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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT 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

On Appeal From Judgment After Bench Trial District Court
of the East Central Judicial District

BRIEF OF NORTHSTAR FOUNDERS LLC
(V. HAYDEN CAPITAL USA, LLC, HAYDEN CAPITAL CORP., PETER WILLIAMS, AND STEPHEN HAYDEN)

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STATEMENT OF ISSUES

[1] Did the Hayden Defendants waive their objection to personal jurisdiction by voluntarily suing third parties as a plaintiff, asking the district court to award them a multi-million dollar judgment against the third-parties and Northstar, and failing to contest jurisdiction at trial?

[2] Did the district court err by finding a prima facie case for personal jurisdiction over the Hayden Defendants when the evidence, taken in the light most favorable to Northstar, established that they fraudulently induced a North Dakota company (Northstar) to contract and were engaging in an on-going fraud against the North Dakota company?

[3] Did the district court clearly err by finding that Peter Williams was acting on behalf of his employer, Oppenheimer?

[4] Did the district court err by determining that Northstar had received a "Financing" under the Hayden Agreement?

[5] Did the district court err by dismissing Northstar's tort claims for damages under the doctrine of collateral estoppel on the basis of an unappealable interlocutory ruling entered by the New York federal court?

[6] Did the district court err in concluding that the Hayden Defendants' pleadings against Northstar were made with reasonable cause and in good faith, when the court found that the testimony in support of the pleadings (offered by Peter Williams) was intentionally false?

STATEMENT OF THE CASE

[7] In late 2010, Northstar Founders, LLC, formerly known as Northstar Agri Industries, LLC ("Northstar"), agreed to sell its assets to a subsidiary of a publicly-traded

company, PICO Holdings, Inc. ("PICO"), in return for a 12.34% interest in the subsidiary. The assets related to a proposed canola crushing plant, which was later constructed by the PICO subsidiary near Hallock, Minnesota.

[8] When the transaction was announced, Northstar was faced with interrelated claims for so-called finder's fees (or financing fees) based on a brief introduction it received to PICO in 2008. The introduction had been made by Peter Williams, who was then an employee of Oppenheimer & Co., Inc. ("Oppenheimer"). Oddly, neither claim was made by Oppenheimer. Instead, they were made by Irish Financial Group, Inc. ("Irish") and MDL Consulting Group, LLC ("MDL"), on the one hand, and Hayden Capital USA, LLC ("Hayden USA"), and its managing member Hayden Capital Corp. ("HCC"), on the other.

[9] Surprisingly, one of the purported principals of Hayden USA making the demand was Williams, the Oppenheimer employee who made the brief introduction several years before. In other words, the individual Northstar had dealt with solely as an Oppenheimer representative was now claiming that he had been working for Hayden USA all along.

[10] In January 2011, Northstar commenced this action in district court in Cass County, where it had its principal office. App.31-35. Without knowledge of what had gone on behind-the-scenes, Northstar simply pleaded entitlement to declaratory relief. App.31-34. It requested a declaration that, under the relevant agreements and in light of the transaction which took place, Irish, MDL, Hayden USA, and HCC were not entitled to a financing fee based upon a brief introduction made by Oppenheimer. Id.

[11] Soon thereafter, Hayden USA commenced an action in New York federal court claiming entitlement to the financing fee. Dkt. #24. It also moved under Rule 12 to dismiss the North Dakota action on personal jurisdiction grounds. Dkt. #9. After seeing Hayden USA's and HCC's moving papers, which claimed that Williams had been working for Hayden USA all along, Northstar realized that it had been the target of a scam. Dkt. #11-12. Accordingly, Northstar successfully moved to amend its complaint to allege that it had been fraudulently induced to contract with Hayden USA. App.51-53.

[12] The district court determined that it had personal jurisdiction over Hayden USA and HCC. App.53-55. They were subject to jurisdiction under Rule 4(b)(2)(C), the district court reasoned, because Northstar's fraud allegation stated an "independent tort," or tortious activity, and, more broadly, because "Hayden's activity does fall within the prevue of Rule 4 of the N.D.R. Civ. P." Id.

[13] The district court further concluded that the exercise of personal jurisdiction over Hayden USA and HCC complied with due process. App.54-55. After discussing federal case law, the district court reasoned that the constitutional requirements were met:

> The Court concludes that these decisions are persuasive. The emails by Williams representing himself to be a representative of Oppenheimer when that was not true, targeted Northstar in North Dakota. Therefore, it was certainly reasonable that Hayden, who actually employed Williams, could reasonably expect answering to Northstar in North Dakota on a fraudulent inducement claim. Northstar's burden here is to make a prima facie showing of jurisdiction. The Court must look at the facts set forth in the affidavits in the light most favorable to Northstar. . . . Northstar has met that burden.

App.55 (citation omitted).

[14] After its Rule 12 motion was denied, Hayden USA and HCC filed their responsive pleading, which asserted counterclaims against Northstar for over $4.8

million. Dkt. #113. But Hayden USA did not limit its pleading to compulsory counterclaims against Northstar. Rather, it also asserted a third-party complaint, seeking over $4.8 million, against two PICO subsidiaries involved in the canola plant, PICO Northstar, LLC ("PICO Northstar") and PICO Northstar Hallock ("PNS Hallock") (together, the "PICO Defendants"). N.S.App.33-50. Thus Hayden USA affirmatively invoked the jurisdiction of the North Dakota courts to hail into this State third-parties, seeking millions of dollars from them. Id. Moreover, Hayden USA's claims against the PICO Defendants were not pleaded as an alternative to obtaining relief from Northstar, but as stand-alone claims. Id.

[15] Following discovery, Northstar filed a Second Amended Complaint. App.89-109. That pleading asserted tort claims for damages against, among others, Hayden USA, HCC, and their principals – Williams and Stephen Hayden. Id. Meanwhile, the New York federal action continued as a parallel proceeding.

[16] In June 2012, all parties filed motions for summary judgment. Hayden USA asked the court to enter judgment in its favor and against Northstar in an amount in excess of $4.8 million. Dkt. #355. Moreover, Hayden USA opposed the motion brought by the PICO Defendants, which sought the dismissal of the third-party claims Hayden USA had asserted against them, as plaintiff. Dkt. #420. The district court denied Hayden USA's motion against Northstar in its entirety and denied the PICO Defendants' motion in part, dismissing Hayden USA's contract claim but letting the equitable claims survive. App.175-89.

[17] The district court also dismissed Northstar's tort claims for damages against Hayden USA, HCC, Williams, and Hayden. App.181-83. The sole basis for that

decision was the district court's determination that a previous decision of the New York federal court (which dismissed those claims on the pleadings) constituted a final judgment on the merits for purposes of collateral estoppel. Id.

[18] After their summary judgment motion was denied, Hayden USA and HCC then filed another motion to dismiss on jurisdictional grounds. Dkt. #556. As the district court noted:

> Hayden Defendants are not challenging the correctness of this Court's April [2011] decision [finding a prima facie case for jurisdiction]. Rather, their argument is that this Court was divested of jurisdiction when this Court dismissed the Plaintiff's tort claims in its Memorandum Opinion and Order of August 24, 2012 [the summary judgment decision]. The dismissal of the tort claims was based upon the doctrine of collateral estoppel by reason of a New York court's previous decision.

App.192.

[19] In other words, Hayden USA and HCC argued that based on the district court's decision on the merits of certain claims (the dismissal of Northstar's tort claims for damages under the doctrine of collateral estoppel), the district court was divested of personal jurisdiction to decide the merits of any claims. The district court rejected that nonsensical argument and concluded "that once jurisdiction attaches by this Court's finding of a prima facie case for personal jurisdiction as this Court did in its April [2011] Order, the Court cannot be divested of that jurisdiction over the parties by later events [i.e., rulings] in the case." App.193.

[20] The case proceeded to trial, where the district court heard the evidence from February 5 through February 15, 2013. App.336. During trial, the Hayden Defendants (Hayden USA, HCC, Williams, and Hayden) did not offer either evidence or argument contesting the district court's jurisdiction over them. To the contrary, Hayden USA not only affirmatively invoked the court's jurisdiction in its counterclaim against

Northstar, but also in the claim it asserted as plaintiff, the multi-million dollar third-party claims against the PICO Defendants.

[21] Following trial, Hayden USA and HCC submitted a post-trial brief. In keeping with their position at trial, among the brief's 93 pages was not a single challenge to the court's jurisdiction. Rather, they framed the issues solely as those that would entitle them to affirmative relief. Dkt. #954 at 9. Similarly, in their request for relief, Hayden USA asserted that "Northstar cannot be heard to claim fraud" and demanded judgment in their favor in an amount in excess of $4.8 million. Dkt. #954 at 92. There was no request, whether in the alternative or otherwise, that the case be dismissed on jurisdictional grounds. Dkt. #954.

[22] In its decision, the district court dismissed Hayden USA's equitable claims against the PICO Defendants. App.346-48. The court also dismissed Hayden USA's counterclaim against Northstar and declared that Northstar did not owe any financing or finder's fees to Hayden USA, HCC, Williams, or Hayden. App.353-54. The court did not address the defense of fraudulent inducement, because it determined that "Williams was acting on his employer Oppenheimer & Co.'s behalf when he introduced PICO Holdings to Northstar." App.341. That finding was fatal to Hayden USA's contractual counterclaim (which hinged on being able to claim the introduction made by Williams as its own) and was supported by numerous facts found by the court. App.341-43.

[23] Those facts, among others the court heard, also convinced the district court that Williams not only acted on behalf of Oppenheimer in his dealings with Northstar, but also that it was his "intention that at all times he was acting on Oppenheimer & Co.'s behalf when they introduced PICO Holdings to Northstar."

App.342. Similarly, the district court found that "[i]t was on October 25, 2010, that Williams first suggested to Northstar that he was acting on Hayden USA's behalf when Hayden USA submitted an invoice to Northstar." App.343. The Court found that that "action by Williams was his attempt to collect a fee, and was not truly an expression of his intention to be acting on Hayden USA's behalf when the introduction of PICO Holdings was made." Id.

[24] In other words, the district court determined that Williams was actually acting on behalf of Oppenheimer; that at all relevant times he knew that he was, and intended to be, acting on behalf of Oppenheimer; but that he later falsely asserted that he had been acting on behalf of Hayden USA in an attempt to get a multi-million dollar fee from Northstar and the PICO Defendants. Simply put, the district court determined that Williams' testimony and Hayden USA's pleadings were intentionally false.

STATEMENT OF FACTS

I. THE PARTIES AND RELEVANT NON-PARTIES.

A. Northstar.

[25] Northstar is a North Dakota-based company which sought financing to build a canola plant near Hallock, Minnesota. App.35. Northstar acted through its president, Neil Juhnke, and a member of its board, Tom Persson. Tr.1337. Northstar ultimately exhausted its funds and was never able to build the plant. Tr.1244. At the end of 2010, Northstar sold its assets to a PICO subsidiary by transferring them, pursuant to a contribution agreement, to PICO Northstar, in return for a 12.34% interest in that company. Tr.1442-43.

B. Irish, MDL, Liebig, and Zweig.

[26] Irish and MDL consult with businesses to assist them in raising capital. Tr.824-25. At all relevant times, Irish acted through Robert Liebig and MDL acted through Andy Zweig. Tr.825, 848, 1018-19.

C. Hayden USA, HCC, Hayden, and Williams.

1. Hayden USA was a newly formed shell company.

[27] Hayden USA was formed in February 2008. Tr.432. The company was formed to serve as the entity through which HCC, Williams, and another individual would provide a bridge loan to a company called Ecology Coatings. Tr.432-33. HCC and Williams are members of Hayden USA. Id. Stephen Hayden, a Calgary resident, was Hayden USA's sole officer. Tr.433. Williams has never been an employee or officer of Hayden USA. Tr.432-33, 785.

[28] Aside from providing a bridge loan to Ecology Coatings and entering into the contract with Northstar, Hayden USA has not engaged in any other business. Tr.432, 778-79. It has no employees, no office, no telephone number, no email address, and no operational bank account. Tr.432-36. Apart from the funds loaned to Ecology Coatings, which simply passed through the company, Hayden USA has had no capitalization or funds. Tr.436.

2. HCC owns and operates a hamburger drive-thru in Calgary, Alberta.

[29] HCC is based out of Calgary, Alberta, Canada. Tr.720. Its primary business is the operation of a drive-thru hamburger restaurant. Tr.774-77. Hayden is the chairman and chief executive officer of HCC. Tr.799.

3. Williams was an Oppenheimer investment banker who also served on the board of HCC.

[30] Williams was employed full-time from 2004 until February 2009 as an investment banker in the New York office of Oppenheimer or its predecessor, CIBC World Markets ("CIBC"). Tr.88-89. Upon becoming employed by CBIC, Williams was advised in writing that CBIC (later Oppenheimer) expected him "to devote [his] entire business day to the work of the Firm, and . . . to avoid any outside activity, employment, position, association or investment that might interfere or appear to interfere with the independent exercise of [his] judgment regarding the best interests of the Firm and its clients." Tr.425-26; N.S.App.240-41.

[31] In addition to his Oppenheimer/CIBC employment, since 2005 Williams has been a member of the board of directors of HCC, the hamburger company owned by his childhood friend, Hayden. Tr.428. As a full-time employee of an investment bank, Williams' directorship with HCC required his employer's approval. Id. Williams received such approval in a September 26, 2005, letter from Oppenheimer's predecessor, CIBC. Tr.428-32; Ex. 570.

[32] The authorization was limited solely to Williams' "service as a Director for Hayden Capital Corp.," subject to certain conditions. Ex. 570. The approval letter advised HCC that "the use of our [CIBC's and later Oppenheimer's] name or that of an affiliate in an effort to raise capital or solicit business is not authorized, unless CIBC [later Oppenheimer] has been formally engaged to act in such capacity." Id.

D. Oppenheimer.

[33] Oppenheimer operates a nationally-known investment bank. Tr.425. The company has offices in New York (where Williams worked) and in Minneapolis.

Heinberg Dep. 54, 63; Tr.1321. On or about May 29, 2012, Oppenheimer commenced a lawsuit in New York state court against both Northstar and Hayden USA. N.S.App.279-90. Among other things, Oppenheimer is seeking the same fee that Hayden USA is seeking here, basing its claim, in part, on the work of Williams. Id.

E. PICO, PICO Northstar, and PNS Hallock.

[34] PICO is a holding company based out of La Jolla, California, which invests in or owns various companies. Tr.1518. At relevant times, PICO interacted with Northstar and Williams through its then executive vice president and chief legal officer, Damian Georgino. Tr.708, 1403.

[35] As noted above, PICO Northstar acquired Northstar's assets pursuant to a contribution agreement under which Northstar received as compensation a 12.34% interest in PICO Northstar. Tr.1519-21; APP.MDL0251. PICO Northstar wholly owns PICO Northstar Hallock, LLC ("PNS Hallock"), which received a $60 million equity contribution from PICO and a $100 million loan pursuant to a credit agreement with ING. APP.MDL0251. PNS Hallock used the funds to construct the Hallock, Minnesota, canola plant. Id.

II. NORTHSTAR SEARCHES FOR FINANCING TO BUILD THE CANOLA PLANT.

A. Beginning in 2007, Northstar works with several companies in an attempt to obtain equity and debt financing.

[36] In 2007, Northstar engaged with several companies in an effort to raise funds, including Oppenheimer. Tr.1313-37. Oppenheimer, through Ralph McGinley and Scott McLinden of the firm's Minneapolis office, proposed working with Northstar to raise funds through the issuance of tax exempt revenue bonds. Tr.1320-22. Northstar,

however, elected not to go forward with the proposed bond financing through Oppenheimer. Id.

B. Northstar enters into an agreement with Irish and MDL.

[37] In April 2008, Northstar entered into a Financial Advisory Agreement (the "Irish Agreement") with Irish and MDL. Tr.1350; Ex. 19. Under the Irish Agreement, Irish and MDL were engaged to act as Northstar's "independent financial advisor in one, or a series of, Financings." N.S.App.63-67. Irish/MDL introduced Northstar to Williams, of Oppenheimer, and suggested that he may be able to locate a source of financing for Northstar. Tr.1359.

C. Northstar enters into an agreement with Oppenheimer.

[38] On April 28, 2008, Williams executed, on Oppenheimer's behalf, a confidentiality agreement with Northstar. Tr.472-73, 1367; N.S.App.83-89. That agreement was "intended to facilitate ongoing business dealings between [Northstar] and Oppenheimer associated with the development of a Canola Processing facility in Northwestern Minnesota." Id.

[39] On May 5, 2008, Williams identified for Northstar's consideration a number of firms, with which Oppenheimer had a relationship, that might provide financing, and Williams began contacting them on Northstar's behalf. Tr.524-28; N.S.App.224-25. Williams sent a list of the potential financing sources to Northstar from his Oppenheimer email account (which then still used a CIBC email address) which explicitly stated, "This communication is sent exclusively on behalf of Oppenheimer & Co., Inc. or its affiliates." Id.

D. Northstar enters into an agreement with Hayden USA.

[40] At about the same time that Irish/MDL introduced Northstar to Williams, of Oppenheimer, Irish/MDL also suggested that Northstar execute a non-exclusive financial advisory agreement with Hayden USA. Tr.912. During a May 1, 2008, telephone call involving Juhnke, Zweig, and Williams, Zweig told Northstar that Hayden USA was a competitor of Williams and Oppenheimer and would access markets that they would not. Tr.1378-80. Williams did not dispute that characterization and never disclosed any affiliation with Hayden USA. Tr.1386.

[41] Accordingly, on May 2, 2008, Northstar signed a non-exclusive letter agreement with Hayden USA (the "Hayden Agreement"). Tr.1254. The Hayden Agreement was countersigned by Stephen Hayden, someone Northstar had neither met nor spoken to, but whom the agreement identified as the company's president. App.274.

[42] The Hayden Agreement provides that Northstar engaged Hayden USA "to act as a non-exclusive financial advisor and placement agent" in connection with Northstar's potential sale of debt or equity securities or its potential debt financing through a loan. App.269. Under the Hayden Agreement, a "Financing" consists of the sale and/or issuance of equity securities "of the Company," meaning Northstar; the sale and/or issuance of debt securities "of the Company"; or a loan, credit facility, or other debt financing "made to the Company." Id.

[43] The Hayden Agreement obligated Hayden USA to use its "best efforts" to "identify and introduce the Company [Northstar] to potential Purchasers [for its debt or equity securities] and/or Lenders," as those terms were defined in the agreement. App.270. Hayden USA also had additional obligations, such as to "assist in structuring the financing." Id.

[44] As compensation, the Hayden Agreement obligated Northstar to pay Hayden USA 3% of the aggregate proceeds that Northstar raised from the sale of its securities. App.271. Thus the Hayden Agreement provides for a Financing Fee in one – and only one – type of transaction: Northstar's sale of its equity or debt securities. App.270-71. The Agreement does not provide for a fee if Northstar sold its assets or if Northstar received a loan. App.269-76.

III. UNBEKNOWNST TO NORTHSTAR, WILLIAMS WAS INVOLVED IN HAYDEN USA'S PROCUREMENT OF THE HAYDEN AGREEMENT.

[45] The correspondence between Irish/MDL and Williams (to which Northstar was not privy), as well as the testimony of those parties, show that Williams had some kind of involvement in Hayden USA's procurement of the Hayden Agreement. N.S.App.194-200. Northstar's representatives, however, were unaware of any affiliation between Williams and Hayden USA. Tr.1210.

[46] Representatives of Irish/MDL testified that they understood that Williams would work for Oppenheimer, Hayden would work for Hayden USA, and they would access different markets. Tr.968, 1100, 1161. Though it was never disclosed to Northstar, Irish/MDL knew that Williams served as a "liaison" or "go-between" in communications with his life-long friend, Hayden. Tr.1125, 1145.

[47] Georgino, of PICO, testified that although Williams introduced him to the Northstar opportunity, he had never heard of Hayden USA (or Hayden) until being served with a subpoena in 2012. Georgino Dep. 23-25. Indeed, Williams acknowledged that he never told PICO he purported to represent Hayden USA. Tr.564-65.

[48] Oppenheimer's head of investment banking, Marshall Heinberg, testified that Williams was authorized only to serve on the board of directors of HCC and was not

authorized to attempt to obtain financing for Northstar on behalf of Hayden USA. Heinberg Dep. 14-15, 18-29; N.S.App.223, 240-41. Heinberg and Williams' former Oppenheimer colleague Paul Parhar also testified that Williams' involvement in connecting Northstar and PICO was in his capacity as an Oppenheimer employee. Heinberg Dep. 56-60, 69-75; N.S.App.256; Parhar Dep. 14-22, 37-38, 41-42.

[49] By contrast, Williams, while admitting that Northstar was never advised in writing that he purported to work on behalf of Hayden USA, testified that on two occasions (May 1 and August 11, 2008) he told Juhnke, of Northstar, that he worked for Hayden USA. Tr.186-90, 625-634, 645. The district court rightly rejected that testimony.

IV. AT WILLIAMS' REQUEST, COMMUNICATIONS REGARDING HIS INVOLVEMENT IN PROCURING THE HAYDEN AGREEMENT ARE WITHHELD FROM NORTHSTAR.

[50] When communicating with Zweig concerning the proposed Hayden Agreement, Williams wrote to Zweig, "Please have everything go through you until they [the proposed agreements] are all signed." Tr.496; N.S.App.170-74. A few days later, Williams again wrote to Zweig, "Please ensure that they [Northstar] return the signed [Hayden USA] letter to you, not me. Very important." Tr.503; N.S.App.175-77. Zweig abided by Williams' instructions. Tr.1161-62. Additionally, in a May 1, 2008, email to Hayden (to which Northstar was not privy), Williams made it clear that Hayden should sign the Hayden Agreement. Tr.506; N.S.App.178-81.

V. OTHER OPPENHEIMER INVESTMENT BANKERS LOCATE PICO AS A POTENTIAL FINANCING SOURCE.

A. Oppenheimer and Parhar find PICO.

[51] Williams introduced Northstar, or presented the Northstar opportunity, to a number of Oppenheimer sources. Tr.524-26; N.S.App.224-25. These included Och-Ziff Capital Management, LLC ("Och-Ziff"), Centerbridge, Stone Tower, and Cerberus. Id. Though Och-Ziff had some interest, it ultimately declined to invest in Northstar, as did the other sources that Williams identified. Tr.538-41. At that point, the parties Williams identified had passed and Williams was out of options. Id.

[52] In the spring of 2008, however, and without Williams' involvement, a broker with Oppenheimer (Ron DesBois) put two of his New York investment banking colleagues, Paul Parhar and John Woodby, in contact with PICO management. Parhar Dep. 14-16; N.S.App.252. The purpose of the meeting was for Oppenheimer to pitch its services, including its investment banking services, to PICO management. Parhar Dep. 15.

[53] On June 12, 2008, Parhar and Woodby had a dinner meeting in La Jolla, California, with Georgino. Parhar Dep. 16-17; Georgino Dep. 26-34; N.S.App.252, 272-73, Dkt. #929. Georgino told the Oppenheimer investment bankers the type of investment that might interest PICO, and they, in turn, told Georgino they would look for potential opportunities. Parhar Dep. 17-19; Georgino Dep. 34-36.

[54] Upon returning from the La Jolla dinner meeting to his New York office on June 16, Parhar learned that Williams – his colleague and a full-time Oppenheimer employee – had been working with Northstar. Parhar Dep. 19-20, 34-36. Based on what

Georgino had recently told him, Parhar thought that Northstar's canola opportunity may interest PICO. Parhar Dep. 27-29.

[55] Parhar then initiated a call to Georgino, introduced him to Williams, and they discussed the canola opportunity. Parhar Dep. 20-21; Georgino Dep. 36-41. Parhar documented the call in an email to DesBois, Oppenheimer's original connection to PICO, stating "we had a follow-up call with him [Georgino] on an agriculture related asset [Northstar]. He seemed pretty intrigued . . . ." Parhar Dep. 24-26; N.S.App.264.

[56] On June 16, the same day Parhar called Georgino, and in an email stating "[t]his communication is sent exclusively on behalf of Oppenheimer," Williams sent Georgino a summary of the Northstar opportunity. Georgino Dep. 41-44; N.S.App.262-63. Referring back to the conference call with Parhar, Williams (who did not previously know Georgino or know of PICO) wrote, "Damian, Take a look at the brief material on the canola seed crushing opportunity I think you may be interested in." Georgino Dep. 36-41; N.S.App.262-63. After summarizing the Northstar opportunity, Williams then closed with an offer to introduce PICO and Northstar, identifying himself as "Executive Director, Investment Banking, Oppenheimer & Co." N.S.App.262-63.

[57] Upon receiving the email, PICO evaluated the opportunity and investigated the canola industry. Georgino Dep. 44-45. Meanwhile, Williams corresponded with other Oppenheimer employees concerning Northstar. Among other things, Williams corresponded with Ralph McGinley, of Oppenheimer's Minneapolis office, with whom Northstar had previously discussed the potential bond financing. Heinberg Dep. 54; Parhar Dep. 29-31; N.S.App.271. After asking Williams to call him "on the canola crush operation," McGinley wrote to Williams, "We have a lot of

information about this project." Id. Furthermore, Williams contacted James Irvine, a senior investment banker in Oppenheimer's New York office, concerning his expertise on a potential Northstar transaction. Heinberg Dep. 85-88; N.S.App.265-66.

B. PICO is interested in Northstar and the two companies are introduced by Oppenheimer.

[58] On July 15, 2008, Georgino responded to Williams' June 16 email and asked "is this [Northstar] opportunity still kicking around?" Georgino Dep. 45-47; N.S.App.267-68. On July 21, Georgino again followed up with Williams, asking, "Can we discuss this opportunity in detail?" Georgino Dep. 47-50; N.S.App.274-77. Williams responded, "Of course," and the two had a telephone call concerning Northstar on July 23, 2008. Tr.574-75; N.S.App.274-77.

[59] Just days later, on July 25, Williams arranged a conference call between Georgino, Juhnke, and Persson. Georgino Dep. 56-57; Ex. 679. The call was held through Oppenheimer's conference call system. Heinberg Dep. 90-92, 216. PICO expressed interest in Northstar, and immediately after the call Northstar provided PICO with additional information about its business plan. Georgino Dep. 59-61; Dkt. #936-40. Williams, who acknowledged that he did not have a substantive role in the first Northstar/PICO conference call, never worked on the potential Northstar/PICO transaction again. Tr.617-18.

VI. PICO AND NORTHSTAR EXECUTE A MEMORANDUM OF UNDERSTANDING AND WILLIAMS REQUESTS A FEE AGREEMENT FOR OPPENHEIMER.

[60] On or about July 31, 2008, Northstar and PICO entered into a non-binding memorandum of understanding, which contemplated PICO making a $31 million

investment "in the equity of Northstar." Georgino Dep. 61-62; N.S.App.96-104; Tr.1212-13; App.300-305.

[61] On August 11, 2008, Williams sent Northstar a proposed 3% finder's fee agreement with Oppenheimer. Tr.625; N.S.App.90-95. The proposal requested that Northstar "ensure" that PICO sign a letter acknowledging that "Oppenheimer has referred you to Northstar and, therefore, Oppenheimer may receive a finder's fee from Northstar if you make an investment in Northstar." N.S.App.90-95.

[62] Persson, of Northstar, then forwarded Williams' proposed 3% Oppenheimer fee agreement to Georgino, of PICO. Dkt. #759. Persson explained that Northstar did not have an agreement with Williams/Oppenheimer, commented on Irish/MDL, and discussed the potential of a fee being due to another party (Acala Partners). Id. Notably absent from Persson's email was any reference to Hayden USA. Id. That, of course, is because from Northstar's perspective (as well as from Irish's, MDL's, Oppenheimer's, and PICO's), Hayden USA was not involved. Tr.1210, 1447-49, 1668-69.

[63] In response, Georgino wrote that "3% is rather large for an introduction" (he testified that 1% would be standard) and stated that he would discuss the proposed Oppenheimer fee with Williams when Williams visited La Jolla in a week's time. Georgino Dep. 63-64, 67-69, 76-80. Georgino then wrote to Williams, "Just received the proposed Oppenheimer engagement letter from Northstar. We should probably chat sooner rather than later." Georgino Dep. 71-73; N.S.App.278. Williams, however, postponed his scheduled meeting with Georgino, and the two never discussed the

proposed Oppenheimer fee agreement. Georgino Dep. 70; Dkt. #941, N.S.App.278; Tr.643-46. None of the correspondence even mentioned Hayden USA. Id.

VII. WILLIAMS ADVISES OPPENHEIMER TO ANTICIPATE A $1 MILLION FEE FROM NORTHSTAR AND ACKNOWLEDGES THAT OPPENHEIMER "WAS ENGAGED DIRECTLY WITH NORTHSTAR."

[64] Heinberg, the head of Oppenheimer's investment banking, testified that it is not uncommon for the company to work on a matter, and even to make introductions, without a signed fee agreement. Heinberg Dep. 148-52. Further, Heinberg explained that Oppenheimer maintains a "pipeline" report, which tracks potential fees Oppenheimer may be paid and which may include fees for which there is currently no signed fee agreement. Heinberg Dep. 109-10.

[65] In keeping with that procedure, in September 2008, Williams sent an internal Oppenheimer email explaining that the potential "Northstar Finder's Fee" was "[o]ne more addition to the pipeline." Heinberg Dep. 105-09; N.S.App.270. Based on PICO's then-proposed $31 million investment "in the equity of Northstar" and Oppenheimer's proposed 3% finder's fee agreement, Williams reported a 40% chance of a $1 million fee to Oppenheimer in the fourth quarter of 2008. Heinberg Dep. 106-07.

[66] At about the same time, Williams wrote to Zweig and Liebig concerning another matter, stating that it "would be similar in structure to the Northstar deal where Oppenheimer is engaged directly with Northstar and Irish/MDL has a separate agreement with Northstar." N.S.App.269.

VIII. PICO'S POTENTIAL $31 MILLION INVESTMENT "IN THE EQUITY" OF NORTHSTAR NEVER HAPPENS.

[67] At about the same time that Williams was telling his employer, Oppenheimer, to anticipate a $1 million fee from the Northstar transaction, the

transaction fell through. Tr.1424. At least part of the reason was the 2008 nationwide financial crisis, which resulted in the potential construction lender (ING) being unwilling to loan money. Id. Thus the 2008 transaction never happened, and PICO did not invest $31 million "in the equity of Northstar," as was contemplated in the memorandum of understanding. Tr.1424, 1435.

IX. IN 2010, PICO AND NORTHSTAR ENGAGE IN A DIFFERENT TYPE OF TRANSACTION.

[68] In late 2010, Northstar and PICO again began negotiations. Tr.1433-34. Williams had nothing to do with the 2010 negotiations. Tr.1403, 1405, 1412, 1432.

[69] At the end of 2010, Northstar closed on the transaction with PICO described above. In summary, then, Northstar did not receive financing to construct and operate the plant, but merely received a minority ownership interest in the plant owned and operated by PNS Hallock. Northstar did not sell debt or equity securities, never received an equity investment from PICO, and certainly did not receive a $100 million loan from ING.

X. THE LAWSUITS.

[70] After the 2010 transaction was publically announced, Hayden USA, HCC, and Irish/MDL demanded a fee based on Williams' involvement in introducing Northstar to PICO. Tr.1447-49, 1668-69; Dkt. #797, 887; N.S.App.73-78. Northstar denied that a fee was due to any party and responded with utter surprise to the assertion that Williams worked for Hayden USA – an assertion that also shocked and angered Zweig and Liebig. Id. Northstar was therefore faced with Irish/MDL's and Hayden USA's claims for multi-million dollar fees, both of which were based on Williams' limited involvement, as an Oppenheimer employee, in introducing Northstar to PICO. Id. Accordingly, Northstar

commenced a declaratory action in North Dakota, where both Irish/MDL and Hayden USA/HCC were subject to personal jurisdiction. Dkt. #6.

[71] In addition to asserting a $4.8 million counterclaim in North Dakota, Hayden USA commenced an action in New York federal court, asserting causes of action for the same $4.8 million fee. Dkt. #24. Oppenheimer then sued Northstar in New York state court, seeking the same $4.8 million fee that Hayden USA claims here. N.S.App.279-90. In that case, Oppenheimer also sued Hayden USA, alleging claims arising out of Hayden USA's assertion that Williams was acting on its behalf while dealing with Northstar. Id.

LEGAL ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER THE HAYDEN DEFENDANTS.

A. Hayden USA and HCC waived any jurisdictional defense.

[72] The Hayden Defendants argue that the district court erred in determining that there was a prima facie case for jurisdiction over them, which resulted in the denial of their Rule 12 motions. But a more fundamental issue must first be addressed: The Hayden Defendants' conduct throughout the litigation waived their right to object to jurisdiction and, indeed, amounted to a legal submission to the jurisdiction of the North Dakota courts and a "voluntary general appearance" under Rule 4(b)(4).

[73] The defense of a lack of personal jurisdiction is one which must be specifically preserved and is otherwise waived. See N.D.R. Civ. P. 12(h)(1). The Court has previously held, for example, that the failure to specifically assert the defense in a timely pleading is a waiver. See Walwork Lease & Rental Co. v. Schermerhorn, 398 N.W.2d 127, 129-30 (N.D. 1986). When the defense is waived, the party has made a

"voluntary general appearance." N.D.R. Civ. P. 4(b)(4). Thus, under both Rule 12 and North Dakota case law, if a jurisdictional defense is not preserved, it is waived.

[74] The federal courts (construing the identical Rule 12(h)(1)) have determined that "Rule 12 does not say that there are no other means of waiving a defense of lack of jurisdiction over the person." Peterson v. Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir. 1998) (emphasis added) (marshaling the case law). That is, Rule 12(h)(1) sets forth only "minimum requirements" which must be met to avoid waiver, but "other factors" (such as "sandbagging" or refraining from pursuing the defense at trial) may nonetheless result in waiver. Id. at 1318-19.

[75] The Second Circuit has explained that a party will waive, or be estopped from raising, a jurisdictional defense based on the parties' litigation conduct:

> It is well established that a party forfeits its defense of lack of personal jurisdiction by failing timely to raise the defense in its initial responsive pleading. But there are various [additional] reasons a defendant may be estopped from raising the issue. A court will obtain, through implied consent, personal jurisdiction over a defendant if [t]he actions of the defendant [during the litigation] . . . amount to a legal submission to the jurisdiction of the court, whether voluntary or not.
>
> * * *
>
> [O]ther circuits have held that a defendant who unsuccessfully raises a jurisdictional objection at the outset, but later creates the impression that he has abandoned it, may not seek to renew his jurisdictional argument on appeal following an adverse determination on the merits.

City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 134 (2d Cir. 2011) (internal quotes and citations omitted).

[76] The Ninth Circuit has adopted a similar rule, noting that it has particular application to unfair litigation conduct (such as pursuing a claim on the merits, but then asserting a jurisdictional defense when unhappy with the result), as follows:

> Most defenses, including the defense of lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation. See Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (affirming district court's finding that defendants' conduct during litigation constituted waiver of personal jurisdiction); Yeldell v. Tutt, 913 F.2d 533, 538-39 (8th Cir. 1990) (finding waiver where defendant raised personal jurisdiction defense in manner that was technically timely, but late in trial proceedings). For example, if a defendant were to engage in "sandbagging" by raising the issue of personal jurisdiction on a motion to dismiss, deliberately refraining from pursuing it any further when his motion is denied in the hopes of receiving a favorable disposition on the merits, and then raising the issue again on appeal only if he were unhappy with the district court's ultimate decision, then we would not hesitate to find that the defendant had waived any right to pursue the defense.

Peterson, 140 F.3d at 1318.

[77] In this case, the Hayden Defendants are attempting to do exactly what the federal courts prohibit. They initially sought dismissal. When that motion failed, they abandoned the defense by not only asserting a counterclaim against Northstar, but also by asserting a third-party complaint against the PICO Defendants. The Hayden Defendants then moved for summary judgment against Northstar, asking the court to invoke its jurisdiction in their favor with a $4.8 million award.

[78] When the summary judgment motion was denied, the Hayden Defendants again moved to dismiss the case on jurisdictional grounds. When that motion was denied, the Hayden Defendants then proceeded to trial and again asked the court to exercise its jurisdiction in their favor – both against Northstar and the PICO Defendants – without a word indicating they were attempting to preserve a challenge to jurisdiction (even in the alternative).

[79] In their post-trial brief, the Hayden Defendants framed the issues for the court solely as those relating to the monetary relief they were seeking. They did not raise the issue of jurisdiction at trial. That conduct constituted a waiver of the personal

jurisdiction defense and a "voluntary general appearance" under Rule 4(b)(4). See Taghon v. Kuhn, 497 N.W.2d 403, 406 (N.D. 1993) (stating that issues not raised at trial will not be considered on appeal).

B. Hayden USA entered a voluntary general appearance by suing as third-party plaintiff.

[80] Invoking the authority of the courts of North Dakota without a "previously made and properly preserved objection to the jurisdiction of the court" is a "general appearance" which "amounts to a waiver of the right to object to the jurisdiction of the court over the person so appearing." Tooz v. Tooz, 50 N.W.2d 61, 65 (N.D. 1951) (emphasis added). Hayden USA invoked the jurisdiction of the North Dakota courts by serving and filing a third-party summons and complaint against the PICO Defendants, then proceeding to pursue the claims through trial.

[81] Those claims were not alternative claims and hailed into court third parties. No rule or law required Hayden USA to bring those claims in North Dakota. Having voluntarily elected to do so, as plaintiffs, Hayden USA's previous objection to the court's jurisdiction, as defendant, was not "properly preserved." It therefore made a voluntary general appearance under Rule 4(b)(4) and waived the right to assert jurisdictional defenses.

C. There was a prima facie case for jurisdiction.

[82] If the Hayden Defendants are allowed to challenge the district court's assertion of jurisdiction over them (which defense, as explained above, they waived), the review extends only to whether the district court properly found a prima facie case for jurisdiction. Peterson v. Highland Music, Co., 140 F.3d 1313, 1319 (9th Cir. 1998). The

Hayden Defendants accept that proposition by seeking only that standard of review in their brief. Appellants' Br. ¶ 37.

[83] In conjunction with its ruling on the jurisdiction motion, the district court allowed Northstar to amend its complaint to assert a fraud claim against the Hayden Defendants. The Hayden Defendants have not challenged that ruling and thus accept the correctness of the district court's decision on the motion to amend. That unchallenged ruling should put to rest whether jurisdiction arose under Rule 4(b)(2)(C), which provides for jurisdiction when the allegations are in "tort" and allege an "injury" within the state. N.D.R. Civ. P. 4(b)(2)(C). See also Hansen v. Scott, 2002 ND 101, ¶¶ 18-20, 645 N.W.2d 233 (stating that for jurisdictional purposes "a plaintiff need not prove a defendant committed a tort by a preponderance of evidence; rather, the plaintiff satisfies the burden as to the first prong of the personal jurisdiction test by establishing a prima facie cause of action," regardless of "whether North Dakota would in fact permit [the plaintiff] to recover damages in tort").

[84] In any event, Northstar's fraud claim was well supported by affidavits, which set forth Williams' concealment of any affiliation he had with Hayden USA and thereby fraudulently induced Northstar to contract with the company. App.35-43. Under North Dakota law, fraud is a tort. See Dewey v. Lutz, 462 N.W.2d 435, 442 (N.D. 1990) ("The only significant distinction between the torts of fraud and deceit is whether the wrongdoer happens to be a party to a contract."). Accordingly, the district court correctly concluded that there was, at a minimum, a prima facie case for jurisdiction under Rule 4(b)(2)(C).

[85] The Hayden Defendants argue that jurisdiction should not have been found on the basis of "fraud" because the affidavits supporting the allegations do not specifically claim damages. But the Court's longstanding case law does not require a showing of pecuniary damages in a claim that a party was fraudulently induced to contract, as follows:

> It is not necessary to avoid a contract for fraud that any damage has been or may be suffered by the defrauded party. As was said in Beare v. Wright (lately decided by this court) 14 ND 26, 103 N.W. 632, a contract induced by fraud "is voidable, not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free."

Raymond v. Edelbrock, 107 N.W. 194, 196 (N.D. 1906). In a fraud case, the "injury" is being fraudulently induced to contract. Id. That suffices to establish an "injury" within the meaning of Rule 4(b)(2)(C).

[86] It also should be noted that Northstar alleged damages for the Hayden Defendants' fraud and deceit. App.60, 104-105. Those allegations, however, were never put to trial, as the district court dismissed Northstar's tort claims for damages on the basis of collateral estoppel. But the fact remains that the affidavits before the district court in connection with the jurisdiction motion, taken in the light most favorable to Northstar, showed that Hayden USA, through its undisclosed principal Williams, reached into North Dakota to fraudulently induce Northstar to contract. App.35-43. That was sufficient to make a prima facie case, which the Hayden Defendants did not contest at trial. Those allegations satisfy Rule 4 and due process considerations. App.53-55.

[87] Moreover, the evidence at trial would have established jurisdiction under multiple provisions of Rule 4 and easily satisfied due process considerations, if it had been challenged. Hayden USA engaged in only two transactions, one of which was with

Northstar. Thus at least 50% of its activities were directed into North Dakota. The Hayden Defendants' numerous contacts and communications directed into North Dakota began with the suppression of a material fact in 2008 (Williams' affiliation with Hayden USA) and continued into 2011 with threats (harm to "stakeholders") and statements the district court ultimately determined were false (that Williams worked with Northstar as a representative of Hayden USA). N.S.App.73-78. When at least 50% of a company's activities are directed into a State to obtain a multi-million dollar fee through threats, false statements, and perjured testimony, there should be no surprise when those misdeeds must be answered for in that State.

II. THE DISTRICT COURT'S DETERMINATION THAT WILLIAMS ACTED ON BEHALF OF OPPENHEIMER WAS NOT CLEAR ERROR.

[88] Hayden USA's argument that the district court committed "clear error" in finding that Williams was acting on behalf of Oppenheimer in connection with the introduction of Northstar and PICO should be given short shrift. Every witness but Williams and his long-time friend, Hayden, who both stood to gain by the millions if their story was accepted, agreed that Williams acted on behalf of Oppenheimer. Tr.888, 1032, 1367, 1638-40.

[89] Moreover, from beginning to end, the evidence showed that Williams acted on behalf of Oppenheimer. On April 28, 2008, at the outset of his dealings with Northstar, Williams acted on behalf of Oppenheimer when he signed a contract with Northstar, on Oppenheimer's behalf, to "facilitate ongoing business dealings between [Northstar] and Oppenheimer associated with the development of a Canola Processing facility." Tr.472-73. He also admitted that he was acting on behalf of Oppenheimer – not Hayden USA – at the end of his dealings with Northstar, when on August 11, 2008,

he asked Northstar to sign a 3% Oppenheimer fee agreement, which would have required Northstar to "ensure" that PICO sign a letter acknowledging that "Oppenheimer has referred you to Northstar." Tr.560.

[90] In between, the facts and circumstances surrounding the introduction point to the inescapable (and certainly reasonable) conclusion that Williams was acting on Oppenheimer's behalf, as described in paragraphs 38 through 66 above. If there remained room for any doubt, it was put to rest by Williams' own contemporaneous emails, which told Oppenheimer to expect a $1 million fee from Northstar and which characterized his involvement with Northstar as one where "Oppenheimer is engaged directly with Northstar."

[91] Hayden USA argues that Williams must have been working on behalf of Hayden USA because there was no signed fee agreement with Oppenheimer. But Marshall Heinberg, the head of Oppenheimer's investment banking, testified, "It's not uncommon at all to send an engagement letter to not have it signed, to continue to believe that it will eventually be signed and to expend efforts." Heinberg Dep. 148. The record shows that is exactly what Williams did by proposing an Oppenheimer fee agreement in August 2008 and, though it was not signed, nonetheless advising Oppenheimer the following month to expect a "Northstar Finder's Fee." Tr.405.

[92] Moreover, when asked whether he would be "reluctant" to make an introduction without a signed fee agreement, Heinberg responded, "Not necessarily . . . ." Heinberg Dep. 151-152. Thus there is nothing illogical about Oppenheimer introducing Northstar to PICO without a signed fee agreement. In any event, that lone fact does not

establish, apart from all the contrary evidence, that Williams made the introduction on behalf of Hayden USA.

III. THE DISTRICT COURT ERRED IN DETERMINING THAT NORTHSTAR RECEIVED A FINANCING (AN ALTERNATIVE GROUND FOR DISMISSAL OF HAYDEN USA'S COUNTERCLAIM).

[93] Section 6 of the Hayden Agreement governs compensation. App.271. It provides that a fee may come due only upon an "Equity and/or Debt Financing." Those terms are defined in section 1 of the Hayden Agreement. App.269. An "Equity Financing" consists of the sale or issuance of various equity securities "of the Company," meaning Northstar. A "Debt Financing" consists of the sale or issuance of various debt securities "of the Company" or a loan made "to the Company," again meaning Northstar.

[94] Further, section 6 of the Hayden Agreement explicitly requires the sale of securities before a fee is due. App.271. The first paragraph of section 6 states that any fee would come "from the *proceeds of the sale* of such Securities" (emphasis added). The third paragraph states that a fee is due only "if, at any time during the term of this letter agreement or within 12 months from termination . . . the Company [Northstar] enters into an agreement in principle or executes a singed term sheet *for the sale of* Equity and/or Debt Securities" (emphasis added). The Hayden Agreement does not provide for a fee in the event that Northstar receives a loan, nor in the event Northstar engages in any other type of transaction.

[95] It is undisputed that the 2010 PICO transaction did not result in Northstar selling or issuing equity or debt securities. Thus, as a matter of law, Northstar did not receive a "Financing" that would entitle Hayden USA to a fee.

IV. THE DISTRICT COURT ERRED IN DISMISSING NORTHSTAR'S TORT CLAIMS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

[96] The district court gave collateral estoppel effect to the New York federal court's interlocutory order dismissing Northstar's tort claims on the basis that Northstar did not adequately plead damages. App.181-83. The applicability of collateral estoppel is a question of law fully reviewable on appeal. Simpson v. Pneumatic Tool Co., 2005 ND 55, ¶ 8, 693 N.W.2d 612.

[97] Before collateral estoppel will bar relitigation of a fact or issue, there must be a final decision on the merits. Gratech Co., Ltd. v. Wold Engineering, P.C., 2007 ND 46, ¶ 14, 729 N.W.2d 326. But because the New York court's order was interlocutory, Northstar has been unable to appeal to seek a reversal of the dismissal of its tort claims.[1]

[98] "The inability of a party to appeal from an adverse determination in the prior proceeding is a major factor to be considered" when determining whether to give collateral estoppel effect to a ruling. See United States v. Solemo, 81 F.3d 1453, 1464 (9th Cir. 1996); see also Tausevich v. Board of Appeals, 521 N.E.2d 385, 388 (Mass.

[1] Northstar respectfully asserts that the New Your federal court erred in dismissing its tort claims on the pleadings. The court determined that Northstar failed "to plead adequately the element of damages" because the alleged damages, in the court's view, were "attributable to the litigation with Hayden Capital over the fee agreement," not the fraud. App.368. The cases relied on by that court, however, merely stood for the proposition that attorneys' fees are not recoverable as damages. App.368 (and cases cited therein). But Northstar has alleged an ongoing fraud, at the root of which was Hayden USA's false assertion that Williams was its agent. App.92-109. Northstar has also alleged damages beyond attorneys' fees (App.104-05), and the fees it sought were those for which it must indemnify the PICO Defendants, which are valid damages under North Dakota law. See Olson v. Fraase, 421 N.W.2d 820, 829 (N.D. 1988) (stating that attorneys' fees incurred with respect to a third party are recoverable when they result from the defendant's "wrongful act").

1988) ("In general, where issue preclusion has been applied on the basis of a preliminary or interlocutory order, that order was appealed or could have been appealed. . . . Where there has been no appealable judgment or interlocutory order, [the court] would need special circumstances to justify the imposition of issue preclusion"); Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265, 1270-71 (5th Cir. 1986) ("We are not aware of any federal appellate decision which has applied preclusion to a prior nonfinal ruling as to which appellate review was unavailable."). There are no special circumstances here that warrant giving collateral estoppel effect to an interlocutory order entered in New York federal court. The district court therefore erred in dismissing the tort claims for damages.

V. THE DISTRICT COURT ERRED IN DENYING NORTHSTAR'S REQUEST FOR ATTORNEYS' FEES.

[99] Northstar requested fees against Hayden under N.D.C.C. § 28-26-31. That provision states, "Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee . . . ." N.D.C.C. § 28-26-31. The district court denied the request, despite finding Williams' testimony and therefore Hayden USA's pleading untrue, because the claim survived summary judgment. App.350-51.

[100] "Section 28-26-31, N.D.C.C., is the legislature's effort to penalize the litigants who plead false matters or initiate suits without having a basis in law or in fact." Westchem Agricultural Chemicals, Inc. v. Engel, 300 N.W.2d 856, 859 (N.D. 1980). If the district court finds that pleaded allegations are untrue, and made without reasonable

cause and not in good faith, "the court must award reasonable expenses [and] . . . attorney fees." Id.

[101] Construing a similar provision, the Illinois Court of Appeals held that "the presentation of false evidence permits an inference that the offending party knew or reasonably should have known his pleadings were false and, therefore, the imposition of fees and expenses was proper." Dayan v. McDonald's Corp., 466 N.E.2d 945, 953 (Ill. Ct. App. 1984).[2] Stated another way, "[t]he most compelling proof that a litigant knew or should have known his allegations or denials were untrue is provided by his presentation of fabricated testimony or the concealment of evidence. . . . [A] party's presentation of false evidence or his concealment of evidence proves his consciousness that his pleadings are unfounded and unreasonably made." Id. at 952.

[102] The district court found that Williams was not acting on behalf of Hayden USA and that the claims to the contrary (asserted in the pleadings and throughout trial) "was his attempt to collect a fee, and was not truly an expression of his intention to be acting on Hayden USA's behalf when the introduction of PICO Holdings was made." App.343. The district court also found that it was "Williams' belief and intention that at all times he was acting on Oppenheimer & Co.'s behalf when he introduced PICO Holdings to Northstar." App.342. In other words, the district court found that Hayden USA's position, as set forth in its pleadings, was not only untrue but also a lie.

[103] Despite those findings, the Court concluded that Hayden USA's pleadings were not made in bad faith apparently because they survived summary judgment.

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[2] The Supreme Court has previously cited Illinois law when interpreting N.D.C.C. § 28-26-31. See Estate of Nelson, 281 N.W.2d 245, 247 (N.D. 1979).

App.350-51. But "'[b]ad faith', includes the 'asserting' of facts known to be untrue," and a party who continues to assert false statements should be liable for the opposing party's attorneys' fees. Grandys v. Sping Soft Water Conditioning Comp., 242 N.E.2d 454, 456 (Ill. Ct. App. 1968); see also Kostbade v. Telford, 301 N.W.2d 321 (Ill. Ct. App. 1973). The mere fact that a false pleading is later supported by false evidence, thereby preventing summary dismissal, does not make the lie a basis for good faith litigation. Accordingly, the district court's ruling on this issue should be reversed and Northstar should be awarded attorneys' fees under N.D.C.C. § 28-26-31.

CONCLUSION

[104] Northstar respectfully requests that the district court's judgment be affirmed, except that (a) it be reversed and remanded for further proceedings on Northstar's tort claims for damages against the Hayden Defendants and (b) it be reversed to award Northstar attorneys' fees under § 28-26-31 and remanded for a determination of the amount of fees due.

Dated: February 20, 2014

/s/ Benjamin J. Hasbrouck

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Northstar Founders, 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 8,945.

Dated: February 20, 2014

/s/ Benjamin J. Hasbrouck

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Northstar Founders v. Hayden Capital, et al.
Supreme Court No. 20130245

STATE OF NORTH DAKOTA)
) ss
COUNTY OF CASS)

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above entitled matter. On March 3, 2014, affiant served a true and correct copy of the following:

Brief of Northstar Founders LLC (v. Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams, and Stephen Hayden) (corrected cover page);

Brief of Northstar Founders LLC (v. MDL Consulting Group, LLC and Andrew Zweig) (corrected cover page);

Supplemental Appendix of Northstar (index only).

Copies of the foregoing were served, via email, as follows:

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To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Nowak

Subscribed and sworn to before me on March 3, 2014.

Notary Public

LORI JO DANIELSON
Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2018

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Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above entitled matter,

On February 24, 2014, affiant served, via email, a true and correct copy of the following documents:

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Brief of Northstar Founders LLC (v. MDL Consulting Group, LLC and Andrew Zweig);

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Andrea Nowak

Subscribed and sworn to before me on February 24, 2014.

Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2018

LORI JO DANIELSON
Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2018

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rhartman@cooley.com

Robert J. Udland
rudland@vogellaw.com

To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

/s/ Andrea Nowak
Andrea Nowak

Subscribed and sworn to before me on February 20, 2014.

/s/ Lori Danielson
Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2018