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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

PLS Services, LLC,
Plaintiff/Appellant,

v.

Valueplus Consulting, LLC,
Defendant/Appellee

and

Clear Creek Retirement Plan LLC; John Wesley Johnson P.S. Defined Benefit Plan; 2011-12 Opportunity Fund 6-1, LLC; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Complaint; Robert L. Doremus and Shannon M. Doremus DBA Sound Investments Company; Dale John Huysman and Anita Ruth Huysman; and Rusty Fields;

Defendants.

Supreme Court No. 20200270

Court File No. 53-2019-CV-01120

BRIEF OF APPELLANT
PLS SERVICES, LLC

ORAL ARGUMENT REQUESTED

Appeal from the following orders and judgment entered in the District Court for the Northwest Judicial District, Civil No. 53-2019-CV-01120, Hon. Paul Jacobsen presiding:

1. January 10, 2020 Order Granting Defendant ValuePlus Consulting, LLC's Motion for Partial Summary Judgment (Doc ID# 77);

2. May 21, 2020 Order Granting Defendant ValuePlus Consulting, LLC's Motion for an Award of Attorney's Fees (Doc ID# 140);

3. May 21, 2020 Order Denying Plaintiff PLS Services, LLC's Motion to Amend/Correct Order Granting Summary Judgment (Doc ID# 141);

4. Judgment entered May 27, 2020 (Doc ID# 148); and

5. Amended Judgment September 23, 2020 (Doc ID# 189).

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I. STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred by ignoring and therefore denying PLS's Rule 56(f) request for discovery, in violation of its fundamental right as a litigant under the North Dakota Rules of Civil Procedure to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

[¶2] Whether the District Court erred by making findings of fact regarding the specific knowledge of Defendant ValuePlus Consulting, LLC and its status as a good faith purchaser, despite competent, admissible evidence to the contrary.

[¶3] Whether the District Court erred by granting an award of attorney's fees to Defendant ValuePlus Consulting, LLC on the grounds that PLS's claim against ValuePlus Consulting, LLC was "frivolous" and that PLS "made untruthful allegations in the Complaint without reasonable cause."

[¶4] Whether the District Court erred by denying PLS's Motion to Amend/Correct Order Granting Summary Judgment and Order Granting an Award of Attorney's Fees and thereby failing to correct the afore-stated errors before entry of Judgment.

II. STATEMENT OF THE CASE

[¶5] This case[1] is a priority dispute between Plaintiff/Appellant, PLS Services, LLC ("PLS") and Defendant/Appellee ValuePlus Consulting, LLC ("ValuePlus") regarding their competing mortgage interests[2] in a residential property located in Williston,

[1] Aside from the priority dispute between Plaintiff/Appellant PLS Services, LLC and Defendant/Appellee ValuePlus Consulting, LLC, Plaintiff has also asserted claims against the other defendants. Those claims are still pending before the district court and are not relevant to the issues before this Court on appeal.

[2] The parties' competing mortgage interests are described in Section. III.A. below.

North Dakota ("Subject Property"). PLS's mortgage interests are prior in time to ValuePlus's mortgage interest and therefore have priority. However, PLS's mortgages contained an error in the legal description, resulting in those mortgages being recorded in an errant tract index for a non-existent property. Because PLS's mortgages were recorded in an errant tract index, ValuePlus claims the status of a Good Faith Purchaser, without notice of PLS's mortgages.

[¶6] Contrary to its claim to be a Good Faith Purchaser under North Dakota law, ValuePlus previously received a separate mortgage intended to cover the same Subject Property, with the same errant legal description, and caused it to be recorded in the same errant tract index as PLS's mortgages. At that same time, ValuePlus executed a purchase agreement to buy the Subject Property that specifically referenced "monetary encumbrances" on the Subject Property, giving ValuePlus notice of, or at least a duty to inquire into, PLS's mortgage interests. Consequently, ValuePlus cannot qualify as a Good Faith Purchaser.

[¶7] On July 31, 2019, PLS brought the present action, seeking reformation of its mortgages to correct the errant legal description, foreclosure of its mortgages as against the Subject Property, and a determination that PLS's mortgage interests are senior to those of ValuePlus and the other defendants. Dkt. # 2.

[¶8] ValuePlus filed its Answer on September 16, 2019 (Dkt. # 16) and filed a motion for partial summary judgment 23 days later on October 9, 2019 (Dkt. # 21)—before any discovery could be completed and before the court could even enter a scheduling order. Through its motion, ValuePlus asked the court to find that ValuePlus was a Good Faith Purchaser—an issue of fact under North Dakota law, dismiss all of PLS's claims against

it, determine that PLS's claims were "frivolous" and "untruthful," and award ValuePlus its attorney's fees. Dkt. # 21.

[¶9] PLS opposed the summary judgment motion on the merits, and also requested an opportunity to conduct discovery under Rule 56(f), N.D.R.Civ.P in its response brief and at the motion hearing. Dkt. # 46; App. 164–66.

[¶10] On January 10, 2020, the district court granted ValuePlus's motion for summary judgment. The court's order entirely ignored PLS's Rule 56(f) request, made specific findings of fact regarding ValuePlus's mental state regarding the transactions in question, found as a matter of fact that ValuePlus was a Good Faith Purchaser, found that PLS's claims were "frivolous" and contained "untruthful allegations," and awarded ValuePlus its attorney's fees. App. 172–200.

[¶11] On February 21, 2020, PLS moved the district court to reconsider its order granting summary judgment. Dkt. # 95. The district court denied that motion, and judgment was entered on May 27, 2020, dismissing all of PLS's claims against ValuePlus, requiring PLS to immediately release its Notice of Lis Pendens on the Subject Property, ordering PLS to pay $16,623.00 in attorney's fees. App. 223.

[¶12] On June 11, 2020, PLS moved to amend the judgment to include Rule 54(b) certification. Dkt. # 152. Certification was appropriate and imperative in this case so that PLS could exercise its right to an appeal without suffering the unjust hardship of having ValuePlus dispose of the Subject Property while the remaining claims were resolved. On September 11, 2020, the district court granted PLS's motion for Rule 54(b) certification (Dkt. # 186), and an amended judgment was entered on September 23, 2020. App. 225.

III. STATEMENT OF THE FACTS

[¶13] This case involves a priority dispute between Plaintiff/Appellant, PLS Services, LLC ("PLS") and Defendant/Appellee ValuePlus Consulting, LLC ("ValuePlus") regarding their competing mortgage interests in a residential property in Williston, North Dakota, described as follows:

> Lot 22R, Block 9, Madison Ridge Rearrangement #3, in Blocks 7, 9 & 10 in the E½ Section 30, Township 154 North, Range 101 West of the 5th P.M., Williams County, North Dakota
>
> (hereinafter referred to as the "Subject Property").

A. PLS Obtains Mortgages With Errant Legal Descriptions

[¶14] PLS's interest in the Subject Property derives from the following two mortgages of record, each with a face value of $120,000.00 (for a total face value of $240,000.00):

- Mortgage dated June 29, 2012, recorded July 10, 2012, as Document No. 738880, between Clear Creek Retirement Plan, LLC, as borrower, and Robert L. Doremus and Shannon M. Doremus, husband and wife, DBA Sound Investments Company, as lenders. App. 28.

- Mortgage dated June 29, 2012, recorded July 10, 2012, as Document No. 738881, between Clear Creek Retirement Plan, LLC, as borrower, and Robert L. Doremus and Shannon M. Doremus, husband and wife, DBA Sound Investments Company, as lenders. App. 36.

(hereinafter collectively referred to as the "PLS Mortgages").

[¶15] PLS acquired these mortgages by the following two assignments of record:

- Assignment of Mortgage dated February 19, 2014, recorded March 4, 2014, as Document No. 780996, between Robert L. Doremus and Shannon M. Doremus, husband and wife, DBA Sound Investments Company, assignors, and PLS Services, LLC, as assignee. App. 34.

- Assignment of Mortgage dated February 19, 2014, recorded March 4, 2014, as Document No. 780995, between Robert L. Doremus and Shannon M.

Doremus, husband and wife, DBA Sound Investments Company, assignors, and PLS Services, LLC, as assignee. App. 42.

(hereinafter collectively referred to as the "PLS Assignments").

[¶16] The PLS Mortgages each contained an error in the legal description in that each mortgage describes "Lot 22R, Block 9, Madison Ridge Rearrangement" instead of "Lot 22R, Block 9, Madison Ridge Rearrangement #3". App. 33, 41. Importantly, there is no such lot as "Lot 22R, Block 9" located in the "Madison Ridge Rearrangement" subdivision. App. 109. It does not exist. The only "Lot 22R, Block 9" within the greater Madison Ridge development is located in "Madison Rearrangement #3." App. 111. The official plat of "Madison Ridge Rearrangement #3" was recorded on December 6, 2011. App. 111.

[¶17] It is uncontradicted in this case that Robert Doremus, the original mortgagee and drafter of the PLS Mortgages, admitted that both he and Clear Creek Retirement Plan, LLC, the record title owner and mortgagor of the Subject Property, intended that the PLS Mortgages would cover the Subject Property, but that Doremus errantly omitted "#3" when drafting the legal descriptions. App. 125–26.

[¶18] Robert Doremus, the original mortgagee and drafter of the PLS Mortgages, caused the mortgages to be recorded in an errant tract index for a nonexistent property, rather than the Subject Property. App. 113. At the time the PLS Mortgages were recorded, they were the first and only documents recorded in that errant tract index. App. 113.

B. ValuePlus Negotiates Purchase Agreement with Owner of Subject Property For Purchase of Subject Property Subject to "Monetary Encumbrances Not Assumed By Buyer."

[¶19] On June 19, 2012, ValuePlus executed a Residential Purchase and Sale Agreement ("Purchase Agreement") with Clear Creek Retirement Plan, LLC—the owner

of the Subject Property—for the purchase of the Subject Property. App. 151. The Purchase Agreement also contains an error in the legal description as it, too, fails to reference "Rearrangement #3." App. 151. However, it was the intention of ValuePlus that the Purchase Agreement would cover the Subject Property. App. 145. The purchase price for Lot 22R was $468,000.00. App. 151.

[¶20] Paragraph 14 of the Purchase Agreement states in relevant part: "CONDITION OF TITLE. Unless otherwise specified in this Agreement, title to the property shall be marketable at closing," but "The following shall not cause the title to be unmarketable: . . . monetary encumbrances not assumed by buyer that does not exceed the sales price of the property." App. 153 (emphasis added).

[¶21] Paragraph 17 of the Purchase Agreement states: "UNDERLYING ENCUMBRANCES. If there is an existing Mortgage, Real Estate Contract, or other encumbrance which is to remain unpaid after closing and its terms required the holder's consent to this sale, Buyer agrees to promptly apply for such consent and this Agreement is conditioned on it being obtained. Seller may not encumber the property with any encumbrance(s) that exceeds the value of the property at closing or, if seller financed, exceeds the total of the seller carried financing." App. 153.

[¶22] As part of the Purchase Agreement, ValuePlus was to receive a mortgage on the Subject Property in the amount of $225,000.00 to secure Clear Creek's performance of its obligations under the Purchase Agreement. App. 159.

[¶23] The total face value of the PLS Mortgages ($240,000.00) and the security mortgage provided for in the Purchase Agreement ($225,000.00) was $465,000.00--$3,000.00 less than the $468,000.00 purchase price, and title to the Subject Property was

therefore "marketable" under Paragraph 14 of the Purchase Agreement. App. 153. In other words, ValuePlus agreed that title to the Subject Property was still marketable despite the presence of the existing monetary encumbrances. App. 153.

C. ValuePlus Obtains Mortgage With Same Errant Legal Description

[¶24] On July 12, 2012 (two days after the PLS Mortgages were recorded), ValuePlus received a mortgage from Clear Creek Retirement Plan, LLC pursuant to the Purchase Agreement. App. 129, 159. The mortgage contained the same errant legal description as that contained in the PLS Mortgages and the Purchase Agreement. App. 134. That mortgage was dated July 12, 2012, and recorded September 26, 2012, as Document No. 744509, between Clear Creek Retirement Plan, LLC, as borrower, and ValuePlus Consulting, LLC as lender to secure a loan of $225,000.00 ("ValuePlus Notice Mortgage"). App. 129.

[¶25] Importantly, ValuePlus caused the ValuePlus Notice Mortgage to be recorded in the same errant tract index that the PLS Mortgages were recorded in rather than the Subject Property. App. 113. At the time ValuePlus caused the ValuePlus Mortgage to be recorded, only four other documents had been filed in that tract index—all of which involved Robert Doremus, three of which were mortgages issued by Clear Creek, and two of which were the PLS Mortgages. App. 113.

[¶26] Eight months later, ValuePlus learned of the errant legal description and executed a Satisfaction of Mortgage dated March 15, 2013, recorded on April 24, 2013, as Document. No. 758888, satisfying the ValuePlus Notice Mortgage in full. App. 135. Simultaneously, ValuePlus received a new mortgage from Clear Creek dated March 14, 2013, recorded August 2, 2013, as Document No. 765268, between Clear Creek Retirement

Plan, LLC, as borrower, and ValuePlus Consulting, LLC as lender to secure a loan of $225,000.00. App. 137. This new mortgage contained the exact same terms and was for the exact same amount as the ValuePlus Notice Mortgage but contained a correct legal description for the Subject Property rather than the errant legal description in the ValuePlus Notice Mortgage. App. 137, 142. This mortgage was later satisfied of record by a Satisfaction of Mortgage dated November 19, 2013, recorded on December 2, 2013 as Document No. 775111. App. 163.

D. ValuePlus Obtains Present Interest in the Subject Property

[¶27] Approximately ten months after it discovered the errant legal description in the ValuePlus Notice Mortgage, ValuePlus acquired its present mortgage interest in the Subject Property, with a face value of $175,000.00, from the following mortgage and assignment:

- Mortgage dated January 9, 2013, recorded August 1, 2013, as Document No. 765197, between Clear Creek Retirement Plan, LLC, as borrower, and Fidelity Capital Services LLC, as lender. App. 60.

  (hereinafter referred to as the "ValuePlus Mortgage")

- Assignment of Mortgage dated January 16, 2014, recorded January 30, 2014, as Document No. 778544, between Fidelity Capital Services LLC as assignor, and ValuePlus Consulting, LLC, as assignee. App. 66.

E. 2017 Foreclosure Action; PLS Seeks to Intervene

[¶28] ValuePlus brought a foreclosure action against Clear Creek Retirement Plan, LLC—the record owner of the Subject Property—in Civil No. 53-2017-CV-00898 (the "2017 Foreclosure Action"). App. 101. PLS moved to intervene in that case to assert the priority of its mortgage interests over that of ValuePlus and the other defendants. ValuePlus opposed PLS's motion to intervene. In doing so, ValuePlus submitted an

affidavit from its owner, Rakesh Gupta, in which he stated, "I did not have knowledge, actual or otherwise, of any of the Alleged PLS Notes and Mortgages at any time prior to the date the Subject Assignment was delivered to Valueplus, recorded, and indexed against the Subject Property." App. 71–73. The district court denied PLS's motion to intervene, noting that the 2017 Foreclosure Action would not impact "senior mortgages, which PLS claims it has over the interest of ValuePlus." App. 76. On March 27, 2019, ValuePlus obtained a judgment of foreclosure in the 2017 Foreclosure Action. App. 101. ValuePlus later purchased the Subject Property at a sheriff's sale. App. 68.

F. PLS Brings Present Foreclosure Action; ValuePlus Moves for Summary Judgment

[¶29] On July 31, 2019, PLS brought the present action, seeking reformation of the PLS Mortgages and PLS Assignments to correct the errant legal description, foreclosure of its mortgages as against the Subject Property, and a determination that PLS's mortgage interests are senior to those of ValuePlus and the other defendants. App. 13. ValuePlus filed its Answer on September 16, 2019 (App. 44) and filed a motion for partial summary judgment just 23 days later on October 9, 2019. Dkt. # 21.

[¶30] No discovery was conducted during the 23 days between the filing of ValuePlus's Answer and the filing of its motion for partial summary judgment. App. 107.

[¶31] In its motion for partial summary judgment, ValuePlus claimed it was a Good Faith Purchaser for value under N.D.C.C. § 47-19-41, alleging it had neither actual knowledge nor constructive notice of PLS's mortgage interests at the time it received the ValuePlus Mortgage. Dkt. # 22.

[¶32] In its motion, ValuePlus also sought an award of attorney's fees on the grounds that PLS's action was "frivolous" under N.D.C.C. § 28-26-01(2). Dkt. # 22.

ValuePlus further asserted that the allegations in PLS's Complaint were "untruthful allegations," which justified an award of attorney's fees under N.D.C.C. § 28-26-31. Dkt. # 22. ValuePlus argued that PLS's claims were "frivolous" and "untruthful" because PLS was aware of ValuePlus's affidavit filed in the 2017 Foreclosure Action in which ValuePlus disclaimed any actual or constructive notice of the PLS Mortgages, yet still proceeded with its claims in spite of this affidavit. Dkt. # 22.

G. PLS Opposes Summary Judgment and Requests Opportunity to Conduct Discovery Under N.D.R.Civ.P. 56(f)

[¶33] PLS opposed ValuePlus's summary judgment motion on the merits. Dkt. # 46. Specifically, PLS argued that questions of fact existed as to (1) ValuePlus's status as a Good Faith Purchaser; (2) ValuePlus's actual knowledge regarding the PLS Mortgages; (3) ValuePlus's knowledge of the errant legal descriptions and the recording of its prior mortgage interest in an errant tract index; and (4) what, if any, inquiry ValuePlus performed with regard to the PLS Mortgages prior to receiving the ValuePlus Mortgage. Dkt. # 46.

[¶34] PLS also requested it be allowed an opportunity to conduct discovery pursuant to N.D.R.Civ.P. 56(f) before the Court ruled on ValuePlus's summary judgment motion. Dkt. # 46. Specifically, PLS filed affidavits from the undersigned counsel and PLS explaining that issues of fact existed as to ValuePlus's status as a Good Faith Purchaser, that no discovery had been conducted in the 23 days between ValuePlus's Answer and motion for summary judgment, and that depositions and other discovery were necessary for PLS to respond substantively to the issues presented in the summary judgment motion. Dkt. # 46–47, 52; App. 104, 127.

H. Court Holds Hearing on ValuePlus's Motion for Partial Summary Judgment

[¶35] A hearing was held on ValuePlus's summary judgment motion on December 16, 2019. During the hearing, the undersigned counsel stressed on a number of occasions that summary judgment was inappropriate because no discovery had been done regarding ValuePlus's status as a Good Faith Purchaser. App. 167–69. The district court even acknowledged the issue:

> THE COURT: Okay. So all of this is simply towards the argument: I shouldn't grant this motion now so it would give you time for discovery?
>
> MR. LAUTT: Precisely.

App. 169.

[¶36] The Court asked ValuePlus's counsel to respond, stating: "Yeah. And to the point of why – maybe I should hold off – or not hold off – to give him time for discovery." App. 170. ValuePlus's counsel responded that PLS should have done investigation about its claims outside of formal discovery before initiating its action against ValuePlus. App. 170. ValuePlus's counsel stated PLS "[could] have been having conversations with Clear Creek, or these other parties, to support the allegations that they put in their Complaint." App. 170. ValuePlus's counsel then suggested to the district court that PLS had not done so, which is false and is contradicted by the affidavits filed previously with the court in which such conversations were described. App. 104, 127.

[¶37] At the conclusion of the hearing, the district court took the matter under advisement and instructed both parties to draft a proposed order and submit it to the Court in an editable Word document.

I. Court Grants ValuePlus's Motion for Partial Summary Judgment and Ignores PLS's Rule 56(f) Request for Discovery

[¶38] The district court did not issue a memorandum opinion on the summary judgment motion. Instead, on January 9, 2020, the court signed the proposed order submitted by ValuePlus, granting the motion, dismissing all of PLS's claims against ValuePlus, finding PLS's action frivolous, and granting ValuePlus's request for an award of attorney's fees. App. 172. In its Order, the Court made the following specific findings of fact:

> Hence, a subsequent purchaser is only protected against a prior conveyance of the same real estate if: (1) **the purchaser has neither actual knowledge or constructive notice of the earlier conveyance**; (2) gave valuable consideration for the real estate conveyed; and (3) recorded their instrument before the earlier instrument was recorded. See N.D.C.C. § 47-19-42 (a mortgage is a "conveyance" for purposes of section 47-19-41, N.D.C.C.); see Putnam, 232 N.W. at 752 (determining that an assignment of mortgage is a "conveyance" subject to the recording statutes). One can only claim the protection of a BFP if all three requirements are met. **Valueplus has satisfied all of these requirements**.

App. 184 (emphasis added).

> Valueplus did not have any actual knowledge of PLS Services' purported interest in the Subject Property.

App. 187.

> In other words, Valueplus only learned of PLS Services' purported interest in the Subject Property several years after Valueplus acquired an interest in the Subject Property. Valueplus did not have actual knowledge of PLS Services' purported interest in the Subject Property prior to Valueplus acquiring an interest in the Subject Property.

App. 187. (emphasis in original).

> PLS Services has not presented anything more than deductive conclusions based on unreasonable inferences. These affidavits, along with PLS Services' failure to contradict the same with reasonable inferences or competent admissible evidence, demonstrate why there are no material facts in dispute regarding Valueplus' lack of actual knowledge.

App. 188–89.

> …the inferences offered by PLS Services in its answer brief and at the Hearing on the Motion are not **reasonable** inferences in light of Gupta's uncontradicted testimony contained in his affidavit (Doc. No. 23) and his supplemental affidavit (Doc. No. 63).

App. 188 (emphasis in original).

> PLS Services was and is aware that ValuePlus did not have actual knowledge of the Alleged PLS Mortgages and Assignments prior to the time ValuePlus acquired an interest in the Subject Property based upon Gupta's affidavit filed in the 2017 Foreclosure Action and the other testimony form the parties as part of PLS Services' unsuccessful attempt to intervene in that action.

App. 198.

> PLS Services was and is aware that Valueplus did not have constructive notice of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property as it is undeniable, and PLS Services even admits, that the Alleged PLS Mortgages and Assignments do not accurately describe the Subject Property, were not indexed against the Subject Property, and they do not appear in the tract index or the chain of title for the Subject Property.

App. 198.

> PLS Services was and is aware that Valueplus did not have inquiry notice of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property.

App. 198.

[¶39] Importantly, the Court's Order granting summary judgment was entirely silent on PLS's request for discovery under Rule 56(f). It was completely ignored. App. 199.

J. PLS Seeks Reconsideration of Court's Order Granting Summary Judgment and Awarding Attorney's Fees

[¶40] On February 21, 2020, PLS moved the Court to reconsider its Order granting summary judgment because the order made improper findings of fact and failed to address in any manner PLS's request for discovery under Rule 56(f). Dkt. # 95. The district court denied PLS's motion. App. 222. Regarding PLS's Rule 56(f) request for discovery, the district court stated, "The record by PLS Services does not meet the standard for relief under this Rule which requires identification of the particular information sought, an explanation of how that information would prevent summary judgment, and an explanation for why it has not yet obtained the information. . . . Here, the Court again exercises its discretion that PLS Services is not entitled to relief under Rule 56(f), N.D.R.Civ.P." App. 221–22.

IV. LAW AND ARGUMENT

A. The Court Erred By Ignoring PLS's Rule 56(f) Request And Thereby Denying PLS a Fair Opportunity to Conduct Discovery.

[¶41] Rule 56, N.D.R.Civ.P., provides in relevant part:

> **(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

[¶42] The North Dakota Supreme Court has held that, "N.D.R.Civ.P. 56(f) should be applied liberally." *Choice Fin. Grp. v. Schellpfeffer*, 2006 ND 87, ¶ 10, 712 N.W.2d 855. "[T]he purpose of subdivision (f) is to provide an additional safeguard against an

improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective." *Id.* "Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality." *Id.* "Where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Choice Fin. Grp.*, 2006 ND 87, ¶ 15, 712 N.W.2d 855 (quoting *Costlow v. United States,* 552 F.2d 560, 564 (3d Cir.1977)).

[¶43] "Our primary concern under Rule 56(f) is to ensure that parties are given a full and fair opportunity to conduct necessary discovery before being required to meet a motion for summary judgment." *Aho v. Maragos*, 1998 ND 107, ¶ 7, 579 N.W.2d 165. "Rule 56(f) is intended to safeguard against judges swinging the summary judgment axe too hastily." *Id.* (internal quotations omitted). "We will apply the rule to prevent a 'rush to summary judgment' when a party has been denied a fair opportunity to conduct discovery." *Id.* "The district courts have a duty under Rule 56(f) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment." *Id.* at ¶ 4 (citing 11 Moore's Federal Practice § 56.10[8][a] (1998)).

[¶44] "A request for additional time for discovery under Rule 56(f) invokes the trial court's discretion, and its decision will not be overturned on appeal absent an abuse of that discretion." *Id.* at ¶ 4.

[¶45] In *Aho v. Maragos*, the defendant moved for summary judgment just six weeks after serving an answer to the complaint. *See Aho*, 1998 ND 107, ¶ 3, 579 N.W.2d 165. The plaintiff opposed the motion and requested a continuance, asserting he had not had an opportunity to conduct necessary discovery to adequately oppose the summary

judgment motion. *Id.* Approximately six weeks later, the district court granted the summary judgment motion without specifically addressing the plaintiff's request for a continuance to conduct discovery. *Id.* In reversing the district court's grant of summary judgment, this Court noted that "the district court did not address Maragos's motion for a continuance or give any reasoning or rationale for its implicit denial of the motion. The court merely, at a later date, granted the heirs' motion for summary judgment." *Id.* at ¶ 5. The Court went on to conclude:

> In this case, the heirs moved for summary judgment six weeks after Maragos served his answer. The hearing was held 20 days later. When presented with this accelerated time frame, we believe the district court abused its discretion in failing to allow Maragos additional time to conduct discovery to oppose the motion for summary judgment.

Id. at ¶ 8.

[¶46] Nearly identical facts came before this Court in *Johnson Farms v. McEnroe*, 568 N.W.2d 920 (N.D. 1970). In that case, "Johnson Farms' request for additional time for discovery in defense to the summary judgment motion was ignored by the trial court." *Id.* at ¶ 30. "The court then based the grant of summary judgment against Johnson Farms in part because no documentary evidence to support its position has been alleged or shown to have ever existed." *Id.* (internal quotations omitted). The Court went on to conclude "the trial court erred in failing to allow Johnson Farms further time for discovery before ruling on the summary judgment motion." *Id.* The Court reversed the summary judgment and remanded the case for further discovery and for trial on the disputed issues of material fact. *Id.* at ¶ 31.

[¶47] In this case, the motion for partial summary judgment was filed 23 days after ValuePlus filed its Answer, and before the Court even had the chance to enter a

scheduling order. App. 6; Dkt. # 16, 21. The motion centered solely on ValuePlus's claim to be a Good Faith Purchaser with respect to the PLS Mortgages. Under North Dakota law, a party's status as a good faith purchaser is deeply fact dependent. *See Diocese of Bismarck Tr. v. Ramada, Inc.*, 553 N.W.2d 760, 768 (N.D. 1996). At the time ValuePlus filed its motion, all of the questions of fact relating to what ValuePlus knew about the PLS Mortgages and when it knew it were still yet to be developed. Importantly, ValuePlus—the party moving for summary judgment—was in possession of much of the factual evidence relating to its claim to be a Good Faith Purchaser, *e.g.*, the state of mind of its owner, Rakesh Gupta, and documents relating ValuePlus's transactions regarding the Subject Property. Therefore, PLS had no choice but to request an opportunity for discovery under Rule 56(f). Under these circumstances, North Dakota law requires that discovery should be granted "as a matter of course." *See Choice Fin. Grp.*, 2006 ND 87, ¶ 15, 712 N.W.2d 855.

[¶48] PLS complied with Rule 56(f) by timely requesting an opportunity for discovery in its brief in opposition to ValuePlus's summary judgment motion. Dkt. #46 at ¶¶ 29–33. PLS filed an affidavit executed by the undersigned counsel stating, "PLS is unable to present facts essential to justify PLS's opposition to the partial summary judgment motion that has been filed in this action. No discovery has been done on ValuePlus's status as a good faith purchaser, which is a question of fact essential to PLS's claims and ValuePlus's defense." App. 106. PLS also submitted an affidavit executed by PLS's owner and manager, Patricia L. Sanderson, stating, "Depositions and other discovery are necessary for PLS to present essential facts justifying its position in this action and oppose the pending motions for summary judgment." App. 128.

[¶49] Despite complying with Rule 56(f), requesting an opportunity for discovery in its brief (Dkt. #46 at ¶¶ 29–33), supplying affidavits specifying the issues requiring discovery (App. 106, 128), and again requesting discovery at the motion hearing (App. 167–69), the Court's order granting summary judgment was entirely silent on PLS's Rule 56(f) request. App. 172. As was the case in *Aho* and *Johnson Farms*, the issue was completely overlooked by the Court. App. 172.

[¶50] It is difficult to conceive of a case that would merit an opportunity to conduct discovery under Rule 56(f) more than the present case. The critical issue in ValuePlus's summary judgment motion was whether ValuePlus qualifies as a Good Faith Purchaser—a deeply fact dependent issue under North Dakota law. *See Diocese of Bismarck Tr.*, 553 N.W.2d at 768. ValuePlus relied solely on affidavits from Rakesh Gupta, ValuePlus's owner, to qualify itself as a Good Faith Purchaser. App. 71; Dkt. # 22. However, because no discovery was allowed in this case, PLS never had the opportunity to depose or cross examine Mr. Gupta about the matters contained in his affidavit, or depose any of the other parties before being required to answer ValuePlus's summary judgment motion.

[¶51] As in *Aho* and *Johnson Farms*, here the district court abused its discretion by ignoring and therefore denying PLS's request for discovery under Rule 56(f). The court's order was an "improvident and premature grant of summary judgment," which Rule 56(f) was designed to protect against. *See Choice Fin. Grp.*, 2006 ND 87, ¶ 10, 712 N.W.2d 855. The court's ignoring and denial of PLS's Rule 56(f) request deprived PLS of its fundamental right as a litigant under the North Dakota Rules of Civil Procedure to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or

defense." *See* N.D.R.Civ.P. 26(b)(1)(A). The summary judgment must therefore be reversed, and the case remanded for trial on the disputed issues of material fact.

B. The Court Erred By Making Findings of Fact About ValuePlus's Status as a Good Faith Purchaser.

1. Summary Judgment Standard of Review

[¶52] Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c).

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Lynch v. New Pub. Sch. Dist. No. 8, 2012 ND 88, ¶ 7, 816 N.W.2d 53.

[¶53] The North Dakota Supreme Court "has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment." *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74, ¶ 10, 764 N.W.2d 665. "The district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Id.* Because findings of fact are inappropriate on a motion for

summary judgment, the clearly erroneous standard set out in N.D.R.Civ.P. 52(a), which governs our review of a district court's findings of fact in a bench trial, is inapplicable to our review of the court's resolution of a motion for summary judgment." *Id.*

[¶54] "A motion for summary judgment is not an opportunity to conduct a mini-trial. If there are disputed issues of material fact that require resolution by findings of fact, the party opposing summary judgment is entitled to present its evidence to a finder of fact in a full trial." *Id.* at ¶ 11. "If the moving party meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials . . . but must present competent admissible evidence to show the existence of a genuine issue of material fact." *Lynch*, 2012 ND 88, ¶ 7, 816 N.W.2d 53. "Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

2. The District Court Erred By Resolving Issues of Fact About ValuePlus's Knowledge and Status as a Good Faith Purchaser Against PLS Despite Competent Admissible Evidence to the Contrary.

[¶55] ValuePlus's entire defense against PLS's priority claim is that ValuePlus qualifies as a Good Faith Purchaser. PLS disputes that ValuePlus is a Good Faith Purchaser under North Dakota law because the documents of record and circumstances surrounding those transactions suggest ValuePlus had actual or constructive notice of the PLS Mortgages before it took assignment of the ValuePlus Mortgage.

[¶56] As explained above, PLS was prevented from conducting any discovery on these matters and therefore never had an opportunity to develop a complete factual record. However, even on the limited evidence available to it from documents of record, there is

enough evidence from which a reasonable trier of fact could conclude ValuePlus was on notice of the PLS Mortgages and therefore does not qualify as a Good Faith Purchaser.

[¶57] PLS's position is straightforward and is based on the following facts established by documents of record in this case: (1) ValuePlus was a party to a Purchase Agreement intended to cover the Subject Property which specifically referenced existing "monetary encumbrances" on the property, App. 151; (2) that Purchase Agreement provided for ValuePlus to take a $225,000.00 mortgage on the Subject Property to secure performance of the Purchase Agreement, App. 159; (3) ValuePlus received a mortgage from Clear Creek (the "ValuePlus Notice Mortgage") only days after the PLS Mortgages were recorded, App. 129; (4) the ValuePlus Notice Mortgage contained the exact same errant legal description as the PLS Mortgages, App. 33, 41, 134; (5) the ValuePlus Notice Mortgage was recorded in the exact same errant tract index as the PLS Mortgages, App. 113; (6) that by at least March 14, 2013, ValuePlus learned of the errant legal description in the ValuePlus Notice Mortgage and immediately worked together with Clear Creek to correct it by satisfying the ValuePlus Notice Mortgage and taking from Clear Creek a new mortgage with the same terms for the same amount ($225,000.00), App. 135, 137; and (7) ValuePlus obtained its present interest in the Subject Property approximately ten months thereafter. App. 60, 66. Under these circumstances, the trier of fact could reasonably infer that ValuePlus had actual notice of the existence of the PLS Mortgages or at the very least had a duty to inquire into PLS's mortgage interests. Summary judgment was therefore inappropriate.

[¶58] The North Dakota Supreme Court has defined a Good Faith Purchaser as follows:

> Good faith is "an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." N.D.C.C. § 1–01–21. A good-faith purchaser must acquire rights without actual or constructive notice of another's rights. [*Farmers Union Oil Co. v.*] *Smetana*, 2009 ND 74, ¶ 16, 764 N.W.2d 665. Actual notice consists of express information of a fact, N.D.C.C. § 1–01–23, and constructive notice is notice imputed by law to a person not having actual notice. N.D.C.C. § 1–01–24. A person who has "actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." N.D.C.C. § 1–01–25; *Erway v. Deck*, 1999 ND 7, ¶ 10, 588 N.W.2d 862. Whether a party acted in good faith is a question of fact. *Smetana*, at ¶ 15. "The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons." N.D.C.C. § 47–19–19. This Court long ago recognized that the language in N.D.C.C. § 47–19–19 provides constructive notice of the contents of a recorded instrument to all purchasers and encumbrancers subsequent to the recording. *First Nat'l Bank v. Big Bend Land Co.*, 38 N.D. 33, 37, 164 N.W. 322 (1917). *See Wheeler v. Southport Seven Planned Unit Dev.*, 2012 ND 201, ¶ 17, 821 N.W.2d 746; *Bangen v. Bartelson*, 553 N.W.2d 754, 758 (N.D. 1996).

Sundance Oil and Gas, LLC v. Hess Corp., 2017 ND 269, ¶ 13, 903 N.W.2d 712.

[¶59] The North Dakota Supreme Court "has 'consistently held that a purchaser who fails to make the requisite inquiry cannot claim the protection of a good-faith purchaser status' under N.D.C.C. § 47–19–41." *Id.* (quoting *Swanson*, 2011 ND 74, ¶ 10, 796 N.W.2d 614). "Rather, a person who fails to make the proper inquiry will be charged with constructive notice of all facts that such inquiry would have revealed." *Id.* "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." N.D.C.C. § 1-01-25.

[¶60] "The issues of good faith and constructive notice are similar in that they both require an examination of the information possessed by a person." *Diocese of*

Bismarck Tr. v. Ramada, Inc., 553 N.W.2d 760, 768 (N.D. 1996). "The information, however, need not be so detailed as to communicate a complete description of an opposing interest; instead, the information must be sufficient to assert the existence of an interest as a fact, which in turn gives rise to a duty to investigate." *Id.* "In making inquiry, a person must exercise reasonable diligence; a superficial inquiry is not enough." *Id.*

[¶61] "A party's status as a good faith purchaser without notice of a competing interest is a mixed question of fact and law." *Sundance*, 2017 ND 269, ¶ 12, 903 N.W.2d 712. "The factual circumstances relating to events surrounding the transaction—the realities disclosed by the evidence as distinguished from their legal effect—constitute the findings of fact necessary to determine whether a party has attained the status of a good faith purchaser without notice." *Diocese of Bismarck Tr.*, 553 N.W.2d at 768.

[¶62] By signing the proposed order granting the motion for partial summary judgment submitted by ValuePlus, the district court resolved a disputed question of fact—ValuePlus's status as a good faith purchaser—in ValuePlus's favor. The Court did so despite competent, admissible evidence to the contrary and despite the law, which clearly states, "the facts 'necessary to determine whether a party has attained the status of a good-faith purchaser without notice constitute findings of fact.'" *Sundance*, 2017 ND 269, ¶ 12, 903 N.W.2d 712 (emphasis added).

[¶63] In its Order Granting Partial Summary Judgment, the Court made the following specific findings of fact:

> Hence, a subsequent purchaser is only protected against a prior conveyance of the same real estate if: (1) **the purchaser has neither actual knowledge or constructive notice of the earlier conveyance**; (2) gave valuable consideration for the real estate conveyed; and (3) recorded their instrument before the earlier instrument was recorded. See N.D.C.C. § 47-19-42 (a mortgage is a "conveyance" for purposes of section 47-19-41, N.D.C.C.);

> see Putnam, 232 N.W. at 752 (determining that an assignment of mortgage is a "conveyance" subject to the recording statutes). One can only claim the protection of a BFP if all three requirements are met. **Valueplus has satisfied all of these requirements**.

App. 184 (emphasis added).

> Valueplus did not have any actual knowledge of PLS Services' purported interest in the Subject Property.

App. 187.

> In other words, Valueplus only learned of PLS Services' purported interest in the Subject Property several years after Valueplus acquired an interest in the Subject Property. Valueplus did not have actual knowledge of PLS Services' purported interest in the Subject Property prior to Valueplus acquiring an interest in the Subject Property.

App. 187. (emphasis in original).

> PLS Services has not presented anything more than deductive conclusions based on unreasonable inferences. These affidavits, along with PLS Services' failure to contradict the same with reasonable inferences or competent admissible evidence, demonstrate why there are no material facts in dispute regarding Valueplus' lack of actual knowledge.

App. 188–89.

> …the inferences offered by PLS Services in its answer brief and at the Hearing on the Motion are not **reasonable** inferences in light of Gupta's uncontradicted testimony contained in his affidavit (Doc. No. 23) and his supplemental affidavit (Doc. No. 63).

App. 188 (emphasis in original).

> PLS Services was and is aware that ValuePlus did not have actual knowledge of the Alleged PLS Mortgages and Assignments prior to the time ValuePlus acquired an interest in the Subject Property based upon Gupta's affidavit filed in the 2017 Foreclosure Action and the other testimony form the parties as part of PLS Services' unsuccessful attempt to intervene in that action.

App. 198.

> PLS Services was and is aware that Valueplus did not have constructive notice of the Alleged PLS Mortgages and Assignments prior to the time

> Valueplus acquired an interest in the Subject Property as it is undeniable, and PLS Services even admits, that the Alleged PLS Mortgages and Assignments do not accurately describe the Subject Property, were not indexed against the Subject Property, and they do not appear in the tract index or the chain of title for the Subject Property.

App. 198.

> PLS Services was and is aware that Valueplus did not have inquiry notice of the Alleged PLS Mortgages and Assignments prior to the time Valueplus acquired an interest in the Subject Property.

App. 198.

[¶64] To summarize, the Court—in ruling on a summary judgment motion under Rule 56—made **specific findings of fact** as to ValuePlus's knowledge and mental state regarding the earlier conveyances in question, which is a necessary element of qualifying as a good faith purchaser. The Order based these finding on what it repeatedly referred to as the "uncontradicted testimony" of Rakesh Gupta, ValuePlus's owner. App. 187–88. However, the Court's finding that Gupta's affidavits were "uncontradicted" is plainly wrong. PLS's brief opposing summary judgment cited a host of facts, supported by documents in the record (the official tract index, mortgages and satisfactions involving ValuePlus, etc.), which suggest that ValuePlus did have actual knowledge of the PLS Mortgages. Dkt. # 46 ¶¶ 18–21. This evidence is based on documents filed of record with the Williams County Recorder. These are documents that ValuePlus itself refers to and relies upon and are obviously competent and admissible.

[¶65] The Order rightly stated that "A party opposing summary judgment will be 'given the benefit of all favorable inferences which can reasonably be drawn from the record.'" App. 188 (citing *Desert Partners IV, L.P. v. Benson*, 2016 ND 37, ¶ 9, 875 N.W.2d 510 (quoting *Tibert V. Nodak Mut. Ins. Co.*, 2012 ND 81, ¶ 8, 816 N.W.2d 31)).

However, the Order then found that "the inferences offered by PLS Services in its answer brief and at the Hearing on the Motion are not **reasonable** inferences in light of Gupta's uncontradicted testimony contained in his affidavit (Doc. No. 23) and his supplemental affidavit (Doc. No. 63)." App. 188 (emphasis in original). The Order continues, "PLS Services has not presented anything more than deductive conclusions based on unreasonable inferences. These affidavits, along with PLS Services' failure to contradict the same with reasonable inferences or competent admissible evidence, demonstrate why there are no material facts in dispute regarding Valueplus' lack of actual knowledge." App. 188–89 (emphasis in original).

[¶66] Once again, the district court incorrectly states that Rakesh Gupta's affidavits were "uncontradicted." But beyond that, it concludes, without any explanation whatsoever, that the inferences PLS has drawn from the documents of record as to ValuePlus's knowledge of the earlier conveyances are "not reasonable." But on what grounds? Could a reasonable trier of fact not examine the circumstances surrounding the ValuePlus Notice Mortgage and reasonably conclude that ValuePlus knew or should have known about the PLS Mortgages? If not, why not? Why would such a conclusion on the part of a trier of fact be so unreasonable as to deprive PLS the opportunity to even present the issue to a trier of fact? Under North Dakota law, "[a]ny issue may be proven by circumstantial evidence or by a combination of direct and circumstantial evidence." *Farmers Ins. Exch. v. Schirado*, 2006 ND 141, ¶ 12, 717 N.W.2d 576. "Accordingly, a plaintiff may establish the elements of its claim by circumstantial evidence." *Id.* Circumstantial evidence may provide an inference of questions of fact. *See id.*

[¶67] Whether ValuePlus knew about the PLS Mortgages at the time it acquired its present interest in the Subject Property is a question of fact. The circumstances in this case—the documents of record and the timing in which such documents were executed and recorded—suggest that ValuePlus had such knowledge.

[¶68] In this case, we must examine the information possessed by ValuePlus at the time it acquired its present interest in the Subject Property in January 2014. *See Diocese of Bismarck Tr.*, 553 N.W.2d at 768. It is not necessary that the information possessed by ValuePlus amount to a complete description of PLS's claimed interest in the Subject Property. Rather, the information possessed by ValuePlus must have been sufficient to assert the existence of PLS's interest as a fact, which in turn required further investigation on the part of ValuePlus. *See id.* A superficial inquiry on the part of ValuePlus would not be enough. Instead, ValuePlus was required to exercise reasonable diligence.

[¶69] In this case, we know or can reasonably infer that ValuePlus had actual knowledge of the PLS Mortgages because ValuePlus's own Purchase Agreement referenced existing "monetary encumbrances" on the Subject Property. App. 153. We also know or can reasonably infer that ValuePlus had actual knowledge of the errant legal description in the ValuePlus Notice Mortgage and that ValuePlus realized its mortgage was improperly recorded in an index for a non-existent property. App. 113, 123. On these facts alone, we can reasonably conclude that ValuePlus was aware, or should have been aware, of the existence of the PLS Mortgages by at least March 2013. App. 135, 137.

[¶70] Given ValuePlus's knowledge of the existence of the PLS Mortgages, ValuePlus had a duty of inquiry under North Dakota law to investigate the nature of the PLS Mortgages to discover if those mortgages were intended to encumber the Subject

Property rather than the non-existent property to which both the PLS Mortgages and the ValuePlus Notice Mortgage were indexed. All that was necessary for ValuePlus to learn the true nature and intent of the PLS Mortgages was simply to ask the grantor of those mortgages—Clear Creek Retirement Plan, LLC. ValuePlus was already in contact with Clear Creek regarding the ValuePlus Notice Mortgage and the mortgage that later replaced it, so ValuePlus certainly had the means of inquiring. App. 135, 137. However, it appears ValuePlus made no inquiry whatsoever.

[¶71] "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." N.D.C.C. § 1-01-25. Because ValuePlus failed to make the requisite inquiry under North Dakota law, it is deemed to have constructive notice of the PLS Mortgages and their intended attachment to the Subject Property. At the very least, the circumstances surrounding ValuePlus's knowledge and inquiry are questions of fact, which were never subject to discovery in this case. The district court's findings of fact regarding the specific knowledge of ValuePlus about the earlier conveyances in question are erroneous and should be reversed, and the case should be remanded for trial on these issues.

C. <u>The Court Erred By Granting ValuePlus an Award of Attorney's Fees.</u>

[¶72] In its Order, the district court found that PLS's priority claim against ValuePlus was "frivolous" under N.D.C.C. § 28-26-01(2) and "untruthful" under N.D.C.C. § 28-26-31. Those statutes state as follows:

> N.D.C.C. § 28-26-01(2):
>
> In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable

> attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.
>
> N.D.C.C. § 28-26-31:
>
> 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, to be summarily taxed by the court at the trial or upon dismissal of the action.

"A court's discretionary determinations under N.D.C.C. § 28–26–01(2) will not be overturned on appeal absent an abuse of discretion. *Tillich v. Bruce*, 2017 ND 21, ¶ 7, 889 N.W.2d 899. Likewise, "The district court has discretion to award attorney's fees under N.D.C.C. § 28–26–31, and the court's decision will not be reversed on appeal unless the court abuses its discretion." *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 65, 855 N.W.2d 614. "A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Tillich*, 2017 ND 21, ¶ 7, 889 N.W.2d 899.

[¶73] Here, the district court's rationale does not lead to a reasoned determination, and it misinterprets and misapplies the law. The sole basis for the district court's decision is that, during the 2017 Foreclosure Action, ValuePlus's owner, Rakesh Gupta, swore an affidavit on November 1, 2018, in which he disclaimed having knowledge of the PLS Mortgages. App. 196. In the affidavit, he stated: "I did not have knowledge, actual or

otherwise, of any of the Alleged PLS Notes and Mortgages at any time prior to the date the [ValuePlus Mortgage] was delivered to Valueplus, recorded, and indexed against the Subject Property." App. 73, 196. Based on this statement from Rakesh Gupta, the Court reasoned as follows:

> In other words, PLS Services has been aware since at least November 1, 2018, that Valueplus did not have any actual knowledge of the Alleged PLS Mortgages and Assignment before taking delivery of the Fidelity Capital Assignment. PLS Services was also aware that Valueplus did not have, nor could it have, constructive knowledge of the Alleged PLS Mortgages and Assignment as the same were not indexed against, and did not appear in the chain of title for, the Subject Property… Therefore, PLS Services undeniably knew at the time it commenced this action that equitable reformation was not available to it as Valueplus was protected by such a claim by statute given its BFP status.

App. 196.

[¶74] The Court's reasoning is erroneous. The entire priority dispute between PLS and ValuePlus hinges on ValuePlus's alleged status as a good faith purchaser, which is a question of fact. The district court's reasoning assumes that an affidavit executed by one of the parties is conclusive of the fact it seeks to establish—specifically, what Rakesh Gupta knew at a certain point in time—and that any action brought to challenge that factual claim must be "frivolous" and "untruthful." This is just wrong. Otherwise, any plaintiff would be guilty of bringing a frivolous or untruthful claim simply by continuing to pursue its cause of action after a denial of fact on the part of the defendant. That is an absurd proposition, and it is not how N.D.C.C. § 28-26-01(2) and N.D.C.C. § 28-26-31 work. Our entire system of civil procedure is built around the discovery of facts through depositions, document production, subpoenas, and other mechanisms, and challenging the fact claims of the other party through cross examination and the adversarial process. The fact that Rakesh Gupta swore an affidavit disclaiming knowledge of the earlier conveyances does

not mean that any factual contention to the contrary is "frivolous" or "untruthful." Especially when there is competent, admissible evidence from which a reasonable trier of fact could conclude otherwise. *See* Sec. IV.B.2.

[¶75] The error of the district court's award of attorney's fees is made worse by the fact that PLS was denied an opportunity to conduct any discovery on the issue of ValuePlus's knowledge of the PLS Mortgages. In essence, the district court took ValuePlus's word for it about what it knew about the PLS Mortgages, prevented PLS from having an opportunity to discover facts to the contrary, and then penalized PLS for not being able to rebut ValuePlus's position and having the audacity of challenging it in the first place. The district court's reasoning is plainly wrong, and its finding the PLS's claims were "frivolous" and "untruthful" should be reversed.

D. The Court Erred By Denying PLS's Motion Amend/Correct Its Order Granting Summary Judgment and Thereby Failing to Correct the Afore-Stated Errors.

[¶76] The first and only time the district court substantively addressed PLS's request for discovery under Rule 56(f) was in its Order Denying PLS's Motion to Amend/Correct Order Granting Summary Judgment. App. 221–22. In that Order, the district court stated:

> The record by PLS Services does not meet the standard for relief under this Rule which requires identification of the particular information sought, an explanation of how that information would prevent summary judgment, and an explanation for why it has not yet obtained the information. . . . Here, the Court again exercises its discretion that PLS Services is not entitled to relief under Rule 56(f), N.D.R.Civ.P.

App. 221–22.

[¶77] Again, the court's finding that PLS did not "meet the standard for relief" under Rule 56(f) is just wrong. PLS complied with Rule 56(f) by timely requesting an

opportunity for discovery in its brief in opposition to ValuePlus's summary judgment motion. Dkt. #46 at ¶¶ 29–33. PLS filed an affidavit executed by the undersigned counsel stating, "PLS is unable to present facts essential to justify PLS's opposition to the partial summary judgment motion that has been filed in this action. No discovery has been done on ValuePlus's status as a good faith purchaser, which is a question of fact essential to PLS's claims and ValuePlus's defense." App. 106. PLS also submitted an affidavit executed by PLS's owner and manager, Patricia L. Sanderson, stating, "Depositions and other discovery are necessary for PLS to present essential facts justifying its position in this action and oppose the pending motions for summary judgment." App. 128.

[¶78] Refusing PLS the opportunity to conduct discovery in this case was an abuse of discretion. The rationale set forth in the court's Order Denying PLS's Motion to Amend/Correct Order Granting Summary Judgment ignores the evidence and affidavits before it and cannot be considered a "reasoned determination" under the law. To the extent the court's Order Denying PLS's Motion to Amend/Correct Order Granting Summary Judgment serves as the court's only substantive ruling on PLS's Rule 56(f) request for discovery, that Order should be reversed, and this case should be remanded to the district court for discovery and a trial on the merits.

E. Rule 54(b) Certification Was Appropriate.

[¶79] Certification was appropriate and imperative in this case so that PLS could exercise its right to an appeal without suffering the unjust hardship of having ValuePlus dispose of the Subject Property while the remaining claims were resolved. The summary judgment required PLS to immediately release its Notice of Lis Pendens on the Subject Property. App. 224. If PLS was required to wait to bring this appeal until the entry of a

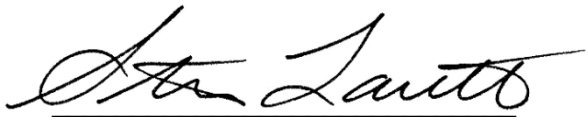
final judgment disposing of all claims involving the other parties still in the lawsuit, ValuePlus would have been free to dispose of the Subject Property during that time. If ValuePlus did so, PLS's claim to the Subject Property would be wholly extinguished, regardless of the outcome of any future appeal, because the Subject Property would be gone. This would be an extremely harsh outcome and demonstrates the extraordinary circumstances that justified certification in this case.

V. CONCLUSION

[¶80] For the reasons stated above, Appellant PLS Services, LLC respectfully requests that this Court reverse the district court's grant of summary judgment, remand the matter back to the district court for discovery and a trial on the merits, and reverse the district court's award of attorney's fees.

[¶81] PLS requests oral arguments in this case. Oral arguments will be helpful to the Court in that counsel will be able to explain the rather complex history involving the mortgages and transactions at issue in this case, and be able to respond to the Court's questions about those and other issues.

Dated this 15th day of January, 2021.



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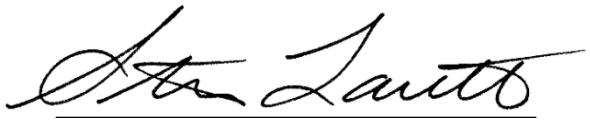
CERTIFICATE OF COMPLIANCE ON WORD COUNT

[¶82] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8)(A); the page count is 38. The argument on the appropriateness of N.D.R.Civ.P. 54(b) certification is less than one (1) page.

Dated this 15th day of January, 2021.



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CERTIFICATE OF WORD PROCESSING PROGRAM

[¶83] The word-processing program is Microsoft Office Word 365.

Dated this 15th day of January, 2021.

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CERTIFICATE OF SERVICE

[¶84] I hereby certify that true and correct copies of the Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 11th day of January, 2021, served electronically on the following:

- Defendant/Appellee Valueplus Consulting, LLC, through its attorney of record Trevor A. Hunter – *thunter@crowleyfleck.com*;

- Robert L. Doremus and Shannon M. Doremus DBA Sound Investments Company, through their attorney of record Nathan Morris Bouray – *nbouray@ndlaw.com*;

- Dale John Huysman and Anita Ruth Huysman through their attorney of record Jack E. Zuger – *jez@pearce-durick.com*;

I hereby further certify that paper copies of the Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 11th day of January, 2021, served by mail on the following:

- Clear Creek Retirement Plan LLC
  21804 Mountain Highway East #131
  Spanaway, WA 98387

- Rusty Fields
  10202 Pacific Ave. S.
  Suite 201
  Tacoma, WA 98444

- John Wesley Johnson P.S. Defined Benefit Plan
  3599 NW Carlton Street, Suite 201
  Silverdale, WA 98383

- 2011-12 Opportunity Fund 6-1, LLC
  1151 Old Porter Pike
  Bowling Green, KY 42103

Dated this 11th day of January, 2021.

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Attorneys for Appellant PLS Services, LLC

CERTIFICATE OF SERVICE

[¶84] I hereby certify that true and correct copies of the Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 15th day of January, 2021, served electronically on the following:

- Defendant/Appellee Valueplus Consulting, LLC, through its attorney of record Trevor A. Hunter – *thunter@crowleyfleck.com*;

- Robert L. Doremus and Shannon M. Doremus DBA Sound Investments Company, through their attorney of record Nathan Morris Bouray – *nbouray@ndlaw.com*;

- Dale John Huysman and Anita Ruth Huysman through their attorney of record Jack E. Zuger – *jez@pearce-durick.com*;

I hereby further certify that paper copies of the Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 15th day of January, 2021, served by mail on the following:

- Clear Creek Retirement Plan LLC
  6911 – 227th East
  Spanaway, WA 98387

- Rusty Fields
  10202 Pacific Ave. S.
  Suite 201
  Tacoma, WA 98444

- John Wesley Johnson P.S. Defined Benefit Plan
  3599 NW Carlton Street, Suite 201
  Silverdale, WA 98383

- 2011-12 Opportunity Fund 6-1, LLC
  ATTN: Amy McLaren, Managing Agent
  108 W 13th St.
  Wilmington, DE 19801

Dated this 15th day of January, 2021.

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