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STATE OF NORTH DAKOTA

Supreme Court Case No. 20130325

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Tharaldson Ethanol Plant I, LLC and Tharaldson Financial Group, Inc.,

Plaintiffs / Appellants,

v.

VEI Global, Inc. f/k/a Valley Engineering, Inc.,

Defendant / Appellee,

and

VEI Global, Inc. f/k/a Valley Engineering, Inc.,

Third-Party Plaintiff,

v.

Dougherty Funding, LLC,

Third-Party Defendant.

Appeal from an order granting Defendant / Appellee's Motion for Partial Summary Judgment, an order granting Rule 54(b) certification, and a Judgment entered on July 22, 2013, an Amended and Final Judgment entered on September 27, 2013, and an Amended Judgment entered on October 2, 2013.

In the District Court, East Central Judicial District, Cass County
The Honorable Wickham Corwin, presiding

APPELLEE'S BRIEF

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[¶ 1] JURISDICTIONAL STATEMENT

[¶ 2] The district court granted VEI Global, Inc.'s ("VEI") motion for summary judgment and entered a memorandum opinion and order for judgment. (APP-105 to -109.) Judgment was entered on July 22, 2013. (APP-110 to -111.) Following an order granting Rule 54(b) certification, the district court entered Final Judgment on September 27, 2013 and Amended Judgment on October 2, 2013. (APP-112 to -115; APP-116 to -117; APP-118 to -119.) Tharaldson Ethanol Plant I, LLC ("Ethanol Plant") and Tharaldson Financial Group, Inc. ("Financial Group") appeal from those orders and judgments and appear to have filed a timely appeal under N.D. R. App. P. 4(a). This Court has original jurisdiction under Article VI, section 2 of the Constitution of North Dakota, sections 27-02-04 and 28-27-01(5) of the North Dakota Century Code, and Rule 54(b) of the North Dakota Rules of Civil Procedure.

[¶ 3] STATEMENT OF THE ISSUES

I. [¶ 4] Whether the district court properly granted Rule 54(b) certification?

II. [¶ 5] Whether the district court properly granted summary judgment on the Note?

[¶ 6] STATEMENT OF THE CASE

[¶ 7] This appeal is about a default on a promissory note. Specifically, it arises out of an isolated, arms-length financial transaction in which VEI agreed to loan $1.35 million to Financial Group in exchange for a $1.35 million promissory note ("Note") from Financial Group. While the Note related to money owed for work on the plant, due to the unique structure of the transaction proposed by Kyle Newman of Ethanol Plant, the loan transaction between Financial Group and VEI was a completely separate transaction. Ethanol Plant, as owner of the plant, contracted with VEI for services relating to the

construction of the plant ("Ethanol Plant-VEI Contract"). Ethanol Plant's claims against VEI are based on that contract. VEI's motion to enforce the Note is unrelated to Ethanol Plant's claims against VEI.

[¶ 8] The structure of the deal is critical to understanding VEI's position:

A. By February 28, 2009, Ethanol Plant owed VEI $1,778,162 in outstanding invoices for VEI's work on the plant. (APP-67, ¶ 4.)

B. VEI demanded payment from Ethanol Plant. Ethanol Plant responded by proposing a unique transaction as a compromise. (APP-70 to -71.)

C. As part of that compromise, Ethanol Plant demanded that VEI reduce the principal balance of its outstanding invoices from $1,778,162 to $1,350,000 and thus waive $428,162 in payments due from Ethanol Plant. (APP-67, ¶ 5.)

D. This compromise was memorialized in a settlement agreement that was executed by Ethanol Plant and VEI on April 15, 2009 ("Settlement Agreement"). (APP-55 to -56.) The Settlement Agreement stated that "[Ethanol Plant] agrees to pay VEI $1,350,000 [sic] for all work performed through February 28, 2009. . . . Upon payment of the [$1,350,000], [Ethanol Plant] will have fully satisfied its payment obligations to VEI under the Contracts for all work done through February 28, 2009." (*Id.*)

E. Financial Group was not a party to the Settlement Agreement. (*Id.*)

F. On April 17, 2009, Ethanol Plant wire-transferred $1.35 million into VEI's bank account. (APP-67, ¶ 7; APP-122 to -124.)

G. Ethanol Plant demanded that VEI execute a Lien Waiver in which VEI acknowledged "receipt of the sum of $1,350,000 . . . as payment for all labor, skill and material furnished through February 28, 2009" and "waive[d] all rights . . . to file or record mechanic's liens against [Ethanol Plant's property] for labor, skill or material furnished [thereto]." (APP-72.)

H. In a completely separate transaction, VEI subsequently wire-transferred the $1.35 million to Financial Group. (APP-122 to -124.)

I. In turn, Financial Group executed a $1.35 million note in favor of VEI as security in the event Financial Group defaulted on its payment obligations under the Note. (APP-49.) The Note is reproduced in part below:

> FOR VALUE RECEIVED, the undersigned THARALDSON FINANCIAL GROUP, INC. . . . promises to pay to the order of VEI GLOBAL, INC. . . . the principal sum of [$1,350,000] with interest thereon from and after the date of this note at a rate equal to the Wall Street Journal Prime Rate, plus [1.75%], adjusted daily and an origination fee of [$12,000].
>
> The principal sum and accrued interest due under this Note shall be paid by [Financial Group] as follows:
>
> A. The sum of $200,000.00 shall be paid on or before April 20, 2009.
>
> B. The principal sum of $100,000.00 plus all accrued interest on July 1, 2009 and $100,000.00 on the first day of each month thereafter until the principal amount owed, plus all accrued interest has been reduced to $150,000.00 (Final Payment).

> C. The Final Payment will only be made if [Ethanol Plant] achieves an ethanol production rate equal to or exceeding 30,821,918 gallons of 2% denatured ethanol over a 90 day period. VEI agrees to waive the Final Payment if [Ethanol Plant] is unable to achieve said ethanol production rate prior to April 1, 2011.

(APP-49.)

J. The Note is only signed by Financial Group. (APP-49.) Ethanol Plant did not sign the Note. (*Id.*)

K. Although the Settlement Agreement incorporates by reference the Note, the Note does not incorporate by reference the Settlement Agreement or the Ethanol Plant-VEI Contract. (APP-55 to -56; APP-49.)

L. The lawsuit is not based on the Settlement Agreement.

M. The entire structure of these two transactions—Ethanol Plant's $1.35 million payment to VEI and VEI's $1.35 million loan to Financial Group in exchange for the Note—were dictated by Kyle Newman of Ethanol Plant. (APP-70 to -71.)

N. Financial Group made only one payment on April 20, 2009 before defaulting on the Note. (APP-68, ¶ 11; APP-100, ll. 6-15.)

O. Financial Group had no interest in Ethanol Plant's claims against VEI until sometime in April, 2013, when Ethanol Plant purported to assign its claims to Financial Group, which did not occur until *after* VEI had filed its motion for summary judgment on the Note. (APP-93, ll. 17-24.)

P. VEI's sole recourse is to enforce the Note against Financial Group. Now that Financial Group has defaulted, VEI is entitled to enforce the Note.

[¶ 9] In short, VEI is entitled to enforce the Note. First, the district court properly granted VEI's request for Rule 54(b) certification. The district court's Rule 54(b) order was based on a reasoned analysis that fully addressed all issues. Moreover, this Court's decision in *Krank v. A.O. Smith Harvestore Prods., Inc.*, 456 N.W.2d 125 (N.D. 1990), directly supports certification.

[¶ 10] Second, the district court properly granted summary judgment on the Note and properly entered judgment against Financial Group because there were no genuine issues of material fact and VEI was entitled to summary judgment as a matter of law.[1] Recoupment fails because neither the Ethanol Plant-VEI Contract nor the Settlement Agreement is the same transaction as VEI's action on the Note. Setoff similarly fails because mutuality is lacking without the Assignment, and mutuality is destroyed with it.

[¶ 11] STATEMENT OF THE FACTS

I. [¶ 12] BACKGROUND

[¶ 13] On October 1, 2006, VEI and Ethanol Plant entered into a contract relating to the construction of the plant. (APP-125 to -163.) In early 2008, VEI began expressing concerns over its outstanding invoices. (APP-67, ¶ 4.) Ethanol Plant, however, assured VEI that its invoices would be paid, so VEI continued to work on the plant. (*Id.*)

[1] Ethanol Plant's involvement in this appeal is improper, or at least questionable, because the district court entered judgment against Financial Group only. (APP-111, ¶ 4; APP-116, ¶ 1; APP-119, ¶ 4.)

[¶ 14] About a year later, Ethanol Plant still had not paid VEI's invoices. By February 28, 2009, VEI's outstanding invoices totaled $1,778,162. (*Id.*)

[¶ 15] It was not until March and April of 2009 when Kyle Newman of Ethanol Plant proposed a transaction in which Ethanol Plant would pay VEI's outstanding invoices in exchange for a settlement agreement. (APP-70 to -71.) At Mr. Newman's insistence, VEI agreed to reduce the balance due on its outstanding invoices by $428,162—specifically, from $1,778,162 to $1,350,000. (APP-55, ¶ 1.) By the Settlement Agreement's terms, Ethanol Plant "agree[d] to pay VEI $1,350,000 [sic] for all work performed through February 28, 2009." (*Id.*) Once Ethanol Plant paid VEI, Ethanol Plant would be deemed to "have fully satisfied its payment obligations to VEI under the Contracts for all work done through February 28, 2009." (*Id.*) Ethanol Plant and VEI executed the Settlement Agreement on April 15, 2009. (APP-56.)

[¶ 16] On April 17, 2009, Ethanol Plant deposited via wire transfer $1,350,000 into VEI's bank account. (APP-122 to -124.)

[¶ 17] Ethanol Plant thereafter presented VEI with a Lien Waiver. (APP-72.) By executing the Lien Waiver, VEI acknowledged "receipt of the sum of $1,350,000 . . . as payment for all labor, skill and material furnished through February 28, 2009" and "waive[d] all rights acquired by [VEI] to file or record mechanic's liens against [Ethanol Plant's property] for labor, skill or material furnished" thereto. (*Id.*) The Settlement Agreement and Lien Waiver relieved Ethanol Plant of its payment obligations with respect to VEI's outstanding invoices.

[¶ 18] VEI and Financial Group subsequently entered into a single, isolated loan transaction in which VEI loaned $1.35 million to Financial Group in exchange for a

$1.35 million note from Financial Group. VEI wire-transferred the money on April 17, 2009. (APP-68, ¶ 8; APP-123.) On April 23, 2009, Financial Group, by and through Gary Tharaldson in his capacity as President, executed the Note. (APP-49.)

[¶ 19] The Note called for an initial payment of $200,000 by Financial Group. (APP-49.) Thereafter Financial Group would make payments of $100,000 in installments until the principal balance due was reduced to $150,000. (*Id.*) The final payment of $150,000 ("Final Payment") was conditioned on the plant achieving "an ethanol production rate equal to or exceeding 30,821,918 gallons of 2% denatured ethanol over a 90 day period . . . prior to April 1, 2011" ("Term C"). (*Id.*) Financial Group paid the initial $200,000 payment on April 20, 2009, but quickly defaulted. (APP-68, ¶ 11.) To date, Financial Group has made no other payments. (*Id.*)

II. [¶ 20] LITIGATION

[¶ 21] Ethanol Plant and Financial Group as plaintiffs both commenced a lawsuit against VEI. Ethanol Plant's claims against VEI were based on the Ethanol Plant-VEI Contract and arose out of the construction of the plant. Even though it was not a party to the Ethanol Plant-VEI Contract, Financial Group asserted Ethanol Plant's claims of damages against VEI. (APP-9 to -20.) Both sought a declaratory judgment that "under equitable principles, including . . . the doctrine of set-off, Plaintiffs owe VEI nothing under the Settlement Agreement and/or Promissory Note due to damages suffered by Plaintiffs as a direct and proximate cause of VEI's breaches of contract and warranty and other wrongful acts." (APP-20, ¶ 68.)

[¶ 22] VEI answered and, in Count IV, counterclaimed against Financial Group for breach of contract for defaulting on its payments under the Note. (APP-36 to -37, ¶¶ 20-28.)

[¶ 23] Financial Group's answer to VEI's counterclaim did not assert the Assignment, or any other document, as a basis for its setoff claim. (APP-42 to -48.)

[¶ 24] Trial is set for October 27, 2014. (Doc ID# 114.)

III. [¶ 25] SUMMARY JUDGMENT

[¶ 26] On April 12, 2013, VEI filed a motion for summary judgment to enforce the Note under Count IV of its answer and counterclaim, seeking $1 million from Financial Group. (APP-37, ¶¶ 20-28; Doc ID## 72-83.) Mindful of the standards for summary judgment, VEI reserved other issues relating to the note—specifically, the Final Payment of $150,000 under Term C—for resolution at a later date. (Doc ID# 72.) VEI asserted that summary judgment should be granted because it had established a prima facie case for enforcement of the Note, and Ethanol Plant and Financial Group had no setoff or recoupment claim. (*Id.*)

[¶ 27] In their reply, Ethanol Plant and Financial Group introduced for the first time an Assignment Agreement ("Assignment"). (APP-54, ¶ 25; APP-62 to -65.) The date of the Assignment was omitted from the answer brief, the Assignment itself, the Assignment's signature blocks, and Affidavit of Ryan Thorpe. (Doc ID# 84; APP-54, ¶ 25; APP-62 to -65) The Assignment occurred four years after Financial Group executed the Note in direct response to VEI's motion for summary judgment:

> THE COURT: What's the date of that assignment?
>
> COUNSEL: It's April [2013] – it was executed after the Summary Judgment Motion was filed, Your Honor.

> THE COURT: But there's no question that [the] assignment was done in response to this motion.
>
> COUNSEL: Correct.

(APP-93, ll. 17-24.) Ethanol Plant and Financial Group argued that the Assignment satisfied the "mutuality" requirement of setoff and gave Financial Group standing to assert setoff. (Doc ID# 84.)

[¶ 28] Ethanol Plant and Financial Group also filed an affidavit signed by Ryan Thorpe, stating, among other things, that "the Plant did not reach its designed production rate until approximately February 2010." (APP-52, ¶ 12.) Presented with that admission, VEI, in its reply, modified its initial motion to include the Final Payment of $150,000. (Doc ID# 93.)

[¶ 29] At the motion hearing, Counsel for Ethanol Plant and Financial Group ("Counsel") stated that Financial Group was a plaintiff for the sole purpose of asserting setoff.

> THE COURT: Okay. Now, the Complaint by [Ethanol Plant] and [Financial Group] against VEI – I read it fairly quickly again this morning, but [I am] trying to figure out why [Financial Group] is a Plaintiff; can you explain that to me?
>
> COUNSEL: Sure, Your Honor. Because they have a setoff claim against Valley Engineering.
>
> THE COURT: To the extent that –
>
> COUNSEL: [Ethanol Plant] does.

(APP-85; ll. 15-23.) Counsel also confirmed Mr. Thorpe's statements in his Affidavit:

> THE COURT: Okay. The plant, of course, is now up and running. It has been for some years.
>
> COUNSEL: Correct, Your Honor.

> THE COURT: And it is and for some time has been meeting designed capacity? Expectations?
>
> COUNSEL: Since February of 2010.
>
> . . .
>
> COUNSEL: I know that Mr. Thorpe is accurate in that in the month of February, they reached the equivalent of production producing 100 million gallons for that month.

(APP-87, ll. 17-22; APP-89, ll. 9-11.)

[¶ 30] At the time of the hearing, Financial Group agreed that the amount of the Note was not in dispute and that the payments on the Note were overdue:

> THE COURT: . . . But, Mr. Collins [counsel for Financial Group], just going back to basic facts, the note – there is no dispute about the amount of the note, it's a $1,350,000 [note]. Obviously that [sic] [is] correct?
>
> COUNSEL: Correct, Your Honor.
>
> THE COURT: Okay. And the only payment that has been made to date is the $200,000?
>
> COUNSEL: Correct.
>
> THE COURT: And *all* of the other payments are long since overdue under the terms of the note itself.
>
> COUNSEL: Correct.

(APP-100, ll. 6-15 (emphasis added).)

[¶ 31] With respect to VEI's recovery of the Final Payment of $150,000 under Term C of the Note, the court stated it would take the issue under advisement:

> THE COURT: . . . Well, I think at a minimum the last $150,000 payment, I'm not going to enter summary judgment as to that, because I just – what I indicated a minute ago. You didn't ask for it, and they didn't respond to it, as they otherwise might have. So that, I think, is an open issue. And, I'm going to take – I want to look at this again, in light of this hearing and

> the comments that I've heard today and the new case law that I've received.
>
> . . .
>
> THE COURT: . . . As I've already indicated, I do want to think about this further, and I guess I'll not say any – since I'm taking it under advisement, I'm not going to say anything further about which way I'm leaning . . . .

(APP-99, ll. 23-25 to APP-100, ll. 1-5; APP-103, ll. 22-25.)

[¶ 32] After further consideration of the issues and the admissions made during the hearing, the district court found that VEI was entitled to the Final Payment of $150,000 under Term C and granted summary judgment on the entire Note. (APP-105 to -109.) It concluded that recoupment was not available because Ethanol Plant's allegations against VEI did not arise out of the same transaction as the Note. (APP-107-108.) Setoff was not available because the debts were not mutual and "the required mutuality [was] clearly lacking." (*Id.*) Finally, the Assignment did not create an equitable right to setoff because "to the extent room for discretion exist[ed] . . . equity [did] not favor the plaintiffs." (APP-108.) "[N]o court of equity could look favorably on the assignment" because "[i]t [was] an obvious and belated attempt to create something that does not exist." (APP-108.)

[¶ 33] After the court entered judgment on July 22, 2013, VEI requested certification of the summary judgment under Rule 54(b) by filing a letter with the court with a Proposed Amended Order for Judgment and Proposed Amended Judgment attached thereto. (Doc ID#110-12.) The court did not enter the Proposed Amended Judgment, so on August 1, 2013, VEI filed and served Notice of Entry of the July 22, 2013 Judgment. (Doc ID# 116.) Ethanol Plant and Financial Group objected to VEI's request for Rule 54(b) certification, and VEI responded. (Doc ID## 119, 121.)

[¶ 34] The allowable time period within which VEI must bring a motion to alter or amend a judgment under N.D. R. Civ. P. 59(j) quickly approached. To preserve its request for Rule 54(b) certification, VEI filed a motion under Rule 59(j). (Doc ID## 123-132.) Again, Ethanol Plant and Financial Group filed an answer challenging VEI's request, and VEI replied. (Doc ID## 155, 163.)

[¶ 35] After extensive briefing, the court granted VEI's request for Rule 54(b) certification and, on September 27, 2013, entered an Amended Judgment. (Doc ID## 171, 173.) VEI filed a Proposed Amended Judgment, asking the court to insert the language in Rule 54(b) that "there is no just reason for delay" and "directing entry of final judgment." (Doc ID# 174.) The court entered VEI's Proposed Amended Judgment on October 2, 2013. (Doc ID# 176.) VEI filed and served Notice of Entry of the September 27th Judgment and October 2nd Judgment on October 10, 2013. (Doc ID# 186.)

[¶ 36] ARGUMENT

I. [¶ 37] THIS COURT HAS JURISDICTION BECAUSE THE DISTRICT COURT PROPERLY CERTIFIED VEI'S SUMMARY JUDGMENT UNDER RULE 54(B).

A. [¶ 38] VEI Met Its Burden of Establishing Hardship or Prejudice Which Will Result if Certification is Denied.

[¶ 39] Rule 54(b) certification "is reserved for cases involving unusual circumstances where failure to allow an immediate appeal would create a demonstrated prejudice or hardship." *Brummund v. Brummund*, 2008 ND 224, ¶ 6, 758 N.W.2d 735. "The burden is on the proponent to establish prejudice or hardship which will result if certification is denied." *Union State Bank v. Woell*, 357 N.W.2d 234, 237 (N.D. 1984).

[¶ 40] Here, the structure of the transaction itself is unusual. Ethanol Plant deposited $1.35 million into VEI's bank account as full payment on VEI's outstanding invoices. (APP-122 to -124.) In turn, VEI entered into a separate financial transaction in which it wire-transferred $1.35 million to Financial Group in exchange for the Note. (APP-122 to -124; APP-49.) Because the money actually changed hands and VEI held a valid and enforceable note, VEI executed the Lien Waiver, acknowledging Ethanol Plant's payment for services through February 28, 2009 and waiving its right to file a mechanic's lien against Ethanol Plant's property. (APP- 72.) By virtue of these unusual circumstances, VEI's sole recourse was the Note.

[¶ 41] Financial Group's status as plaintiff and the Assignment are also unusual. Financial Group is a plaintiff for the sole purpose of asserting setoff. (APP-85, ll. 15-23.) When the suit was commenced, Financial Group's setoff claim was based solely on damages arising out of VEI's alleged breach of contract and warranty, and negligence. (APP-19, ¶ 68.) But VEI never performed any services for Financial Group. The contract, warranty, and negligence claims are based solely on VEI's contract with Ethanol Plant. And that work arises out of a contract to which Financial Group was not a party. (APP-126.) Four years after execution of the Note, Ethanol Plant executed the Assignment in direct response to VEI's summary judgment motion for the sole purpose of creating standing for Financial Group's setoff claim. (APP-93, ll. 17-24.) The district court, however, rejected Ethanol Plant's and Financial Group's setoff claims. (APP-108.)

[¶ 42] VEI substantiated its claims of hardship and prejudice. Unless certification was granted, Financial Group's status as plaintiff and the Assignment would have allowed Financial Group to continue to escape its payment obligations under the guise of

setoff; and VEI would have held a substantial judgment that it could not enforce for many more months, if not years, even though the district court had concluded that Ethanol Plant and Financial Group had no recoupment or setoff claim. Based on these unusual circumstances and VEI's substantiated claims of hardship and prejudice, VEI met its burden.

B. [¶ 43] The Judgment Completely Decides VEI's Entire Claim Against Financial Group.

[¶ 44] Certification may be appropriate where the judgment fully decides an entire claim and satisfies the policy against piecemeal appeals. *Citizens State Bank-Midwest v. Symington*, 2010 ND 56, ¶¶ 10, 13, 780 N.W.2d 676. Conversely, certification is not appropriate where a partial summary judgment awards some damages, but leaves open the question of additional damages arising out of the same instrument. *Choice Fin. Grp. v. Schellpfeffer*, 2005 ND 90, ¶¶ 8-10, 696 N.W.2d 504.

[¶ 45] In *Symington*, the court granted a bank's motion for partial summary judgment to enforce a guaranty of two promissory notes. *Id.* ¶ 4. The court also certified the partial summary judgment, even though it had not adjudicated a pending contingent fraudulent conveyance claim. *Id.* ¶ 5. On appeal, this Court concluded the court did not abuse its discretion in certifying the partial summary judgment because the certified judgment fully decided an entire claim and satisfied the policy against piecemeal appeals. *Id.* ¶ 15. Importantly, this Court so concluded even though it found the adjudicated guaranty claim and unadjudicated contingent fraudulent conveyance claim were related, but separate transactions. *Id.*

[¶ 46] In *Schellpfeffer*, the court certified a partial summary judgment, awarding only partial damages on a single note and reserving the remaining disputed amount for

further proceedings. 2005 ND 90, ¶¶ 4, 8. This Court dismissed the appeal because, even though the action on the note was a single claim, the partial summary judgment did not adjudicate an entire claim and was not final. *Id.* ¶ 10.

[¶ 47] Here, the district court left no damage claims unadjudicated when it entered judgment on the Note; it adjudicated VEI's entire claim against Financial Group. These cases support certification.

C. [¶ 48] The District Court Properly Exercised Its Discretionary Authority in Granting Rule 54(b) Certification.

[¶ 49] In balancing the equities against juridical concerns, the district court properly exercised its discretion by engaging in a reasoned analysis that fully addressed all issues raised in a request for certification. (APP-112 to -115.)

[¶ 50] Moreover, *Krank v. A.O. Smith Harvestore Products, Inc.* directly supports certification. 456 N.W.2d 125 (N.D. 1990). In *Krank*, the court's initial summary judgment order left a counterclaim unadjudicated, but the parties entered a stipulation which was incorporated into the entered judgment. *Id.* at 127 n.1. The court entered judgment and granted Rule 54(b) certification. *Id.*

[¶ 51] On appeal, this Court concluded the court did not abuse its discretion because "countervailing equitable factors" favored certification, even though future developments below may moot the need for review. *Id.* Although not explicit, this Court found significant that the judgment decided an entire claim. *See id.* Also, judgment holder had obtained a substantial judgment and obviously sought certification "to obtain a final judgment subject to appellate review so that it could be paid promptly on an undisputed claim for damages[and recover leased equipment] . . . without awaiting the final outcome of this potentially lengthy litigation." *Id.* Like the judgment holder in *Krank*, VEI holds a

substantial judgment for an undisputed amount that decides an entire claim. (*See* APP-100, ll. 6-15.) *Krank* directly supports certification.

[¶ 52] The *Woell* factors also favored certification. *See Union State Bank v. Woell*, 357 N.W.2d 234 (N.D. 1984). The district court had already concluded that the Note and Ethanol Plant-VEI Contract were separate transactions. (APP-114 to -115.) As such, the court properly concluded that "the relationship between the adjudicated claims and unadjudicated claims is remote and limited." (APP-115.)

[¶ 53] The district court had also already concluded that Ethanol Plant and Financial Group had no setoff claim. (APP-108.) Based on that ruling, the district court properly found that no possibility of setoff existed.

[¶ 54] The district court found that future developments in the trial court were unlikely to moot the need for review. (APP-115.) Although VEI submits no possibility of mootness exists, to the extent it does, the district court properly relied on *Krank* to find that "the same juridical concern did not outweigh the countervailing equitable factors." (*Id.*)

[¶ 55] Based on its assessment of the equities and juridical concerns, the district court, in the interest of sound judicial administration, properly exercised its discretion in granting Rule 54(b) certification. Its Rule 54(b) order was reasonable, rational, and logical, and correctly applied the law. The unusual facts of this record alleviate any concerns that the district court's reasoning would support certification of "every monetary judgment." (Appellants' Br., p. 11.) The policy against piecemeal appeals is not threatened under these facts. As such, this Court has jurisdiction.

II. [¶ 56] THE DISTRICT COURT'S ORDER FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND VEI IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

A. [¶ 57] Standard of Review

[¶ 58] "Whether summary judgment was properly granted is a question of law that this Court reviews *de novo* on the entire record." *Spratt v. MDU Res. Grp., Inc.*, 2011 ND 94, ¶ 6, 797 N.W.2d 328 (citation omitted) (internal quotation marks omitted).

[¶ 59] "Summary judgment is a procedural device used to promptly resolve a controversy on the merits without a trial if either party is entitled to judgment as a matter of law and the material facts are undisputed or if resolving the disputed facts would not alter the result." *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 10, 785 N.W.2d 164 (citation omitted); *see also* N.D. R. Civ. P. 56(c).

[¶ 60] Summary judgment motions on promissory notes have statistically stood apart from other types of summary judgment motions. In *Farmers & Merchs. Nat'l Bank of Hatton v. Lee*, this Court stated the following:

> [I]t is obvious that some kinds of cases lend themselves more readily to summary adjudication than do others. It is as much for functional reasons as for historical that statistics show motions for summary judgment granted more frequently in actions on notes and for debts than in other kinds of cases.

333 N.W.2d 792, 793 (N.D. 1983); *see also Titus v. Titus*, 154 N.W.2d 391, 396 (N.D. 1967) (stating that summary judgment is more feasible for certain types of litigation, such as actions on notes, than in cases involving negligence).

[¶ 61] In a motion for summary judgment, the evidence is viewed in the light most favorable to the opposing party and all reasonable inferences must be drawn in their favor. *See Iglehart v. Iglehart*, 2003 ND 154, ¶ 9, 670 N.W.2d 343. However, the party

opposing summary judgment "must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact" and cannot simply rely on the pleadings or "unsupported, conclusory allegations." *Tarnavsky v. Rankin*, 2009 ND 149, ¶ 8, 771 N.W.2d 578 (citation omitted).

[¶ 62] "The party opposing summary judgment must also explain the connection between the factual assertions and the legal theories of the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." *Spratt*, 2011 ND 94, ¶ 7 (citation omitted) (internal quotation marks omitted). Courts have "no obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment." *Burris*, 2010 ND 118, ¶ 11 (citation omitted).

B. [¶ 63] The District Court Properly Granted Summary Judgment in Favor of VEI.

[¶ 64] In an action on a note, establishing the existence of a legal debt makes out a prima facie case for enforcement of the note. *Nat'l German-American Bank v. Lang,* 49 N.W. 414, 415 (N.D. 1891). "The issuer of a note . . . is obliged to pay the instrument according to its terms at the time it was issued." N.D. Cent. Code § 41-03-49. "The obligation is owed to a person entitled to enforce the instrument." *Id.* The person entitled to enforce the instrument is its holder. *Id.* § 41-03-27. "[T]he authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings." *Id.* § 41-03-34(1); *Farmers & Merchs. Nat'l Bank of Hatton v. Lee*, 333 N.W.2d 792, 793 (N.D. 1983). Unless defendant proves a defense or recoupment claim, "a plaintiff producing the instrument is entitled to payment if the plaintiff proves

entitlement to enforce the instrument under section 41-03-27." N.D. Cent. Code § 41-03-34(2).

[¶ 65] The material facts are not disputed. Financial Group executed a $1.35 million promissory note in favor of VEI, in exchange for a $1.35 million loan from VEI. (APP-53, ¶ 18; APP-67, ¶ 5.) On April 23, 2009, Gary Tharaldson, in his capacity as president of Financial Group, executed the Note. (APP-49.) Mr. Tharaldson was authorized to execute the Note and his signature is authentic. Financial Group is the issuer of the Note. VEI is the holder of the Note and is entitled to enforce it.

[¶ 66] Furthermore, the following colloquy took place during the hearing on VEI's motion for summary judgment:

> THE COURT: . . . But, Mr. Collins [counsel for Financial Group], just going back to basic facts, the note – there is no dispute about the amount of the note, it's a $1,350,000 [note]. Obviously that [sic] [is] correct?
>
> COUNSEL: Correct, Your Honor.
>
> THE COURT: Okay. And the only payment that has been made to date is the $200,000?
>
> COUNSEL: Correct.
>
> THE COURT: And *all* of the other payments are long since overdue under the terms of the note itself.
>
> COUNSEL: Correct.

(APP-100, ll. 6-15 (emphasis added).) Financial Group made only one payment before defaulting on the Note. (APP-68, ¶ 11.) Since defaulting, Financial Group has made no payments due under the Note. (Appellants' Br., p. 4.) The existence of a legal debt owed by Financial Group to VEI is undisputed.

[¶ 67] Ethanol Plant had conceded on three separate occasions that the conditions set forth in Term C of the Note had been met and therefore VEI was entitled to the Final Payment of $150,000. (APP-52, ¶ 12; Doc ID# 84, ¶ 8; APP-87, ll. 17-22.) Moreover, neither Ethanol Plant nor Financial Group presented any facts contradicting VEI's right to the Final Payment of $150,000.

[¶ 68] VEI's summary judgment motion only concerned the Note. Only Financial Group was a party to the Note. Ethanol Plant did not sign it. Although the Settlement Agreement incorporated by reference the Note, the Note did not incorporate by reference either the Settlement Agreement or the Ethanol Plant-VEI Contract. Further, the only parties to the Settlement Agreement and Ethanol Plant-VEI Contract were Ethanol Plant and VEI. Financial Group was not a party to either the Settlement Agreement or the Ethanol Plant-VEI Contract.

[¶ 69] The district court concluded that Ethanol Plant and Financial Group had no setoff or recoupment claim because both failed to show any genuine issues of material fact. The purported Assignment did not exist at the inception of this litigation and was executed in direct response to VEI's motion for summary judgment. (APP-93, ll. 17-24.) As a matter of law and equity, the district court concluded that the Assignment did not give Financial Group standing to assert Ethanol Plant's claims against VEI for purposes of setoff.

[¶ 70] Based on these undisputed facts, the district court properly granted summary judgment.

C. [¶ 71] The District Court Properly Concluded that VEI was Entitled to the Final Payment of $150,000 Under Term C of the Note.

[¶ 72] On three separate occasions Ethanol Plant and Financial Group conceded that the plant reached its designed production rate in February 2010—more than one year prior to the April 1, 2011 deadline in Term C of the Note.

[¶ 73] In an Affidavit opposing VEI's motion for summary judgment, Ryan Thorpe stated that "the Plant did not reach its designed production rate until approximately February 2010." (APP-52, ¶ 12.)

[¶ 74] In their Memorandum of Law opposing VEI's motion for summary judgment, Ethanol Plant and Financial Group stated that "the plant did not reach its designed production rate until approximately February 2010." (Doc ID# 84, ¶ 8.)

[¶ 75] During oral argument, Counsel confirmed Mr. Thorpe's statement:

> THE COURT: And it [the ethanol plant] is and for some time has been meeting designed capacity? Expectations?
>
> COUNSEL: Since February of 2010.

(APP-87, ll. 20-22.)

[¶ 76] Based on these statements by Ethanol Plant's Chief Operating Officer and its counsel, Ethanol Plant conceded that Term C of the Note had been met. On these facts, the district court properly concluded that VEI was entitled to the Final Payment of $150,000.

[¶ 77] Ethanol Plant and Financial Group argue that the district court's conclusion that "[t]he plant did achieve, in a timely manner, the production criteria necessary to receive the final payment of $150,000" lacked sufficient evidentiary support. This Court,

however, has recognized that informal judicial admissions are conclusive as to the truth of the matter, unless the party who made the admission denies the truth of its statements.

> Informal judicial admissions are statements of probative facts made by a party in the course of proceedings in court. . . . In case of the informal judicial admission the rules of procedure attach a prima facie force. The party is, however, by no means concluded by his statement. *His opponent may rest his case upon it, with confidence, in the absence of further evidence.* But the litigant himself may always seek to correct his mistake so that his statements may be made to correspond with the truth of the matter. *He may, accordingly, upon assuming the burden imposed by so contradictory a position, deny the truth of what he has previously stated.*

Gallagher v. Haffner, 44 N.W.2d 491, 495 (N.D. 1950) (emphasis added) (citation omitted) (internal quotation marks omitted); *see also In re Hedstrom*, 472 N.W.2d 454, 456 (N.D. 1991) (citation omitted) ("Oral stipulations of the parties made in open court on the record are binding.").

[¶ 78] At the outset, it would appear incumbent upon Ethanol Plant to refute its concession with contradictory facts. VEI's right to the Final Payment of $1,350,000 under Term C is an ascertainable fact. As owner of the ethanol plant, Ethanol Plant was certainly in the best position to do so, as it is the source of all records evidencing the plant's ethanol production rate. Additionally, an affidavit refuting the plant's ethanol production rate would have to come from Ethanol Plant.

[¶ 79] Ethanol Plant and Financial Group, however, did not "correct [their] mistake" by "deny[ing] the truth of what [they had] previously stated." *See Gallagher*, 44 N.W.2d at 495. They failed to "set out specific facts showing a genuine issue for trial" by affidavits or otherwise, despite at least three opportunities to do so. *See* N.D. R. Civ. P. 54(e)(1). Following the filing of VEI's reply brief, they never submitted any affidavits contradicting their prior statements, set forth contradictory facts during the motion

hearing, or asked the court for leave to file a supplemental brief. For the first time, after summary judgment had been granted, they attempted to refute payment under Term C in their briefs opposing VEI's Rule 54(b) request. This belated effort, however, failed because summary judgment had already been granted.

[¶ 80] Presented with no facts creating a genuine issue of material fact, the district court made the only inference it could in the absence of any contradictory evidence. The district court made no impermissible findings of fact and properly granted summary judgment on the entire Note.

1. [¶ 81] *Financial Group's Right to Due Process was Not Violated.*

[¶ 82] "The fundamental requirements of due process are notice and a fair opportunity to be heard." *Gustafson v. Poitra*, 2008 ND 159, ¶ 15, 755 N.W.2d 479 (citations omitted) (internal quotation marks omitted). "Due process requires that parties be afforded a meaningful opportunity to present objections." *Id.* (citation omitted) (internal quotation marks omitted). "Notice is sufficient if it informs the party of the nature of the proceedings so there is no unfair surprise." *Morrell v. North Dakota Dept. of Transp.*, 1999 ND 140, ¶ 9, 598 N.W.2d 111.

[¶ 83] The element of "unfair surprise" is the common thread in the two cases discussed by Financial Group. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418-19 (Minn. Ct. App. 2003) (involving a miscaptioned motion); *Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC*, 75 So.3d 865, 870 (Fla. Dist. Ct. App. 2011) (involving a proposed judgment that was broader than motion and hearing arguments). Ethanol Plant and Financial Group put Term C in issue when it filed the Affidavit of Ryan Thorpe. The court did not *sua sponte* decide a request that VEI kept "hidden" from

Financial Group; nor is this a situation where the court awarded relief that was not "argued at the hearing on [VEI's] motion." *See id.* Financial Group had notice of VEI's request when VEI filed its reply brief in support of its motion for summary judgment.

[¶ 84] Financial Group also had a meaningful opportunity to oppose VEI's request for the Final Payment under Term C. The fact that it chose not to do so is not a violation of its right to due process. Financial Group had twelve (12) days to avail itself of at least three opportunities to present contradictory facts after VEI filed its reply brief. The district court never denied Financial Group the opportunity to (1) submit an affidavit before, during, or after the motion hearing; (2) present contradictory facts during the motion hearing; or (3) submit a supplemental brief following the motion hearing. Indeed, Ethanol Plant and Financial Group never made any such requests.

[¶ 85] Counsel engaged in a relatively prolonged discussion regarding Term C. (*See* APP-87, l. 23 to APP-90, l. 3.) During that discussion, the court heard two confirmations that the ethanol plant had met its designed production rate. (APP-87, ll. 20-22; APP-89, ll. 9-11.) Apparently unsatisfied with prior responses, the district court clarified the standard for summary judgment:

> THE COURT: Well, I'm going to take one more stab at it. This is a Rule 56 Motion. You – if you're going to be disputing any of the material facts, I'm supposed to have an affidavit or something in front of me now, disputing that fact. And back to what I just said – [sic] the affidavit that you did submit seems to confirm rather than dispute. So what am I missing?

(APP-89, ll. 12-18.) The record shows that Financial Group had an adequate opportunity to be heard.

[¶ 86] Finally, the district court did not "mislead" Ethanol Plant or Financial Group "by stating at the motion hearing that summary judgment on the matter was

inappropriate." (Appellants' Br., p. 33.) Although the court suggested that it would deny VEI's claim under Term C, the district court, on two separate occasions, made clear that it was taking it under advisement based on what it heard during the hearing and that it had not yet arrived at a decision. (APP-99, ll. 23-25 to APP-100, ll. 1-5; APP-103, ll. 22-25.) Financial Group's right to due process was not violated.

2. [¶ 87] *This Court Need Not Dismiss the Appeal if It Concludes Term C was Improperly Granted*.

[¶ 88] Rule 54(b) is a question of jurisdiction. If this Court reverses the district court's summary judgment order granting VEI the Final Payment under Term C, then this Court would have reached the merits. This Court, however, does not reach the merits until it determines that it has jurisdiction. *See Frontier Enters., LLP v. DW Enters., LLP*, 2004 ND 131, ¶ 3, 682 N.W.2d 746 (citation omitted) (stating an appeal must be dismissed if this Court concludes it does not have jurisdiction). In other words, if this Court reaches the merits, it would have, as it must, already determined that Rule 54(b) certification was proper, and any reversal on the merits would not require dismissing the appeal for lack of jurisdiction under Rule 54(b).[2]

D. [¶ 89] <u>The District Court Properly Concluded that Ethanol Plant and Financial Group have No Recoupment Claim.</u>

[¶ 90] "Recoupment is an equitable doctrine" and "cannot be used to obtain affirmative relief"—only "to reduce or avoid the plaintiff's recovery." *Overboe v. Brodshaug*, 2008 ND 112, ¶ 12, 751 N.W.2d 177 (citation omitted). Recoupment is

[2] In the alternative, should this Court conclude genuine issues of material fact exist and summary judgment on Term C was improper, VEI waives its right to recover the Final Payment, without admitting or conceding any facts relating to the plant's ethanol production rate, or waiving any other rights, including its right to payment for work performed after February 28, 2009.

permitted only where the same, identical transaction provides both plaintiff and defendant with a claim for damages against each other. A recoupment claim "must arise out of the same transaction that is the subject matter of the plaintiff's action." *Id.* (emphasis added) (citation omitted); *see also* N.D. Cent. Code § 41-03-31(1)(c) (stating recoupment is available to the "obligor" against the "original payee" if "the claim arose from the transaction that gave rise to the instrument"). Recoupment is not permitted, if "the damages claimed by the defendant arise from the breach of an independent contract or from a wrong unconnected with the plaintiff's cause of action." 20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* § 35 (2013).

[¶ 91] In this case, a recoupment claim is only available to Financial Group. A claim of recoupment must arise out of the loan transaction because that transaction is "the subject matter of plaintiff's action." Only Financial Group can assert a claim in recoupment because it was the only party to the transaction giving rise to the Note.

[¶ 92] Both Financial Group and Ethanol Plant, however, appear to assert a recoupment claim based on the Ethanol Plant-VEI Contract. Additionally, although not specifically addressed below by the district court, both also appear to assert a recoupment claim based on the Settlement Agreement. VEI addresses the latter claim only to the extent it was raised below and decided by the district court. Regardless, neither of those transactions are the same as the transaction giving rise to the Note.

[¶ 93] The Ethanol Plant-VEI Contract is not the same transaction as the loan transaction. The Note does not incorporate by reference the Ethanol Plant-VEI Contract. Additionally, almost three (3) years separate the Ethanol Plant-VEI Contract (executed on October 1, 2006) from the Note (executed on April 23, 2009). Moreover, Financial Group

cannot bootstrap Ethanol Plant's damage claims into its recoupment claim because it was not a party to the Ethanol Plant-VEI Contract and that contract did not give rise to the Note. Ethanol Plant simply has no claim of recoupment because it was not a party to the Note or the loan transaction. The Ethanol Plant-VEI Contract and the Note are not the same transaction.

[¶ 94] The Settlement Agreement provides no basis for any claim of recoupment. Ethanol Plant and Financial Group have never asserted any claims for damages arising out of the Settlement Agreement. Ethanol Plant and Financial Group waived certain defenses to the "legitimacy" of both the Settlement Agreement and Note, so any such claims would likely fail. (APP-76, ¶ 4.) The Settlement Agreement is not the subject of Ethanol Plant's claims against VEI. Ethanol Plant and Financial Group have not and cannot assert any damages arising out of the Settlement Agreement to recoup from VEI.

[¶ 95] Assuming *arguendo* the Settlement Agreement provided a basis for a recoupment claim, the Settlement Agreement is not the same transaction as the one giving rise to the Note. Although the Settlement Agreement incorporates by reference the Note, the Note does not incorporate by reference the Settlement Agreement. VEI used its own money to loan $1.35 million to Financial Group. Further, Ethanol Plant obtained the Lien Waiver in which VEI acknowledged receipt of payment and waived its right to file mechanic's liens against Ethanol Plant's property. The Settlement Agreement and Note are separate transactions.

[¶ 96] Ethanol Plant and Financial Group cite Ryan Thorpe's Affidavit, Jeff Lund's Affidavit, the Settlement Agreement, and the Tolling and Limited Release Agreement, to establish some "nexus" between the Settlement Agreement and Note.

However, VEI brought a summary judgment motion on the Note. The Note does not incorporate by reference any other agreement. Ethanol Plant and Financial Group never raised any arguments below that any of the Note's terms were ambiguous which would warrant, as a matter of contract interpretation, going beyond the Note's four corners. Rather, by its terms, the Note evidences a pure financial transaction between only Financial Group and VEI.

[¶ 97] In sum, Ethanol Plant and Financial Group have no recoupment claim because the damages claimed under the Ethanol Plant-VEI Contract and Settlement Agreement arose from the alleged breach of an independent contract or from an alleged wrong unconnected to VEI's action on the Note.

E. [¶ 98] The District Court Properly Concluded that Ethanol Plant and Financial Group have No Setoff Claim.

1. [¶ 99] *Ethanol Plant and Financial Group have No Setoff Claim Because There is No Mutuality of Parties.*

[¶ 100] "The doctrine of setoff is "an equitable doctrine requiring that the demands of mutually indebted parties be set off against each other and that only the balance be recovered. *Dakota Partners, L.L.P. v. Glopak, Inc.*, 2001 ND 168, ¶ 21, 634 N.W.2d 520 (citations omitted). Setoff is defined as "a defendant's counterdemand against the plaintiff, arising out of a transaction independent of the plaintiff's claim." *Id.* "Setoff requires mutuality of the parties, such that debts and credits are mutual when they are due to and from same person in same capacity." *Jordet v. Jordet*, 2012 ND 231, ¶ 8, 823 N.W.2d 512 (internal quotation marks omitted) (citing *Collection Ctr., Inc. v. Bydal*, 2011 ND 63, ¶ 44, 795 N.W.2d 667).

[¶ 101] To assert a valid setoff claim, Financial Group must have asserted a debt to setoff against its debt to VEI, and, for any debt sought to be setoff, there must be mutuality of parties. When the suit was commenced, Financial Group only sought a declaratory judgment that it "owe[d] VEI nothing under the Settlement Agreement and/or the Promissory Note due to damages suffered by Plaintiffs as a direct and proximate cause of VEI's breaches of contract and warranty and other wrongful acts." (APP-20, ¶ 68.) Financial Group claimed no damages arising from the Settlement Agreement or the Note; it only sought to bootstrap Ethanol Plant's claims for damages into its recoupment claim. Consequently, for this alleged debt to be setoff against VEI's claims under the Note, there must be mutuality of parties.

[¶ 102] "Setoff requires mutuality of parties" and "debts and credits are mutual when they are due to and from same person in same capacity." *Jordet*, 2012 ND 231, ¶ 8. Based on these facts, if Ethanol Plant were to prevail on its claims against VEI, then VEI would owe a debt to Ethanol Plant. If VEI were to prevail on its claims against Financial Group, then Financial Group would owe a debt to VEI. Financial Group cannot bootstrap Ethanol Plant's claims against VEI into its setoff claim because it was not a party to the Ethanol Plant-VEI Contract. Here, there is no mutuality of parties.

[¶ 103] This is a "triangular setoff" situation. A "triangular setoff" arises "when A attempts to offset an obligation owed to B against B's debt to C." *In re U.S. Aeroteam, Inc.*, 327 B.R. 852, 864 (Bankr. S.D. Ohio 2005). "[A] 'triangular setoff' . . . is prohibited because there is no mutuality of debt between two parties." *Id.* Here, Financial Group attempted to offset its obligation owed to VEI against VEI's alleged "debt" to Ethanol

Plant. Setoff is "prohibited" in this situation "because there is no mutuality of debt between two parties." *See id.*

2. [¶ 104] *The Assignment Destroyed Any Mutuality that Might have Previously Existed.*

[¶ 105] Even with the Assignment, the conclusion is the same. Although "courts are [generally] in agreement that an assignment of rights can create mutuality for setoff purposes," the mutuality requirement must still be met. *In re U.S. Aeroteam, Inc.*, 327 B.R. 852, 865 (Bankr. S.D. Ohio 2005). "[D]ebts are 'mutual' when they are owing between two parties in the same right and in the same capacity." *Id.* (citations omitted). "[A]n assignment to a third party in a transaction that had previously involved only two parties may destroy mutuality by transforming a mutual obligation into a triangular one." *Id.* at 865.

[¶ 106] The Assignment destroyed mutuality because it is not an absolute assignment—Ethanol Plant only transferred fifty-percent of its rights against VEI to Financial Group. An absolute assignment is required for mutuality purposes because mutuality exists only between two parties. When an assignment to a third party is not absolute, mutuality is destroyed. Assuming *arguendo* that mutuality had previously existed, the Assignment destroyed mutuality by transforming a mutual obligation into a triangular one. If the Assignment is valid and damages are recovered against VEI, VEI would owe obligations to both Ethanol Plant and Financial Group.

3. [¶ 107] *The District Court Properly Concluded that Ethanol Plant and Financial Group have No Equitable Setoff Claim.*

[¶ 108] The "right of offset is [a] creature of equity." *Marmarth Sch. Dist. No. 12 of Slope County v. Hall*, 260 N.W. 411, 414 (N.D 1935) (citations omitted) (internal

quotation marks omitted). "While it is the general rule regarding set-off that equity follows the law," in some cases "equity goes beyond the law controlling set-off when a departure is necessary to prevent wrong and injustice." *Id.* (citations omitted). "The equitable remedy of setoff will be exercised to promote substantial justice and rests largely in the sound discretion of the court." *Jordet v. Jordet*, 2012 ND 231, ¶ 8, 823 N.W.2d 512 (citation omitted). This Court "will not reverse a decision founded upon equitable principles absent an abuse of discretion based upon arbitrary, unreasonable, or unconscionable acts." *Id.* (citation omitted).

[¶ 109] Although courts of equity may go beyond the law in situations wanting in mutuality, whether to allow a setoff is within the court's inherent equitable power and its discretionary authority. It is undisputed that the Assignment was executed in direct response to VEI's summary judgment motion, with a date that was conspicuously omitted. (APP-93, ll. 17-24.) Ethanol Plant and Financial Group never argued that a setoff must be allowed to "prevent wrong and injustice." *See Marmarth*, 260 N.W. at 414. The district court acted well within its discretion in stating that "equity does not favor the plaintiffs" and that ""no court of equity could look favorably on the assignment" as it was "an obvious and belated attempt to create something that does not exist." (APP-108.)

[¶ 110] Financial Group's failure to amend the pleadings to include the Assignment as a defense to VEI's right to enforce the Note is fatal to its setoff claim. "A defense raised in an affidavit resisting a motion for summary judgment, but not pleaded in the answer, [cannot] be reviewed on appeal unless there had been a motion to the trial court to amend the answer to include the new defense." *First Nat'l Bank & Trust Co. of*

Williston v. Jacobsen, 431 N.W.2d 284, 286 (N.D. 1988) (citation omitted). Here, Ryan Thorpe's Affidavit raises the Assignment as a defense to enforcement of the Note for the first time. (APP-54, ¶ 25.) Financial Group and Ethanol Plant never pleaded the Assignment in its complaint or answer to VEI's counterclaim. Nor did they ever bring a motion to amend the pleadings. The Assignment was not executed until after VEI filed its summary judgment motion. (APP-93, ll. 17-24.) As such, Financial Group should not be allowed to raise the Assignment as a defense to enforcement of the Note in this appeal.

[¶ 111] In the district court's words, the Assignment "look[s] a little fishy." (APP-93, ll. 25.) Whether by estoppel, the doctrine of finality, the doctrine of unclean hands, or because no motion to amend the pleadings was ever made and Ethanol Plant assigned its rights in the lawsuit after VEI filed its summary judgment motion on the Note against Financial Group in a belated attempt to arguably create a right of setoff, or other such legal theories, Financial Group should not be allowed to assert the Assignment as a defense to VEI's right to enforce the Note.

[¶ 112] **CONCLUSION**

[¶ 113] For the reasons stated herein, VEI respectfully requests this Court conclude that it has jurisdiction over this appeal because the district court properly certified the summary judgment against Financial Group under Rule 54(b).

[¶ 114] VEI also respectfully requests this Court affirm the summary judgment because there are no genuine issues of material fact and VEI is entitled to summary judgment as a matter of law.

Respectfully submitted January 8, 2013

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Supreme Court Case No. 20130325

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Tharaldson Ethanol Plant I, LLC and Tharaldson Financial Group, Inc.,

Plaintiffs / Appellants,

v.

VEI Global, Inc. f/k/a Valley Engineering, Inc.,

Defendant / Appellee,

and

VEI Global, Inc. f/k/a Valley Engineering, Inc.,

Third-Party Plaintiff,

v.

Dougherty Funding, LLC,

Third-Party Defendant.

Appeal from an order granting Defendant / Appellee's Motion for Partial Summary Judgment, an order granting Rule 54(b) certification, and a Judgment entered on July 22, 2013, an Amended and Final Judgment entered on September 27, 2013, and an Amended Judgment entered on October 2, 2013.

In the District Court, East Central Judicial District, Cass County
The Honorable Wickham Corwin, presiding

AFFIDAVIT OF SERVICE

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

The undersigned, being first duly sworn on oath, deposes and says that I am a United States citizen, over 18 years of age, and on January 8, 2014, I electronically filed and served true and correct copies of following documents:

1. **Appellee's Brief**
2. **Appellee's Appendix, and**
3. **Affidavit of Service.**

by electronic mail upon the following attorney(s) at the below e-mail addresses:

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Subscribed and sworn to before me this 8th day of January, 2014.

BRENDA K VITEK
Notary Public
State of North Dakota
My Commission Expires October 6, 2018

Notary Public

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Supreme Court Case No. 20130325

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In the District Court, East Central Judicial District, Cass County
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AFFIDAVIT OF SERVICE

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

The undersigned, being first duly sworn on oath, deposes and says that I am a United States citizen, over 18 years of age, and on January 9, 2014, I electronically filed and served true and correct copies of following documents:

1. **Appellee's Brief**
2. **Affidavit of Service.**

by electronic mail upon the following attorney(s) at the below e-mail addresses:

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Patty Denn

Subscribed and sworn to before me this 9th day of January, 2014.

Notary Public

GAIL DESCHAMP
Notary Public
State of North Dakota
My Commission Expires July 10, 2014