – the court held that the use of two different terms "demonstrates [the drafters'] clear intention of creating different requirements for parallel issues." *Id.* As in *Mauer*, the MDL contract's use of a defined term ("source of Financing") in one sentence and another term ("party or entity") in the next sentence demonstrates that these are different terms for parallel (but not identical) issues.

[31] Finally, a broad definition of the term "party or entity" is consistent with the purpose of the contract: to enable Northstar to locate financing. The introductory paragraph of the contract states that "[Northstar] desires to raise capital through such a financing for the purposes of funding the development and construction of an integrated canola processing and refining facility near Hallock, Minnesota." Contract intro. (APP.MDL0260). The funding and construction are complete, and Northstar now owns a

"canola processing and refining facility near Hallock, Minnesota" as a result of MDL's introduction to Williams.

[32] A party is bound by the language of its contract, even if in hindsight the party wishes the contract were written differently. "Although in retrospect [the provision] is imprecise and unwieldy, [courts] permit parties to freely negotiate and voluntarily agree to contract terms, and [ ] do not interfere in that process absent fraud, duress, or criminal conduct." *Re-Solutions Intermediaries, LLC v. Heartland Fin. Group, Inc.*, 2010 WL 1192030, *2-*3 (Minn. Ct. App. Mar. 30, 2010) (citing *Metro. Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 124 (Minn. 1991)); *see also Lor*, 591 N.W.2d at 704 (courts enforce plain language even if harsh result). There is no evidence in the record of any fraud, duress or criminal conduct in the formation of the MDL contract. Northstar should be held to the agreement it made, particularly when it has received all of the benefits contemplated by the contract.

[33] Put simply, interpreting the term "party or entity" to have its ordinary and accepted meaning is required by Minnesota law and is consistent with the plain language and overall purpose of the contract. The trial accordingly erred in finding the language ambiguous.

2. <u>Williams Is A First Introduced Party.</u>

[34] The trial court found MDL introduced Northstar to Williams as a matter of fact. APP.MDL0160 ¶ 10 (Tr. Order). This was essentially uncontested. All witnesses agreed – and Northstar admitted in its sworn discovery responses – that this was so. In Northstar's own words: "Northstar admits that it was first introduced to Peter Williams, as an Executive Director of Oppenheimer & Co., by Andrew Zweig." APP.MDL0313 ¶ 2.

[35] As a party or entity MDL introduced to Northstar, then, Williams is a first introduced party under the contract.

B. The Introduction To Williams Resulted In The Transaction.

[36] MDL proved at trial that the Hallock transaction was consummated as a result of its introduction. The trial court correctly held that MDL first introduced Mr. Williams to Northstar, that Mr. Williams introduced Northstar to PICO, and that "[a]s a result of this introduction," a financing by PICO was consummated. APP.MDL0152, 0159 ¶¶ 4 & 5, 0160 ¶ 10 (Tr. Order).

1. Williams Introduced Northstar To PICO.

[37] The trial court found Williams introduced Northstar to PICO, and the evidence supports that finding. APP.MDL0159 ¶ 4 (Tr. Order). All witnesses agreed – and Northstar admitted in its sworn discovery responses – that Williams introduced Northstar to PICO. In Northstar's own words: "Northstar admits that it was first introduced to contacts at PICO in connection with its efforts to obtain debt or equity financing by Peter Williams of Oppenheimer & Co." APP.MDL0314 ¶ 3.

2. The 2010 Transaction Was A Direct Result Of The 2008 Introduction.

[38] The trial court correctly found, as a matter of fact, as well that the 2010 transaction occurred as a result of that introduction. APP.MDL0159 ¶ 5 (Tr. Order). The evidence overwhelmingly supports that finding. Notwithstanding a delay occasioned by the collapse of the markets, the 2010 Northstar-PICO transaction was the direct result of the 2008 introduction. All of the evidence at trial – both by testimony and by document – shows that PICO remained interested in the Northstar deal from August 2008 until its consummation in December 2010.

[39] During cross examination, Mr. Juhnke admitted that there was a constant connection with PICO. APP.MDL0195-98. This relationship is evident in the documents:

- In November 2008, the Northstar board minutes stated that the "ING/Pico [sic] option is still viable, however, this option could take 6 to 9 months." APP.MDL0239.

- In February 2009, the board acknowledged that "Pico [sic] is engaged but is waiting for what we bring back to the table, would need a term sheet on debt." APP.MDL0243.

- In April 2010, Mr. Juhnke told Mr. Zweig that Northstar had "PICO in the stable right now" and agreed that PICO "is playing it the same way as they did before." APP.MDL0270.

These documents support the trial court's finding and make it clear that PICO was a financing option from 2008 through 2010.

[40] PICO also admitted that the 2010 transaction was the result of a two-year effort starting in 2008. On September 21, 2010 – the date on which PICO and Northstar signed the Contribution Agreement – PICO's CEO John Hart made the following statement:

> After nearly two years of investigation and analysis, current economic conditions have provided an opportunity to enter a business segment with compelling demographics.

APP.MDL0249. PICO included this statement in its 8-K filing with the SEC. *Id.* Mr. Hart specifically acknowledged that the Contribution Agreement was the result of a two-year effort, and noted that market conditions were the cause of delay. *Id.* Likewise, Mr. Hart admitted on cross-examination that he "remained intrigued" by Northstar throughout the 2008-2010 time period. APP.MDL0208.

[41] Nor is the 2010 deal sufficiently different from the 2008 deal to break the causal chain. In August 2008, when the first Memorandum of Understanding ("MOU") between PICO and Northstar was in place, the Northstar board discussed the fact that "[PICO] would put up the capital and own 80% of [Northstar]" and would "become the decision makers for [Northstar]." APP.MDL0234-35. Although PICO would consider forming an advisory committee, PICO wanted only Messrs. Juhnke and Persson to participate in any board decisions. APP.MDL0235. The ultimate structure of the 2010 transaction may have included several intermediate LLCs, but it was essentially the same deal as envisioned in 2008: PICO contributed capital and took the majority ownership interest in the project.

[42] In sum, the 2010 transaction was consummated as a result of MDL's introduction of Williams to Northstar. If that transaction was a financing within the meaning of the contract, then, MDL is entitled to its fees.

C. The Transaction Was A "Financing."

[43] The trial court ruled on summary judgment that "to the extent of Northstar's ownership in PICO, it has received financing." APP.MDL0132 (SJ Order). After trial, the court correctly ruled that the transaction "was a 'Financing' as that term is defined in the Irish and MDL contract" despite the fact that new corporations were created through which to fund PICO's money. APP.MDL0152 (Tr. Order). As the court observed, such a structure is typical of such transactions. APP.MDL0148 (Tr. Order). The evidence strongly supports that finding.

[44] The MDL contract does not limit the definition of "Financing" to an amount invested directly "into" Northstar; rather, it covers any "public offering and/or any privately negotiated debt, equity or equity-linked investment *accepted by* the

Company." Contract intro. (APP.MDL0260) (emphasis added). The 2010 business combination[9] was an equity-linked investment, and it was accepted by Northstar. It does not matter whether any *cash* was accepted by Northstar; the question is whether an equity-linked investment was accepted by Northstar, which undisputedly occurred. Northstar received and accepted PICO's proposed structure, the money was contributed, and the plant has been built. Northstar could have chosen not to accept this equity-linked investment, if Northstar did not like the terms, but Northstar chose to accept the investment and is therefore bound to pay the success fees attached to that investment.

[45] Unsurprisingly, the evidence showed that Northstar has repeatedly admitted that the transaction is a Financing. Northstar even described the transaction as "the PICO financing" in the context of discussing the MDL dispute. Exhibit 4.24 to the Amended Contribution Agreement (titled "Litigation"), asserted in December 2010 that Northstar was not liable because MDL did not introduce it to PICO, but did not argue that the PICO deal was not a Financing. APP.MDL0253. In fact, the Exhibit specifically referred to the transaction as a financing: "Neither Irish Financial nor MDL Consulting introduced Northstar to PICO. Therefore, Northstar . . . does not believe the agreement applies to the *PICO financing*." *Id.* (emphasis added). Northstar also issued a press release in December 2010 titled "Northstar Agri Industries LLC Announces Definitive Agreements to Provide *Financing* for a Kittson County Minnesota Canola Processing

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[9] Unlike an acquisition – where a party receives a payment and relinquishes all rights to the assets – the transaction was a business combination: Northstar contributed its assets, PICO contributed cash, and each entity took an ownership share that was equivalent to its investment. APP.MDL0147-48 (Tr. Order). Northstar still retains a 12.34% interest in the Hallock plant, through its ownership interest in PICO Northstar, LLC, along with the full panoply of shareholder rights and a pro rata interest in any future dividends. (*See* APP.MDL0279 (PICO SEC filing describing the Northstar "business combination").)

Plant." APP.MDL0158 (emphasis added). Likewise, PICO has referred to the "$60 million of equity finance" in its SEC filings. APP.MDL0279.[10]

[46] If PICO had invested directly into Northstar and received an equity stake of 88% in return, the success fee would be calculated based on the money received by Northstar. The same result should occur, even though PICO and Northstar decided to establish a clean LLC that would combine PICO's funding and Northstar's assets, instead of investing directly into Northstar.[11]

[47] Moreover, the unambiguous language of the MDL contract that MDL is entitled to a cash success fee of "two (2%) percent *of the total amount* of the Financing" supports this conclusion. Contract ¶ 3 (APP.MDL0261). This only makes sense. As several witnesses testified, green field projects are harder to source than established operations. *See, e.g.,* APP.MDL0184-86, 0209. If success fees were dependent on the percentage ownership of the receiving corporation, a success fee for a green field project (where the receiving company has less equity and therefore a smaller percentage of the

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[10] From the beginning, Northstar knew that it would be required to pay success fees as part of the cost of closing the Northstar-PICO transaction. In April of 2008, Northstar budgeted over $6.4 million for financing and closing fees. APP.MDL0231. Northstar expected to amortize the amount over a many-year period.

[11] Northstar did not hesitate to award success fees to Messrs. Juhnke and Persson, APP.MDL0252, even though their contracts are susceptible to the same argument that there was no "financing" to trigger a fee. Mr. Persson's contract states that he is entitled to a fee if Northstar "has sufficient funds to proceed with the Transaction," which is defined as "funding of debt for the development and construction" of the Hallock plant. APP.MDL0318. Mr. Juhnke's contract entitles him to a fee if there is a "Financial Closing," which Mr. Juhnke amended his contract in 2009 to define as "sufficient capital to build the Hallock plant." APP.MDL0255, 0322. Northstar argues that it is not liable to MDL because it did not directly receive any funds; if this were true, neither Mr. Juhnke nor Mr. Persson should have been compensated because Northstar never received "sufficient funds" or "sufficient capital." Likewise, Northstar's argument that the debt financing was not part of the transaction fails; if the argument is correct, there was no basis for Mr. Persson's fee.

ultimate ownership) would be lower than the success fee for financing an established canola plant (where the larger amount of existing assets make the project easier to fund, and reserve a larger share for the receiving company).

[48] In sum, by first introducing Williams to Northstar, who then led it to PICO, the source of the financing for the Hallock plant, MDL fulfilled the terms of its contract. It accordingly is entitled to its contractual fees.

III. MDL IS ENTITLED TO DAMAGES.

[49] Because it incorrectly ruled there was no breach of contract, the trial court did not have an opportunity to calculate the fees to which MDL is entitled. As described below, MDL is entitled to damages in the amount of at least $1.2 million, a certificate representing 5% of the stock of PICO Northstar, LLC, prejudgment interest, and attorney's fees and costs.

A. The Success Fee.

[50] The trial court found that PICO provided "financing as that term was defined in the contract, in the amount of $60,000,000.00 toward construction of the canola plant." APP.MDL0159 ¶ 5 (Tr. Order).[12] Under the terms of the MDL contract, MDL is entitled to two percent success fee: $1.2 million based on the initial $60 million investment by PICO. *See* Contract ¶ 3 (APP.MDL0261).

[51] In addition, MDL submitted evidence that PICO invested an additional $15 million in equity as the project progressed. APP.MDL0280, 0326. All of these equity contributions occurred within the 60-month period described in the MDL contract,

[12] Although this finding of fact is referencing the Hayden contract, the trial court held that "the definition of financing in [the MDL] contract is very similar to the definition of financing in the Hayden USA contract." APP.MDL0152 (Tr. Order). Therefore, the trial court's determination of the amount of financing applies equally to the Hayden and MDL contracts.

and are subject to the success fee provisions. Contract ¶ 11 (APP.MDL0263). MDL also submitted evidence that PICO provided $16.7 million of the initial ING loan, after ING was unable to syndicate that portion of the loan. APP.MDL0280. The trial court did not make any findings with respect to this additional evidence, because it incorrectly held that MDL was not entitled to a fee.

[52] MDL respectfully requests that this Court enter a judgment that MDL is entitled to a cash success fee of at least $1.2 million (two percent of the initial $60 million investment), and remand the case for additional factual findings as to whether the success fee exceeds $1.2 million based on PICO's later investments.

[53] MDL is also entitled to pre-judgment interest. Under North Dakota law, "[e]very person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in the person upon a particular day, also is entitled to recover interest thereon from that day." N.D. Cent. Code § 32-03-04. Where there is no contractual interest rate, prejudgment interest is 6 percent. *Weeks v. Geiermann*, 2012 ND 63 ¶ 25, 814 N.W.2d 792, 801; N.D. Cent. Code § 47-14-05. MDL's success fee was due and payable upon closing of the PICO-Northstar transaction on December 23, 2010. Contract ¶ 3 (APP.MDL0261). To the extent further contributions were made, the additional success fees were due and payable upon conclusion of those transactions. MDL requests that this Court remand the case to the trial court for calculation of pre-judgment interest.

B. The Equity Fee.

[54] The contract entitles MDL to 5% of the "then-outstanding stock" of the company, which means the post-financing capital stock.[13] *See* Contract ¶ 4 (APP.MDL0261). This provision is unambiguous as a matter of law. Northstar and PICO invested in PICO Northstar, LLC, which was the sole member of PICO Northstar Hallock, LLC (the entity that owns the plant). In other words, a 5% share in PICO Northstar LLC is equivalent to a 5% share in the Hallock plant. Because Northstar currently possesses shares in PICO Northstar, LLC (and does not have shares in PICO Northstar Hallock, LLC), MDL respectfully asks the Court to award it shares representing 5% of PICO Northstar, LLC.

C. Attorney Fees.

[55] The trial court did not rule on MDL's contractual entitlement to its attorneys' fees and costs in defending this action. The language is unambiguous:

> The Company [Northstar] agrees to indemnify and hold harmless Advisor [MDL] . . . from and against . . . any legal or other expenses in giving testimony or furnishing documents in response to a subpoena or otherwise (including, without limitation, the cost of investigating, preparing or defending any such action, suit, proceeding or claim, whether or not in connection with any action, suit, proceeding or claim in which [MDL] is a party), as and when incurred, directly or indirectly, caused by, relating to, based upon or arising out of [MDL]'s service pursuant to this Agreement.

Contract ¶ 8 (APP.MDL0262). Contracts, including indemnification provisions, are to be interpreted according to their plain language. *Turner*, 276 N.W.2d at 67. Minnesota courts have upheld broad indemnification clauses such as this, even holding that a clause

[13] To the extent this provision could be viewed as ambiguous, MDL's attorney clarified to Mr. Juhnke that the equity fee represented 5% of the entity on a "post financing basis." APP.MDL0233. Mr. Juhnke never replied or disagreed with this statement, and continued to work with MDL.

indemnifying a party for any "act or [] omission" included indemnification for that party's negligence in a suit brought by the other contracting party. *See Davisco Foods Int'l, Inc. v. Blackwater Props., LLP*, 2001 WL 641584, *2 (Minn. Ct. App. June 4, 2001). The language of the indemnification provision is clear – MDL is entitled to indemnification of legal fees for any lawsuit "related to . . . [MDL's] service pursuant to this Agreement," which includes this litigation.

[56] Even were the language to be found ambiguous, MDL submitted the only parol evidence regarding this clause. APP.MDL0328-30; *see also* APP.MDL0217, 0224, 0318. MDL respectfully asks this Court to rule, as a matter of law, that MDL is entitled to attorney fees, and to remand to the trial court for a determination of the amount of fees.

IV. MDL SHOULD RECOVER BASED ON THE EQUITIES.

[57] In the alternative, if MDL does not recover from Northstar for breach of contract, it should recover from PICO Northstar Hallock LLC under the equitable theories of quantum meruit and unjust enrichment. The trial court erred in ruling that PICO Northstar Hallock was not benefitted by the actions of MDL because it did not consider the fact that but for the actions of MDL in introducing Williams to Northstar PICO Northstar Hallock would never have had the opportunity to own and operate the Hallock plant – an opportunity surely of substantial value, else why would PICO have been willing to invest $60MM?

A. Equitable Relief Is Available In These Circumstances.

[58] Equitable remedies exist precisely for situations like this, where parties unfairly avail themselves of benefits or services provided by another while taking steps to ensure that the party cannot be compensated at law. North Dakota recognizes the equitable claims of quantum meruit and unjust enrichment when justice requires

compensation. Equitable remedies are intended to be flexible. *Baker v. Minot Pub. Sch. Dist. No. 1*, 253 N.W.2d 444, 451 (N.D. 1977). "Equity is not inflexible, and the power of a court . . . depends on the factual situation involved and the need for a given remedy in a particular case." *Id*. Likewise, a "lack of precedent is no obstacle to equitable relief which may be appropriate in a particular factual setting." *Id*.

[59] MDL can recover from PICO Northstar Hallock under an equitable theory even though it has a contract with Northstar. This Court has repeatedly stated that "a third party who derives gain from an agreement between others" may be liable for unjust enrichment if "the third party has participated somehow in the transaction through which the benefit is obtained." *Midland Diesel Serv. & Engine Co. v. Sivertson*, 307 N.W.2d 555, 558 (N.D. 1981). Participation in the transaction is only one way in which a third party may be liable; it "is not the only basis that a party can be unjustly enriched under an agreement with others." *Home Ins. Co. of Dickenson v. Speldrich*, 436 N.W.2d 1, 3 (N.D. 1989). Indeed, equitable claims are designed to do justice, despite the existence of minor details that would defeat a contract claim. *Id*.

B. <u>Equity Is Appropriate Here.</u>

[60] Equitable relief is appropriate here for two reasons. North Dakota cases specifically recognize two instances in which a third party may be liable – when the "third party has participated somehow in the transaction through which the benefit is obtained," or when the third party holds and retains the benefit that is the subject of the transaction. *Id.* (internal quotation omitted). PICO Northstar Hallock satisfies both of these scenarios: it actively participated in the transaction that led to liability (the Northstar financing) *and* has received and retained the benefit conferred (the value of Northstar's assets without a reduction for MDL's success fees). *Cf. Opp*, 1997 ND 32 ¶

12 (holding that defendant who acquired property after services were performed was liable to servicing party under theory of unjust enrichment).

[61] The trial court ruled that it would be inequitable to hold PICO Northstar Hallock liable on an equitable theory because PICO and Northstar agreed that Northstar would be liable for any success fees due under the contract. APP.MDL0155 (Tr. Order). This conclusion is misplaced. The agreement between Northstar and PICO does not provide any justification for denying MDL (a third party) compensation for the services it rendered. MDL is entitled to compensation by the new owner (PICO Northstar Hallock) for services it provided to the property. *Cf. Opp*, 1997 ND 32 ¶ 12. Whether Northstar and PICO have an indemnification agreement is beside the point; it would be inequitable for Northstar and PICO to benefit from the value of MDL's services without paying for those services.

C. MDL Has Satisfied The Elements Of Its Equitable Claims.

1. Unjust Enrichment.

[62] MDL has satisfied all of the elements of unjust enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and impoverishment; (4) absence of justification; and (5) absence of a remedy at law. *Albrecht v. Walter*, 1997 ND 238 ¶ 23, 572 N.W.2d 809, 815.

[63] Enrichment. PICO Northstar Hallock was enriched in that it now owns a fully-operational canola processing plant in Hallock, Minnesota. MDL's services led to PICO Northstar Hallock's opportunity to own the plant. North Dakota courts have recognized that professional services leading to obtaining title to property can be the basis for an unjust enrichment claim. *See Allied Realty, Inc. v. Boyer*, 302 N.W.2d 774, 779 (N.D. 1981) (quantum meruit and unjust enrichment claims based on services leading

to foreclosure). PICO Northstar Hallock further benefited from the fact that it obtained the Northstar assets without a reduction for the MDL fee paid out of those assets. If MDL had been paid at closing, the funds would have either come from Northstar's assets (resulting in a reduction in assets contributed by Northstar to PICO Northstar Hallock), or would have come from the funds released at closing (resulting in a reduction in assets contributed by PICO or ING to PICO Northstar Hallock). Therefore, PICO Northstar Hallock has been enriched by receiving the benefits of MDL's services without paying the resulting cost. In a similar case, this Court held that a defendant who purchases property can be liable under a theory of unjust enrichment, even though the plaintiff who drilled a well on the property before it was acquired could have sought recovery from the prior owners before the property was acquired. *Opp*, 1997 ND 32 ¶ 12. As in *Opp*, the new owner of the assets (PICO Northstar Hallock) has benefited from the services provided by MDL and is liable under a theory of unjust enrichment.

[64] Impoverishment. MDL has been impoverished, because it has performed professional services without compensation. *See Bismarck Hosp. Assoc. v. Burleigh Cnty.*, 146 N.W.2d 887, 893 (N.D. 1966) (professional services as basis for equitable claim).

[65] Connection between enrichment and impoverishment. The enrichment (the fully-constructed plant) and the impoverishment (MDL's services) are connected because MDL's services led to the introduction of Northstar and PICO Holdings, Inc. and the later financing of the plant (and creation of PICO Northstar Hallock).

[66] Absence of justification. MDL has no special or familial relationship with PICO Northstar Hallock to justify the provision of services without compensation.

Further, the principals of PICO Northstar Hallock were aware of MDL's services and claim for compensation prior to consummating the transaction. APP.MDL0274-75. They chose to accept the benefit of those services, and are therefore liable for payment.

[67] Absence of remedy at law. If the trial court was correct that MDL is not entitled to a fee because it did not directly introduce the source of the Hallock financing, MDL has no adequate remedy at law. This Court has recognized that a party may pursue an equitable claim if its breach of contract claim is rejected, for "if no recovery for damages may be had . . . the legal remedy fails." *In the Matter of Estate of Hill*, 492 N.W.2d 288, 296 (N.D. 1992).

2. Quantum Meruit.

[68] MDL has also satisfied all of the elements of a quantum meruit claim. "To prevail on a 'quantum meruit' claim, the claimant must establish the recipient accepted benefits under circumstances which would reasonably notify the recipient that the claimant had an expectation of payment for the services rendered." *Disciplinary Action Against Moe*, 1999 ND 110 ¶ 14, 594 N.W.2d 317, 320. PICO Northstar Hallock received a benefit in that it now owns a fully-operational canola processing plant in Hallock, Minnesota, and, as the facts clearly showed, PICO Northstar Hallock accepted this benefit with full knowledge of MDL's claim.

D. MDL Is Entitled To Damages In Amount Of The Fair Market Value Of Its Services.

[69] North Dakota courts have recognized that the amount of damages may be "the reasonable value of such services performed for other [parties] in the [ ] community." *Bismarck Hosp.*, 146 N.W.2d at 893; *see also In the Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D. 1990) (party was entitled to reasonable value of her

services); *Allied Realty*, 302 N.W. 2d at 779 (awarding quantum meruit damages at agreed-upon commission rate of 6%). The best evidence of the fair market value of MDL's services is the MDL contract, which was fully negotiated and reviewed by Northstar's executives, board and outside legal counsel. Mr. Persson, Northstar's finance guru, described the MDL contract as a "great contract." It was also well within the range of fees that Northstar agreed to pay. *See* APP.MDL0292 (5% fee), 0296 (2% fee), and 0299 ¶ 3(b) (4% fee).

CONCLUSION

[70] For the reasons set forth above, MDL respectfully believes the trial court erred in not awarding it damages on its breach of contract counterclaim. It asks this Court to reverse the judgment below, and hold that MDL is entitled to a cash success fee of at least $1.2 million, together with an equity fee of shares representing 5% of PICO Northstar, LLC. MDL also asks this Court to rule that MDL is entitled to attorney fees under the MDL contract. MDL respectfully asks this Court to remand to the trial court for determination of the appropriate amount of attorney fees and the appropriate amount of the cash success fee, to the extent it would exceed $1.2 million based on PICO's later investments.

[71] In the alternative, if this Court holds that MDL is not entitled to a fee under the contract, MDL respectfully asks this Court to hold that MDL is due a fee from PICO Northstar Hallock, LLC based on equitable theories of recovery, and to award MDL a cash fee of $1.2 million, together with compensation equal to an equity fee of shares representing 5% of PICO Northstar, LLC.

Respectfully submitted,

DORSEY & WHITNEY LLP

Dated: January 10, 2014

By /s/ James K. Langdon
James K. Langdon (# MN-0171931)
Shannon L. Bjorklund (# MN-0389932)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600

Sarah A. Herman (#03399)
Ross Nilson (#06784)
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Telephone: (701) 235-6000

Attorneys for Appellee/Cross-Appellant MDL Consulting Group, LLC

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC complies with the type-volume limitation of the N.D. R. App. P. 32, N.D. R. App. P. 28 and this Court's word limit established in the Court's letter dated December 13, 2013, because it contains only 7,639 words, excluding parts of the brief exempted by the rules. I relied on my word processor, Microsoft Word 2010, to obtain the count.

I further certify that this Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC complies with the typeface requirements of N.D. R. App. P. 32 because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman font, size 12.

/s/ James K. Langdon
James K. Langdon (# MN-0171931)
DORSEY & WHITNEY LLP

Attorneys for Appellee/Cross-Appellant MDL Consulting Group, LLC

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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,
Appellants.

CERTIFICATE OF ELECTRONIC SERVICE

[1] I hereby certify that on January 17, 2014, I caused a corrected version of the **Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC,** to be submitted electronically to the Clerk of the Supreme Court by email to supclerkofcourt@ndcourts.gov and slocken@ndcourts.gov. The Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC was filed on January 10, 2014, but is now re-submitted with revisions to the Table of Contents and Table of Authorities, as requested by the Clerk of the North Dakota Supreme Court in an email dated January 15, 2014.

[2] I hereby certify that other than changing the reference numbers in the Table of Contents and Table of Authorities from page numbers to paragraph numbers, no other changes have been made to this document.

[3] I hereby certify that on January 17, 2014, I caused a corrected version of the **Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC,** to be served on counsel for each party:

Todd Zimmerman (Tzimmerman@fredlaw.com)
Benjamin Hasbrouck (Bhasbrouck@fredlaw.com)
Counsel for Appellee/Cross-Appellant Northstar Founders, LLC, f/k/a Northstar Agri Industries, LLC

Ronald H. McLean (rmclean@serklandlaw.com)
Kasey D. McNary (kmcnary@serklandlaw.com)
John S. Craig (jcraig@abv.com)
Dennis Rambaud (DRambaud@abv.com)
Counsel for Appellants/Cross-Appellees Hayden Capital USA, LLC and Hayden Capital Corp.

Robert J. Udland (rudland@vogellaw.com)
Vanessa Anderson (vanderson@vogellaw.com)
Ray Hartman (rhartman@cooley.com)
Shannon Sorrells (ssorrells@cooley.com)
Counsel for Appellees PICO Northstar, LLC and PICO Northstar Hallock, LLC

Dated: January 17, 2014.

DORSEY & WHITNEY LLP

By /s/ Shannon L. Bjorklund
James K. Langdon (#MN-0171931)
Shannon L. Bjorklund (#MN-0389932)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
langdon.jim@dorsey.com
bjorklund.shannon@dorsey.com

Sarah A. Herman (#03399)
Ross A. Nilson (#06784)
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Telephone: (701) 235-6000
herman.sarah@dorsey.com
nilson.ross@dorsey.com

Attorneys for Appellee/Cross-Appellant MDL Consulting Group, LLC

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No. 20130245

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Defendants.

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Third-Party Plaintiffs,
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Third-Party Defendants and Appellees

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

AMENDED CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on January 10, 2014, I caused the following documents:

1. **Brief of Appellee/Cross-Appellant MDL Consulting Group, LLC**

2. **Appendix of Appellee/Cross-Appellant MDL Consulting Group, LLC**

to be filed electronically with the Clerk of the Supreme Court by email to supclerkofcourt@ndcourts.gov and that an email notifying opposing counsel of the same was sent to the following:

Todd Zimmerman (Tzimmerman@fredlaw.com)
Benjamin Hasbrouck (Bhasbrouck@fredlaw.com)

COUNSEL FOR APPELLEE/CROSS-APPELLANT NORTHSTAR FOUNDERS, LLC, f/k/a NORTHSTAR AGRI INDUSTRIES, LLC

Ronald H. McLean (rmclean@serklandlaw.com)
Kasey D. McNary (kmcnary@serklandlaw.com)
John S. Craig (jcraig@abv.com)
Dennis Rambaud (DRambaud@abv.com)

COUNSEL FOR APPELLANTS/CROSS-APPELLEES HAYDEN CAPITAL USA, LLC AND HAYDEN CAPITAL CORP.

Robert J. Udland (rudland@vogellaw.com)
Vanessa Anderson (vanderson@vogellaw.com)
Ray Hartman (rhartman@cooley.com)
Shannon Sorrells (ssorrells@cooley.com)

COUNSEL FOR APPELLEES PICO NORTHSTAR, LLC AND PICO NORTHSTAR HALLOCK, LLC

Dated: January 10, 2014

DORSEY & WHITNEY LLP

By /s/ James K. Langdon
James K. Langdon (#MN-0171931)
Shannon L. Bjorklund (#MN-0389932)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
langdon.jim@dorsey.com
bjorklund.shannon@dorsey.com

Sarah A. Herman (#03399)
Ross A. Nilson (#06784)
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Telephone: (701) 235-6000
herman.sarah@dorsey.com
nilson.ross@dorsey.com

Attorneys for Appellee/Cross-Appellant MDL Consulting Group, LLC

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Todd Zimmerman (Tzimmerman@fredlaw.com)
Benjamin Hasbrouck (Bhasbrouck@fredlaw.com)

COUNSEL FOR APPELLEE/CROSS-APPELLANT NORTHSTAR FOUNDERS, LLC, f/k/a NORTHSTAR AGRI INDUSTRIES, LLC

Ronald H. McLean (rmclean@serkland.com)
Kasey D. McNary (kmcnary@serkland.com)
John S. Craig (jcraig@abv.com)
Dennis Rambaud (DRambaud@abv.com)

COUNSEL FOR APPELLANTS/CROSS-APPELLEES HAYDEN CAPITAL USA, LLC AND HAYDEN CAPITAL CORP.

Robert J. Udland (rudland@vogellaw.com)
Vanessa Anderson (vanderson@vogellaw.com)
Ray Hartman (rhartman@cooley.com)
Shannon Sorrells (ssorrells@cooley.com)

COUNSEL FOR APPELLEES PICO NORTHSTAR, LLC AND PICO NORTHSTAR HALLOCK, LLC

Dated: January 10, 2014.

DORSEY & WHITNEY LLP

By /s/ James K. Langdon
James K. Langdon (#MN-0171931)
Shannon L. Bjorklund (#MN-0389932)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
langdon.jim@dorsey.com
bjorklund.shannon@dorsey.com

Sarah A. Herman (#03399)
Ross A. Nilson (#06784)
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Telephone: (701) 235-6000
herman.sarah@dorsey.com
nilson.ross@dorsey.com

Attorneys for Appellee/Cross-Appellant MDL Consulting Group, LLC