20130245
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 20, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

NO. 20130245

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

ON APPEAL FROM THE JUDGMENT AFTER BENCH TRIAL
STATE OF NORTH DAKOTA, COUNTY OF CASS

BRIEF OF THIRD-PARTY DEFENDANTS/APPELLEES PICO NORTHSTAR, LLC AND PICO NORTHSTAR HALLOCK, LLC

M. Ray Hartman III (Pro Hac Vice)
Shannon Sorrells (Pro Hac Vice)
COOLEY LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
Telephone: 858.550.6001

Robert J. Udland (#03350)
Vanessa L. Anderson (#06862)
VOGEL LAW FIRM
218 NP Avenue
P. O. Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

Attorneys for Appellees PICO Northstar, LLC
And PICO Northstar Hallock, LLC

TABLE OF CONTENTS

Paragraph

TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES

Paragraph

CASES:

TABLE OF AUTHORITIES

Paragraph

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[1] Whether the trial court correctly dismissed MDL Consulting Group, LLC's equitable claims against PICO Northstar Hallock, LLC because PNS Hallock was not unjustly enriched, and MDL did not offer any services to expect payment from the entity, by introducing Northstar Founders, LLC to Peter Williams, who allegedly introduced Northstar to PICO Holdings for a canola plant project.

STATEMENT OF THE CASE

[2] MDL Consulting Group, LLC ("MDL") appeals from the district court's order for judgment and judgment following trial. (Appellant MDL's App. at 178.) Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams, Stephen Hayden, and Northstar Founders, LLC ("Northstar") further appeal matters from the district court. (Id. at 172-75.) However, the only party to appeal against PICO Northstar Hallock, LLC ("PNS Hallock") is MDL.

[3] Initially, MDL asserted, in a crossclaim, two equitable claims against PNS Hallock: unjust enrichment and quantum meruit. (Id. at 67-73.) MDL claimed that PNS Hallock was liable in equity to MDL because the entity had introduced Peter Williams to Northstar, who in turn was introduced to PICO Holdings. PICO Holdings then transacted with Northstar for a canola plant project, and PNS Hallock was a resulting entity. (Id. at 70.)

[4] The issue proceeded to a bench trial from February 5, 2013, to February 15, 2013, before the Honorable Steven Marquart in Fargo, Cass County, North Dakota. Following trial, the district court issued a memorandum opinion and order on April 25, 2013. (Id. at 144.) The court dismissed both of MDL's equitable claims against PNS Hallock, determining PNS Hallock had not been unjustly enriched by the actions of MDL and MDL provided no services to PNS Hallock, from which that entity benefitted. (Id. at 154.)

[5] There is no error in the district court's order. The district court properly determined PNS Hallock did not receive any benefit upon which MDL could reasonably expect payment, nor was PNS Hallock unjustly enriched because MDL introduced Northstar to Peter Williams, who then introduced Northstar to PICO Holdings for

contribution to the canola plant project. PNS Hallock respectfully requests this Court affirm the district court's judgment in this case.

STATEMENT OF THE FACTS

I. THE PARTIES

[6] Third Party Defendant/Appellee PNS Hallock, a Delaware limited liability company, was formed in fall 2010 and is a wholly-owned subsidiary of PICO Northstar, LLC ("PICO Northstar").[1] (Appellee's App. at 87.) PICO Northstar, which was not sued by Irish/MDL in their crossclaim, is a Delaware limited liability company, formed in fall 2010 that has two members, PICO Northstar Management, LLC ("PICO-NSM"), a wholly-owned subsidiary of PICO Holdings, and Northstar. (Id.) PICO Holdings is not a party to this litigation.

[7] Crossclaim Plaintiff/Appellant MDL is a Michigan limited liability company; Andrew Zweig is its managing partner and one of its two members along with his wife. (Trial Tr. 1018:10-17.) MDL sued PNS Hallock jointly with Irish Financial Group, Inc. ("Irish"), a Minnesota corporation; Robert Liebig was Irish's president and sole shareholder. (Appellant MDL's App. at 51; Trial Tr. 824:24-825:12.) As noted by MDL, its contract with Northstar was between Northstar and Irish/MDL. (Appellant MDL's Br. at n.4.) However, because Irish is not appealing, all references to the Irish/MDL contract or actions taken by Irish/MDL are hereinafter attributed to MDL only.

[1] No party appeals against PICO Northstar.

II. THE PICO-NORTHSTAR TRANSACTION

[8] In early August 2008, PICO Holdings entered into an initial Memorandum of Understanding with Northstar regarding a canola plant project in Hallock, Minnesota. However, the deal between PICO Holdings and Northstar fell apart in fall 2008 due to the financial market collapse and other financial issues.

[9] Approximately two years later, PICO Holdings and Northstar again began discussions regarding a transaction related to the canola processing plant. Eventually, PICO Holdings and Northstar agreed upon a deal whereby a new entity would be created, PICO Northstar, to which Northstar would contribute substantially all of its assets in exchange for a minority ownership and a PICO subsidiary would contribute $60,000,000 in exchange for the majority ownership. On September 21, 2010, PICO Northstar, PICO-NSM and Northstar executed a contribution agreement (the "Contribution Agreement") that set forth the terms of the transaction. (Appellee's App. at 31.)

[10] At the same time, PICO and Northstar negotiated with ING Capital, LLC ("ING") for debt funding. ING required a modification to the structure of the deal, such that PICO Northstar would need to serve as an intermediate holding company and a new company, wholly-owned by PICO Northstar, would serve as the operating entity for the canola plant to be constructed in Hallock, Minnesota. (Id. at 87.) This entity became PNS Hallock. (Id. at 88.) On December 23, 2010, PICO NSM, Northstar, PICO Northstar, and PNS Hallock executed an Amended Contribution Agreement that set forth the final terms for the PICO Northstar Transaction, which included a $60,000,000 contribution from PICO NSM, a $100,000,000 loan by ING, and a contribution of assets and certain liabilities by Northstar. (Id. at 87-88.)

III. TRIAL TESTIMONY

[11] MDL alleges that in April 2008, it introduced Northstar to Peter Williams, an investment banker with Oppenheimer & Co., who then allegedly led Northstar to PICO Holdings. (Appellant MDL's Br. at ¶ 48; Trial Tr. 996:3-11.) As a result, MDL claims that it is owed a finder's fee from Northstar pursuant to an enforceable contract between MDL and Northstar. (Appellant MDL's Br. at ¶ 48.) In the alternative, MDL alleges that it should recover a finder's fee from PNS Hallock—an entity that was not in existence in 2008 when MDL allegedly performed under the Irish/MDL-Northstar Agreement—under the equitable theories of unjust enrichment and quantum meruit. (Id. at ¶ 57.)

[12] However, Bob Liebig and Andy Zweig of Irish/MDL testified at trial that no PICO entity ever asked Irish/MDL to perform a service on its behalf, and that they never performed a service for any PICO entity, including PNS Hallock. (Trial Tr. 1011:13-21; 1191:24-1192:5.) But Zweig and Liebig both go further, and each testified that they have never met or even had a conversation with any representative of PNS Hallock, or any PICO entity. (Id. at 1010:7-1011:12; 1181:3-10; 1190:25-1191:24.)

[13] PICO Northstar VP of Finance, Mitch Parker, testified that PNS Hallock not only did not accept the benefit of any purported services, but specifically disclaimed any rights or obligations under the finder's fee agreements in the September 2010 Contribution Agreement and the December 21, 2010 Amended Contribution Agreement between PNS Hallock and Northstar. (Id. at 1497:1-1499:19; 1502:8-1503:13; see also Appellee's App. at 118-19.) PICO Northstar CEO, John Hart, also testified that no PICO entity accepted any rights or benefits under the finder's fee agreements, and in fact categorically refused to pay finder's fees or any third party service fees. (Trial Tr.

1539:23-1540:15.) This is consistent with PICO Holdings' role as contributing capital to this transaction, and not seeking financing in any way. Hart also testified that no PICO entity ever asked for or received benefits or services from MDL. (Id. at 1540:16-1541:6.)

IV. THE DISTRICT COURT'S ORDER

[14] After trial, the district court dismissed the equitable claims against PICO Northstar and PNS Hallock (collectively "the PICO Defendants") advanced by Irish/MDL and Hayden USA and Hayden Capital Corp. ("the Hayden Defendants"). The court concluded that Irish/MDL and the Hayden Defendants were not entitled to an equitable claim of reimbursement from the PICO Defendants on a theory of unjust enrichment, reasoning that "[c]ertainly the PICO Defendants have not been enriched by putting their own money into [the canola plant] project." (Appellant MDL's App. at 154.) The court noted that the PICO Defendants had contributed $60,000,000 to build the canola plant, and had guaranteed $50,000,000 of the equity pledge of ING. (Id.) The district court also found that the Hayden Defendants and Irish/MDL had "provided no services to the PICO Defendants' benefit." (Id. at 155.) The district court further held that "when the PICO Defendants negotiated a contract term with Northstar concerning the building of this canola plan, Northstar took on the liability for any finder's or broker's fees." (Id.) The court found that "[i]t would be inequitable under these circumstances to require the PICO Defendants to pay any finder's fees." (Id.)

[15] The district court also dismissed Irish/MDL and the Hayden Defendants' claims against the PICO Defendants for *quantum meruit*. The district court again reasoned that Irish/MDL and Hayden "provided no such services to the PICO Defendants that they were expecting to be paid a contribution from the PICO Defendants." (Id.) The

court emphasized that "[a]ll of [Irish/MDL and Hayden]'s agreements for compensation were with Northstar." (Id.) The court noted again that "when the PICO Defendants and Northstar negotiated for building this canola plant, Northstar agreed to take care of all of the outstanding fees that may be owed on the found financing." (Id. at 155-56.) Accordingly, the district court held that the equities were not in Irish/MDL and Hayden's favor. (Id.)[2]

LAW AND ARGUMENT

[16] The trial court correctly determined that both equitable claims by MDL against PNS Hallock must fail. Initially, equitable relief is not available under the circumstances because North Dakota law precludes equitable claims based on the same subject matter as those covered by contracts. Contrary to MDL's argument, MDL did not show that PNS Hallock participated in the transaction sufficient to substantiate an unjust enrichment claim by a third party. PNS Hallock did not request MDL's services, and indeed did not even exist when the services were rendered.

[17] Even if equitable relief were available here, MDL has not proven the basic elements of unjust enrichment or *quantum meruit*. No services or benefits were conferred on PNS Hallock. Even if PNS Hallock received some tangential benefit from the transaction, its retention of the benefits is justified because any purported impoverishment resulted from an agreement executed between MDL and Northstar, not

[2] The Hayden Defendants do not appeal any findings or conclusions relating to their equitable claims against the PICO Defendants. Because the Hayden Defendants do not contest the dismissal of their equitable claims, this brief only responds to arguments presented by MDL in its appeal. MDL seeks equitable relief only from PNS Hallock, not PICO Northstar.

PNS. Further, PNS Hallock and Northstar agreed that Northstar would be liable for any finder's fees.

I. EQUITABLE RELIEF IS NOT AVAILABLE UNDER THESE CIRCUMSTANCES.

A. MDL Cannot Recover From PNS Hallock in Equity Due to the Contract Between MDL and Northstar.

[18] MDL's equitable claims necessarily fail because it is black letter North Dakota law that a claim for unjust enrichment cannot survive if an express contract exists covering the subject matter of the dispute. Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 10, 692 N.W.2d 120. Unjust enrichment is an equitable doctrine "to prevent a person from being unjustly enriched at the expense of another." Id. at ¶ 9. "The doctrine is applied in the absence of an express or implied contract." Hayden v. Medcenter One, Inc., 2013 ND 46, ¶ 22, 828 N.W.2d 775; see also Lord & Stevens, Inc. v. 3D Printing, 2008 ND 189, ¶ 9, 756 N.W.2d 789 ("[A] claim of unjust enrichment is a fiction of law adopted to achieve justice where no true contract exists." (emphasis added)). Similarly, a *quantum meruit* claim cannot stand when an express contract exists, such as the MDL-Northstar Agreement here. See Samp v. MeritCare Health Sys., 2008 WL 4279708, at *3 (D.N.D. Sept. 16, 2008) (*quantum meruit* allows one who "performs substantial services for another without any express agreement for compensation" to recover "the reasonable value of the services rendered" (emphasis added)).

[19] For example, in Lochthowe, this Court rejected a plaintiff's unjust enrichment claim against a third party because an agreement for reimbursement existed with another party. Although unjust enrichment generally applies in the absence of a contract, there "can be no implied-in-law contract when there is an express contract between the parties relative to the same subject matter." 2005 ND 40, ¶ 10, 692 N.W.2d

120. Under this reasoning, the Court further observed that "although a third party may benefit from a contractual arrangement between others, respect for that contractual arrangement requires that courts refuse restitution between parties who did not contract with each other." Id.

[20] MDL does not dispute that it has an enforceable contract with Northstar on the subject of its claims, which is payment for services rendered to provide financing for the Northstar canola plant project. To the contrary, MDL advocates the enforceability of its contract with Northstar through its breach of contract cause of action against Northstar, and demands payment according to its terms. As in Lochthowe, because there is an express contract on the finder's fee dispute between MDL and Northstar, there cannot also be an implied-in-law contract with PNS Hallock.

B. PNS Hallock Did Not Participate in the Transaction Through Which the Purported Benefit Was Obtained.

[21] It is true that a third party may be liable under a theory of unjust enrichment if the party "participated somehow in the transaction through which the benefit was obtained." Midland Diesel Servs. & Engine Co. v. Sivertson, 307 N.W.2d 555, 558 (N.D. 1981). For example, in Midland Diesel, the Court found that a third party participated in a transaction and was unjustly enriched after "requesting" the service and signing a receipt. Id. However, there was no such participation here, as MDL alleges. MDL has not, and cannot, present any evidence showing that PNS Hallock requested its services. Nor did PNS Hallock receive benefits from MDL. The reason for this absence of evidence is obvious: PNS Hallock did not even exist when the services were rendered.

[22] Home Ins. of Dickinson v. Speldrich, 436 N.W.2d 1, 3 (N.D. 1989) also does not help MDL. This Court in Speldrich noted that a third party who derives gain

from an agreement between others may be liable under a theory of unjust enrichment if the underlying contract "becomes unenforceable or invalid." 436 N.W.2d at 3. Here, MDL has not contended that its agreement with Northstar is unenforceable or invalid; rather, MDL advocates the enforceability of the agreement. Moreover, the Court in Speldrich ultimately held that an insured party was not liable for payment of premiums under a theory of unjust enrichment where the insured had no contractual obligation to pay the premiums.

[23] Accordingly, because MDL has failed to show that PNS Hallock participated in obtaining its services, or that PNS Hallock even existed when the services were performed, MDL's unjust enrichment claim must fail.

C. MDL Never Expected Payment From PNS Hallock Until Long After Services Were Rendered.

[24] Under North Dakota law, when both parties are "fully aware from the outset" that payment would be made by one party, it is that party "to whom [the plaintiff] must look for payment." Zuger v. N.D. Ins. Guaranty Ass'n, 494 N.W.2d 135, 139 (N.D. 1992). Up until this litigation, MDL only ever tried to collect a fee from *Northstar*, not PNS Hallock. (Trial Tr. 911:6-16; 1062:16-22; 1181:7-10; 1190:24-1191:12.) Accordingly, because the parties always believed a recovery would come from Northstar, not PNS Hallock, recovery from PNS Hallock is improper.

[25] MDL's mere subjective belief that it would be paid cannot establish an equitable basis for recovery. For instance, in the Restatement (First) of Restitution § 112, Illustration 3, it provides that work performed in another party's absence, but under a mere mistaken belief that the absent party would pay, does not create a right to restitution. Further, a subjective belief is even more lacking if it was not even formed

until after the transaction had occurred. Such is the case here. PNS Hallock had not yet been formed at the time the purported services were performed. Any belief by MDL that PNS Hallock would pay for services was not only subjective, it is contrary to the testimony at trial that MDL only sought to recover a fee from Northstar.

D. PNS Hallock Cannot Be Forced to Pay for a Benefit It Was Unable to Refuse.

[26] Additionally, basic tenants of fairness and the principles of equity preclude recovery here. Under the Restatement (Third) of Restitution and Unjust Enrichment § 2(4) (2011-2012), liability in restitution may not be premised on a "forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse." The evidence demonstrated that PNS Hallock had no opportunity to "refuse" MDL's services, mostly because the purported services were not directed to PNS Hallock. PNS Hallock had no opportunity to refuse services that were allegedly bestowed upon Northstar. Moreover, at the earliest opportunity, PNS Hallock did refuse, *post hoc*, any rights or obligations under the finder's fee agreements. There are numerous liability disclaimers in the Contribution Agreements. (Appellee's App. at 118-19.) Equitable liability for such a "forced" exchange is inconsistent with the principles of equity.

II. MDL HAS NOT SATISFIED THE ELEMENTS OF A CLAIM FOR UNJUST ENRICHMENT.

[27] Even if equitable relief was available under the circumstances here, MDL failed to meet the fundamental elements of its claim for unjust enrichment. Unjust enrichment requires a plaintiff to establish "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy

provided by law." Thimjon Farms P'ship v. First Int'l Bank & Trust, 2013 ND 160, ¶ 20, 837 N.W.2d 327.

A. MDL Did Not Provide Any Services to PNS Hallock's Benefit, and PNS Hallock Was Not Enriched.

[28] An "essential element" to recover under a theory of unjust enrichment is "the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." Thimjon Farms P'ship, 2013 ND 160, ¶ 21, 837 N.W.2d 327; Zuger, 494 N.W.2d at 138. A party is not "enriched" simply for benefiting from a contract between two parties. Thimjon Farms P'ship, 2013 ND 160, ¶ 21, 837 N.W.2d 327.

[29] The trial court dismissed the claims against the PICO Defendants in part because "the PICO Defendants have not been unjustly enriched, and because the Defendants provided no services to the PICO Defendants' benefit[.]" (Appellant MDL's App. at 155.) This conclusion was not in error. PNS Hallock cannot be asked to pay a finder's fee when it did not request that any services be done, and no services were in fact done for it. At trial, witnesses for MDL (as well as Irish and Hayden) admitted that MDL never communicated with PNS Hallock, or any PICO entity. MDL did not perform services directly for PNS Hallock. MDL did not request payment from PNS Hallock, except in litigation. And it is undisputed that PNS Hallock never requested services from MDL or agreed to pay for them. The only purported services that even arguably were performed for PNS Hallock's benefit took place in the spring and summer of 2008, two and a half years before PNS Hallock was formed. No North Dakota court has ever awarded equitable damages against an entity that was not yet formed at the time the purported services or benefits were performed.

[30] MDL argues that the trial court erred in ruling that PNS Hallock was not benefited 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[.]" (Appellant MDL's Br. at ¶ 57.) To the contrary, the trial court did consider this argument, but reasoned that PNS Hallock could not have been enriched "by putting [its] own money into [the canola plant] project." (Appellant MDL's App. at 154.) PNS Hallock contributed $60,000,000 of its own funds to construct the canola plant. But under MDL's reasoning, PNS Hallock must pay for being "found" as its own source of funding to operate its own plant. The trial court rightly rejected this argument.[3]

B. MDL Has Not Been Impoverished, and There is Necessarily No Connection Between the Alleged Enrichment and Impoverishment.

[31] The only work MDL contends was performed in connection with the PICO Northstar Transaction was the introduction of Williams to Northstar, which occurred over the telephone two years before PNS Hallock was formed. (Appellant MDL's Br. at ¶ 48; Trial Tr. 996:3-11; 973:11-975:8.) This introduction caused no pecuniary loss to MDL, and did not involve the incurring of any expense by travel or communication. In addition, MDL actually received a non-refundable fee of $30,000.00 from Northstar "for the full Term payable in full in advance" pursuant to the MDL-Northstar Agreement. (Appellant MDL's App. at 220.) Clearly this payment is more

[3] MDL's reliance on Opp v. Matzke, 1997 ND 32, 559 N.W.2d 837 is misplaced. The defendant in Opp received a benefit from the plaintiff because the plaintiff drilled a well on land later transferred to the defendant, thereby improving the value of the land owned by defendant. Id. at 840. By contrast, here, PNS Hallock invested its own money to own and operate the Hallock plant and received nothing from MDL. Moreover, the court in Opp found that the plaintiff's legal remedy of a mechanic's lien against the prior landowners was eliminated when the property was transferred to the defendant. Id. at 840. Here, MDL still has an enforceable contract with Northstar.

than sufficient compensation for the few hours' work done by MDL. MDL has not actually been impoverished and PNS Hallock has not been enriched by any services performed by MDL.

C. Any Purported Benefit Retained by PNS Hallock is Justified.

[32] MDL's unjust enrichment claims fail for the additional reason that any benefit purportedly retained by PNS Hallock is reasonable. "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, ¶ 14, 603 N.W.2d 891 (citing Restatement of Restitution § 1, comment c.)

[33] Assuming *arguendo* that MDL performed services that bestowed a benefit on PNS Hallock (it did not), any services performed were done on behalf of Northstar and pursuant to the MDL-Northstar Agreement, where Northstar would pay any potential fees. When a benefit, and any resulting impoverishment, results from a valid contractual arrangement made by a party, the result is not contrary to equity. Apache Corp., 1999 ND 247, ¶ 15, 603 N.W.2d 891. Because any purported impoverishment resulted from agreements executed with Northstar, any benefit to PNS Hallock is justified. Id.

[34] MDL contends that PNS Hallock is liable for payment to MDL because "the principles of PICO Northstar Hallock were aware of MDL's services and claim for compensation prior to consummating the transaction" and that PNS Hallock "chose to accept the benefit of those services." (Appellant MDL's Br. at ¶ 66.) But this argument is directly contradicted by the fact that PNS Hallock negotiated a contract term with Northstar that if any liability for finders or broker fees existed, *Northstar*, and not PNS Hallock, would bear that liability. (Appellee's App. at 118-19.) Because Northstar was

contractually responsible for finder's fees, it would be unjust for PNS Hallock to pay a finder's fee to any party. See Zuger, 494 N.W.2d at 139. Indeed, the trial court held that the equities were not in MDL's favor because Northstar agreed to be responsible for any finder's fees. (Appellant MDL's App. at 155.) MDL's argument should be rejected.

D. MDL Has An Adequate Remedy at Law.

[35] Finally, as discussed above, because valid contracts exist on the subject matter of the dispute with Northstar, MDL has an adequate remedy at law: a breach of contract claim against Northstar. The validity of MDL's equitable claims against PNS Hallock are not affected by the success (or lack thereof) of MDL's breach of contract claims. MDL's remedy is its legal right to bring a breach of contract claim against Northstar, regardless of whether that claim is ultimately successful. See Zuger, 494 N.W.2d at 138 (stating that the plaintiff's unjust enrichment claim fails because he "has a valid compensation agreement for his services with [the insurer] . . . . the [insurer's] insolvency does not destroy the existence of that valid agreement; it merely leaves [plaintiff] in the position of a creditor, albeit one in a precarious position"); see also Corsello v. Verizon New York, Inc., 967 N.E.2d 1177, 1185 (N.Y. 2012) ("unjust enrichment is not a catchall cause of action to be used when others fail").[4]

[36] If an adequate remedy at law needed to be successful, every breach of contract claim would be routinely accompanied by an equitable claim so that the plaintiff would have a backdoor to recovery. This is not the law. Yet this is precisely what MDL

[4] In the Matter of Estate of Hill, 492 N.W.2d 288, 296 (N.D. 1992), relied on by MDL, is not to the contrary. The trial court in that case found that there was no express contract between the parties, and consequently, the claimant could seek recovery under an unjust enrichment theory. Id. at 294-96. Here, MDL alleges that it has an enforceable contract with Northstar related to the same subject matter as MDL's equitable claims.

asked the trial court to do. MDL employed equity as a catchall if its contract claims against Northstar failed, as illustrated by claiming "in the alternative" against PNS Hallock for the entire contract amounts. (Appellant MDL's Br. at ¶ 57.) MDL may not use equity to accomplish indirectly what it cannot do directly by a contract claim against Northstar.

III. THE TRIAL COURT PROPERLY DISMISSED MDL'S *QUANTUM MERUIT* CLAIM BECAUSE MDL DID NOT PROVIDE ANY SERVICES TO PNS HALLOCK.

[37] *Quantum meruit* "rests on an obligation imposed by law" where "recovery is allowed for services performed on the basis of a contract implied in law or an implied promise to pay the performer for what the services were reasonably worth." Bismarck Hosp. Ass'n v. Burleigh Cnty., 146 N.W.2d 887, 893 (1966) (emphasis added). A requisite to *quantum meruit* recovery is the "acceptance of benefits by the one sought to be charged" which would reasonably notify him of an expectation of payment. Id. The moving party must also show that the benefiting party requested services or was provided services cost-free. Matter of Estate of Zent, 459 N.W.2d 795, 800 (N.D. 1990).

[38] MDL presented no evidence at trial demonstrating that PNS Hallock impliedly accepted or contracted for its services. In fact, the evidence was to the contrary. As emphasized by the district court, PNS Hallock expressly rejected any promise or obligation of payment, leaving the obligation with Northstar, and it never accepted MDL's services. (Appellant MDL's App. at 155-56; Appellee's App. at 118-19.) MDL seeks contribution for its introduction of Williams to Northstar. However, even under MDL's theory, this introduction is alleged to have occurred in the spring of 2008, and it is undisputed that PNS Hallock did not exist until October 2010. As a result, it is impossible for PNS Hallock to have accepted any benefits from MDL or for PNS

Hallock to have been notified that MDL expected compensation for such benefits. Accordingly, MDL's claim for *quantum meruit* was properly dismissed.

CONCLUSION

[39] For the reasons set forth above, PNS Hallock respectfully requests that this Court affirm the district court's ruling for PNS Hallock on MDL's equitable claims.

Respectfully submitted this 20th day of February, 2014.

By: */s/ Vanessa L. Anderson*
Robert J. Udland
rudland@vogellaw.com
Vanessa L. Anderson (#06862)
vanderson@vogellaw.com
VOGEL LAW FIRM
218 NP Avenue
P. O. Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

and

M. Ray Hartman III (Pro Hac Vice)
Shannon Sorrells (Pro Hac Vice)
COOLEY LLP
4401 Eastgate Mall
San Diego, CA 92121-1909

Attorneys for Appellees PICO Northstar, LLC and PICO Northstar Hallock, LLC

1852557.3

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellees PICO Northstar, LLC and PICO Northstar Hallock, LLC 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 4,338.

By: */s/ Vanessa L. Anderson*

Robert J. Udland (#03350)
rudland@vogellaw.com
Vanessa L. Anderson (#06862)
vanderson@vogellaw.com
VOGEL LAW FIRM
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

and

M. Ray Hartman III (Pro Hac Vice)
Shannon Sorrells (Pro Hac Vice)
COOLEY LLP
4401 Eastgate Mall
San Diego, CA 92121-1909

Attorneys for Appellees PICO Northstar, LLC and PICO Northstar Hallock, LLC

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

NO. 20130245

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

I hereby certify that on February 20, 2014, I served the following documents:

1. **Brief of Third-Party Defendants/Appellees PICO Northstar, LLC And PICO Northstar Hallock, LLC; and**

2. **Appendix of Third-Party Defendants/Appellees PICO Northstar, LLC And PICO Northstar Hallock, LLC**

on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

Ronald H. McLean
Kasey D. McNary
E-mail: rmclean@serklandlaw.com
E-mail: kmcnary@serklandlaw.com

James K. Langdon
Shannon L. Bjorklund
E-mail: langdon.jim@dorsey.com
E-mail: bjorklund.shannon@dorsey.com

Todd E. Zimmerman
Benjamin J. Hasbrouck
E-mail: tzimmerman@fredlaw.com
E-mail: bhasbrouck@fredlaw.com

Sarah Andrews Herman
Ross Nilson
E-mail: herman.sarah@dorsey.com
E-mail: nilson.ross@dorsey.com

/s/ Vanessa L. Anderson