

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Civil No. 09-2018-CV-00378

Plaintiff,

COMPLAINT

-vs-

COLLIN STREHLOW, doing business as
NAILEDIT HOME IMPROVEMENTS,

Defendant.

CPAT 160192.002

[¶1] Plaintiff State of North Dakota on the relation of Wayne Stenehjem Attorney General, by and through Assistant Attorney General Brian M. Card, Consumer Protection and Antitrust Division, brings this cause against Defendant Collin Strehlow doing business as NailedIt Home Improvements, and upon information and belief alleges as follows:

I. INTRODUCTION

[¶2] The State of North Dakota brings this action on the relation of Wayne Stenehjem, the Attorney General of the state of North Dakota, in the public interest pursuant to North Dakota Century Code (N.D.C.C.) § 51-15. This action seeks, under N.D.C.C. § 51-15-07, to restrain and enjoin violations of N.D.C.C. chs. 43-07 and 51-15, and to recover property loss suffered by consumers as a result of such violations. This action also seeks, under N.D.C.C. § 51-15-10, to recover costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action and, under N.D.C.C. § 51-15-11, to obtain civil penalties of not more than

\$5,000.00 for each violation of N.D.C.C. § 51-15-02. Pursuant to N.D.C.C. 47-25-07(3), the Attorney General seeks an order from the court Cancelling Defendant's trade name, NailedIt Home Improvements, as a result of Defendant's use of the trade name to engage in consumer fraud.

II. JURISDICTION AND VENUE

[¶3] Under N.D.C.C. §§ 51-15-07, 51-15-10 and 51-15-11 the district court has jurisdiction to enter appropriate orders.

[¶4] Venue in Cass County is proper under N.D.C.C. §§ 28-04-03 and 28-04-05 because Defendant Collin Strehlow had or has a principal place of business in Cass County, Defendant has transacted business in Hettinger County, and all or part of the cause of action arose in Cass County.

[¶5] This court has personal jurisdiction over Defendant. Defendant, either acting directly or by an agent, did one or more of the following: transacted business in North Dakota; contracted to supply, or supplied, services, goods or other things in North Dakota; committed a tort within or outside North Dakota causing injury to another person or property within North Dakota; committed a tort within North Dakota causing an injury to another person or property within or outside North Dakota; engaged in any other activity within North Dakota; or violated North Dakota law.

III. DEFENDANT

[¶6] Defendant Collin Strehlow is an adult individual and, upon information and belief, is currently residing at, or has a last known address at, 3111 46th Ave. S., Fargo, ND 58104.

[¶7] NailedIt is a sole proprietorship and trade name that was registered with the North Dakota Secretary of State's Office on January 26, 2017. Its owner is Defendant

Collin Strehlow, and the last address provided to the Secretary of State's Office is 3111 46th Ave. S., Fargo, ND 58104-6659. NailedIt Home Improvement's provides the nature of its business as "home and business remodeling, new construction, additions, flooring, cabinets, sheetrock, finish carpentry, windows, doors, bathrooms, kitchens, finish basements."

[¶8]Defendant, individually or in concert with others, formulated, directed, controlled, or participated in the acts and practices set forth herein while doing business as NailedIt Home Improvements.

IV. NATURE OF DEFENDANTS' BUSINESS

[¶9]Defendant, at all relevant times hereto, was engaged in the business of soliciting and selling merchandise, as that term is defined in N.D.C.C. § 51-15-01, in the State of North Dakota, namely soliciting and selling services, including, but not limited to, services as a contractor within the meaning of N.D.C.C. §43-07-01(1).

V. ACTS OR PRACTICES ALLEGED

[¶10]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant engaged in the business or acted in the capacity of a contractor within North Dakota when the cost, value, or price per job exceeded the sum of four thousand dollars without first having a license as required by N.D.C.C. § 43-07-02.

[¶11]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant abandoned a contract without legal excuse after a deposit of money or other consideration has been provided to them. A rebuttable presumption of abandonment has arisen because Defendant

substantially failed to commence any work agreed upon within sixty days of a starting date agreed upon in writing or within ninety days of a contract date when no starting date was agreed upon in writing in violation of N.D.C.C. § 43-07-14(1)(a).

[¶12]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant diverted funds or property received under express agreement for the prosecution or completion of a specific contract, or for a specified purpose in the prosecution or completion of a contract, and used those funds for another contract obligation or purpose to defraud or deceive creditors or an owner in violation of N.D.C.C. § 43-07-14(1)(b).

[¶13]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant engaged in fraudulent or deceptive acts or practices or misrepresentation as a contractor in consequence of which one or more persons was injured in a total amount exceeding three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c).

[¶14]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant failed to refund fully to a consumer an advance payment where a rebuttable presumption of abandonment has arisen and the consumer has requested a refund in violation of N.D.C.C. § 43-07-14(1)(f).

[¶15]In connection with the sale or advertisement of contracting services, or other merchandise as defined as N.D.C.C. § 51-15-01(3), Defendant through written and oral representations made by Defendant, his agents, employees, or representatives, has made untrue, deceptive, and misleading representations, or have engaged in deceptive acts or practices, with the intent that others rely thereon, in violation of N.D.C.C. § 51-

15-02.

[¶16] Defendant's conduct in violation of N.D.C.C. §§ 43-07-02, 43-07-14(1)(a), 43-07-14(1)(b), 43-07-14(1)(c), 43-07-14(1)(f), and 15-15-02 includes the following acts and practices listed in paragraphs 17 through 22 of this Complaint:

[¶17] Defendant, doing business as NailedIt Home Improvements, did not possess a North Dakota contractor's license when he engaged in the work described in this Complaint.

[¶18] While unlicensed Defendant engaged in the business and acted in the capacity of a contractor in North Dakota when the cost, value, or price per job exceeded the sum of four thousand dollars.

[¶19] On or about July 10, 2016, Defendant, doing business as NailedIt Home Improvements, entered into a contract with North Dakota consumers Kevin and Laci Terry, 5272 8th Court W, West Fargo, ND 58078, to build a 14' x 14' deck. Defendant solicited and accepted an advance payment from the Terrys of \$4,150.00. Defendant then installed three posts and the four joists for the deck, but did no other work, thereby abandoning the contract. Defendant ignored the Terrys efforts to communicate with him. They did manage to reach him on one occasion only after contacting Defendant's father. During their conversation, Defendant admitted having diverted the Terrys advance payment. Instead of using their money for material to complete their project, Defendant stated that he used their money to make a vehicle installment payment, and did not have funds to purchase materials to begin – let alone complete – the project he contracted with them to perform. On August 23, 2016, Defendant installed the deck flooring and stair stringers, and was expected to complete the project the next day. Defendant did not return to complete the Terrys' project, again stating he did not have

the money to complete the job. The Terrys purchased \$2,000.00 worth of materials on August 25, 2016 so that the project could be completed. Defendant did not return to complete the project. As a result of his fraudulent and deceptive acts, practices, and misrepresentations, Defendant harmed the Terrys in an amount exceeding three thousand dollars. Defendant was not licensed to operate as a contractor when he solicited and accepted their advance payment of \$4,150.00, and for which the Terrys purchased \$25,000.00 worth of materials.

[¶20] On or about August 31, 2016, Defendant, doing business as NailedIt Home Improvements, contracted with North Dakota consumer Carmen Rohr, 7460 Brynley Blvd., Horace, ND 58047, to construct a garage on her property for a total price of \$16,480.00. On August 31, 2016, Defendant solicited and accepted an advance deposit of \$16,480.00 from Ms. Rohr. A subcontractor, on behalf of Defendant, poured concrete for the garage and driveway. Defendant framed and shingled the garage, but did no further work and did not complete the project, abandoning the project. Ms. Rohr later learned that Defendant did not shingle to code, and, therefore, another contractor had to add bracing to ensure the integrity of the garage. Defendant failed to pay his subcontractor who poured the concrete for Ms. Rohr's project. It also appeared to Ms. Rohr that Defendant diverted her advance payment and used her money to take a vacation in Bora Bora. As a result of his fraudulent and deceptive acts, practices, and misrepresentations, Defendant harmed Ms. Rohr in an amount exceeding three thousand dollars. Defendant was not licensed to operate as a contractor when he solicited and accepted Ms. Rohr's advance payment of \$16,480.00.

[¶21] Defendant's actions constituting violations of N.D.C.C. §§ 43-07-02, 43-07-14, and 51-15-02 include the following:

- a. Engaging in the business or acting in the capacity of a contractor within North Dakota when the cost, value, or price per job exceeds the sum of four thousand dollars without first having a contractor license issued by the Secretary of State in violation of N.D.C.C. § 43-07-02.
- b. Abandoning a contract without legal excuse after a deposit of money or other consideration has been provided in violation of N.D.C.C. § 43-07-14(1)(a).
- d. Diverting funds or property received under express agreement for the prosecution or completion of a specific contract, or for a specified purpose in the prosecution or completion of any contract, and applying or using funds and property for another contract obligation or to defraud or deceive creditors or the owner in violation of N.D.C.C. § 43-07-14(1)(b).
- e. Engaging in fraudulent or deceptive acts or practices or misrepresentations as a contractor in consequence of which one or more persons is injured in excess of three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c).
- f. Failing to refund fully the contracting party's advance payment where a rebuttable presumption of abandonment has arisen and a contracting party has made a request for a refund in violation of N.D.C.C. § 43-07-14(1)(f).
- h. Making false and misleading representations to customers, including false representations regarding Defendant's status as a licensed contractor, and his ability or intent to complete consumer projects, in violation of N.D.C.C. § 51-15-02.

[¶22] Defendant's actions constitute consumer fraud under N.D.C.C. § 51-15-02.

VI. CONSUMER FRAUD LAW VIOLATIONS
(N.D.C.C. § 51-15-01, et seq.)

[¶23] Plaintiff re-alleges paragraphs 1 through 22 of this Complaint.

[¶24] Defendant, while doing business as NailedIt Home Improvements, engaged in deceptive acts or practices in violation of N.D.C.C. § 51-15-02, for which North Dakota is entitled to relief, including injunctive relief, penalties, costs, expenses, and attorney fees.

[¶25] The deceptive acts or practices alleged in paragraphs 1 through 22 of this Complaint constitute violations of N.D.C.C. §§ 51-15-02 for which the court:

- a. May order injunctive relief as provided in N.D.C.C. § 51-15-07 or as otherwise provided by law;
- b. May order Defendant to pay to the State of North Dakota a civil penalty of up to \$5,000 for each violation as provided in N.D.C.C. § 51-15-11;
- c. Shall order Defendants to pay to the State of North Dakota the costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action as provided in N.D.C.C. § 51-15-10, if Defendants is adjudged in violation of N.D.C.C. ch. 51-15; and
- d. May order such relief as may be necessary to prevent the use or employment of deceptive acts or practices by Defendants or to restore any loss suffered by persons as a result of the deceptive acts or practices of Defendants as provided in N.D.C.C. § 51-15-07.

VII. REQUEST FOR RELIEF

[¶26]WHEREFORE, PLAINTIFF PRAYS for Judgment against Defendant as follows:

- a. That Defendant Collin Strehlow be adjudged in violation of the consumer fraud law and N.D.C.C. § 51-15-02 for engaging in the deceptive acts and practices alleged in this Complaint.
- b. That Defendant Collin Strehlow, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations with the intent that others rely thereon, in violation of N.D.C.C. § 51-15-02, while engaging in the sale or advertisement of contracting and home improvements, repairs or services, or any other merchandise as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.
- c. That Defendant Collin Strehlow, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in the sale of merchandise as defined by N.D.C.C. § 51-15-01(3).
- d. That Defendant Collin Strehlow, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in or acting in the capacity of a contractor within North

Dakota.

- d. That, under N.D.C.C. § 51-15-07, Defendant Collin Strehlow be enjoined and restrained from operating a contractor business under a trade name requiring licensure or registration under N.D.C.C. § 47-25 and from operating, participating, or engaging in any contractor business in North Dakota.
- e. That, pursuant to N.D.C.C. § 51-15-07, Defendant Collin Strehlow, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him be permanently enjoined and restrained from soliciting or accepting from consumers advance payments or consumer deposits in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3).
- f. That, pursuant to N.D.C.C. § 51-15-11, Defendant Collin Strehlow be assessed a civil penalty of \$5,000.00 for each violation of N.D.C.C. § 51-15-02.
- g. That, pursuant to N.D.C.C. § 51-15-10, the Attorney General be awarded and Defendant Collin Strehlow be ordered to pay all costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action.
- h. That, pursuant to N.D.C.C. § 51-15-07, Defendant Collin Strehlow be ordered to pay restitution to all consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which may have been acquired by Defendant Collin Strehlow, doing business as NailedIt Home Improvements, by


means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

- i. That, pursuant to N.D.C.C. § 47-25-07(3), the Court order the Secretary of State to cancel Defendant's trade name, NailedIt Home Improvements, for using the name to engage in violation of N.D.C.C. chs. 43-07 and 51-15.
- j. That Plaintiff be given such other and further relief as the nature of this case may require and this court may determine to be fair, just, and equitable.

Dated this 16th day of November, 2017.

State of North Dakota
Wayne Stenehjem
Attorney General

BY:



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Attorneys for Plaintiff.

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Civil No. 09-2018-CV-00378

Plaintiff,

-vs-

**BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

COLLIN STREHLOW, doing business as
NAILEDIT HOME IMPROVEMENTS,

Defendant.

CPAT 160192.002

[¶] State of North Dakota ex rel. Wayne Stenehjem, ("Attorney General" or "Plaintiff") offers the following in support of its Motion for Summary Judgment against Collin Strehlow, doing business as Nailedit Home Improvements ("Defendant"), pursuant to N.D.R.Civ.P. 56. The Attorney General is seeking summary judgment adjudging Defendant in violation of North Dakota Century Code (N.D.C.C.) §§ 43-07-02(1), 43-07-14(1)(a), 43-07-14(1)(b), 43-07-14(1)(c), 43-07-14(1)(f), and 51-15-02, *et seq.* (the "Consumer Fraud Law"), ordering injunctive relief, and adjudging Defendant liable for damages, penalties and attorney fees in the amounts set forth herein, and such other relief the court may find just and equitable. The Attorney General is also seeking an order that the Secretary of State cancel Defendant's trade name, Nailedit Home Improvements, for his use of the trade name to engage in violations of N.D.C.C. chs. 43-07 and 51-15.

I. INTRODUCTION

¶2] The State of North Dakota, ex rel. Wayne Stenehjem, Attorney General, commenced this action pursuant to N.D.C.C. chs. 43-07 and 51-15 by service of a Summons and Complaint on Defendant on August 27, 2017. This action primarily seeks, under N.D.C.C. § 51-15-07, to restrain and enjoin violations of N.D.C.C. §§ 43-07-02(1), 43-07-14(1)(a), 43-07-14(1)(b), 43-07-14(1)(c), 43-07-14(1)(f), and 51-15-02 and to obtain injunctive relief as a result of such violations. This action secondarily seeks, under N.D.C.C. § 51-15-10, to recover costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action and, under N.D.C.C. § 51-15-11, to obtain civil penalties of not more than \$5,000.00 for each violation of N.D.C.C. § 51-15-02.

¶3] Defendant Collin Strehlow ("Strehlow") is an individual who is a resident of the State of North Dakota. Defendant's last known address is 6289 59th Ave. S., Fargo, ND 58104. Defendant also received mail at 3111 46th Ave. S., Fargo, ND 58104.

¶4] NailedIt Home Improvements ("NailedIt") is a sole proprietorship and trade name that was registered with the North Dakota Secretary of State's office on January 26, 2017. Its owner is Defendant Strehlow, and the last address provided to the Secretary of State's Office is 3111 46th Ave. S., Fargo, ND 58104-6659. NailedIt was in the business of "home and business remodeling, new construction, additions, flooring, cabinets, sheetrock, finish carpentry, windows, doors, bathrooms, kitchens, finish basements."

¶5] Defendant was or is engaged in the business of soliciting and selling merchandise, as that term is defined in N.D.C.C. § 51-15-01, in the State of North Dakota,

namely contracting to provide services to improve real property, including roof reshingling, and other services as a contractor within the meaning of N.D.C.C. § 43-07-01. Defendant's business practices include soliciting advance payments for materials and his services. Defendant Strehlow does not possess a contractor's license.

[¶]6] While engaged in this business, Defendant engaged in illegal behavior in connection with the sale of home repair services, including:

- a. operating as a contractor and accepting payment for contracting services without a contractor's license in excess of the statutory four thousand dollar in violation N.D.C.C. § 43-07-02;
- b. abandoning a contract without legal excuse after a deposit of money or other consideration has been provided in violation of N.D.C.C. § 43-07-14(1)(a);
- c. diverting funds or property received under express agreement for the prosecution or completion of a specific contract, or for a specified purpose in the prosecution or completion of a contract, and applied or used the funds for another contract obligation or to defraud or deceive the owner in violation of N.D.C.C. § 43-07-14(1)(b);
- d. engaging in fraudulent or deceptive acts or practices or misrepresentations as a contractor in consequence of which one or more persons was injured in a total amount exceeding three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c);
- e. failing to refund fully a contracting party's advance payment if a rebuttable presumption of abandonment has arisen and the contracting party has made a request for a refund in violation of N.D.C.C. § 43-07-14(1)(f);

f. expressly, impliedly, or by omission of a material fact, falsely representing to consumers that Defendant Strehlow, and/or the entity NailedIt, was properly licensed, as required by N.D.C.C. ch. 43-07, and was otherwise in compliance with or authorized by North Dakota law to provide services in North Dakota in violation of N.D.C.C. § 51-15-02;

g. in connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), making promises and representations to consumers that were false and misleading, including soliciting and accepting advance payments for home improvement projects and subsequently failing to provide all of the services and/or merchandise agreed to under the terms of the contracts in violation of N.D.C.C. § 51-15-02.

[¶7] On August 27, 2017, the Plaintiff, State of North Dakota ex rel. Wayne Stenehjem, Attorney General ("Plaintiff" or "Attorney General") commenced the above-entitled action against the Defendant by serving a Summons and Civil Complaint on Defendant by personal service. Sheriff's Return of Service on Collin Strehlow, filed with the Court on January 31, 2018, Doc ID# 3. Plaintiff's Complaint seeks, under the Consumer Fraud Law, N.D.C.C. ch. 51-15, to restrain and enjoin violations of N.D.C.C. chs. 43-07; to restrain and enjoin violations of the Consumer Fraud Law; to recover costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action; and to obtain civil penalties of not more than \$5,000.00 for each violation of the Consumer Fraud Law.

[¶8] On January 31, 2018, Plaintiff sent Defendant a letter informing him that the Summons and Complaint had been filed with the Cass County District Court, and

subsequently provided him with the Notice of Assignment and Case Number. Exhibit 1. Plaintiff's Summons advised Defendant that he should serve an answer or other proper written response within twenty-one days after service of the Complaint, exclusive of the date of service. See, Summons, filed with the Court on January 31, 2018, Doc ID# 1. More than twenty-one days have elapsed since Plaintiff's Complaint was served on Defendant and filed with the Court and Defendant has failed to answer or otherwise appear in this action.

II. BY NOT ANSWERING THE COMPLAINT, DEFENDANT HAS ADMITTED ITS ALLEGATIONS

[¶9] Under N.D.R.Civ.P. Rule 12(a)(1)(A), "a defendant must serve an answer within 21 days after being served with the summons and complaint." Under N.D.R.Civ.P. Rule 8(b)(6), an allegation is admitted if it is not denied where a responsive pleading is required. As of the date of Plaintiff's Motion for Summary Judgment, Defendant has not served or filed a responsive pleading in this matter. It is a well-established principle of law in North Dakota that a party acting *pro se* is held to the same standard as an attorney. Greenwood, Greenwood, & Greenwood, P.C. v. Klem, 450 N.W.2d 745, 747 (N.D. 1990). North Dakota statutes and rules on procedure are not modified for *pro se* parties. Id. By not serving a responsive pleading to the Complaint, according to N.D.R.Civ.P. Rule 8(b)(6), Defendant has admitted all of Plaintiff's allegations.

III. UNDISPUTED FACTS

[¶10] In its Complaint, Plaintiff alleged the following:

[¶11] In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant engaged in the business or acted in the capacity of a contractor within North Dakota when the cost, value, or

price per job exceeded the sum of four thousand dollars without first having a license as required by N.D.C.C. § 43-07-02. Complaint ¶ 10.

[¶12]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant abandoned a contract without legal excuse after a deposit of money or other consideration has been provided to them. A rebuttable presumption of abandonment has arisen because Defendant substantially failed to commence any work agreed upon within sixty days of a starting date agreed upon in writing or within ninety days of a contract date when no starting date was agreed upon in writing in violation of N.D.C.C. § 43-07-14(1)(a). Complaint ¶ 11.

[¶13]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant diverted funds or property received under express agreement for the prosecution or completion of a specific contract, or for a specified purpose in the prosecution or completion of a contract, and used those funds for another contract obligation or purpose to defraud or deceive creditors or an owner in violation of N.D.C.C. § 43-07-14(1)(b). Complaint ¶ 12.

[¶14]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant engaged in fraudulent or deceptive acts or practices or misrepresentation as a contractor in consequence of which one or more persons was injured in a total amount exceeding three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c). Complaint ¶ 13.

[¶15]In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendant failed to refund fully to a

consumer an advance payment where a rebuttable presumption of abandonment has arisen and the consumer has requested a refund in violation of N.D.C.C. § 43-07-14(1)(f). Complaint ¶ 14.

[¶16]In connection with the sale or advertisement of contracting services, or other merchandise as defined as N.D.C.C. § 51-15-01(3), Defendant through written and oral representations made by Defendant, his agents, employees, or representatives, has made untrue, deceptive, and misleading representations, or have engaged in deceptive acts or practices, with the intent that others rely thereon, in violation of N.D.C.C. § 51-15-02. Complaint ¶ 15.

[¶17]Defendant's conduct in violation of N.D.C.C. §§ 43-07-02, 43-07-14(1)(a), 43-07-14(1)(b), 43-07-14(1)(c), 43-07-14(1)(f), and 51-15-02 includes the following acts and practices listed in paragraphs 17 through 22 of this Complaint: Complaint ¶ 16.

[¶18]Defendant, doing business as NailedIt Home Improvements, did not possess a North Dakota contractor's license when he engaged in the work described in this Complaint. Complaint ¶ 17.

[¶19]While unlicensed Defendant engaged in the business and acted in the capacity of a contractor in North Dakota when the cost, value, or price per job exceeded the sum of four thousand dollars. Complaint ¶ 18.

[¶20]On or about July 10, 2016, Defendant, doing business as NailedIt Home Improvements, entered into a contract with North Dakota consumers Kevin and Laci Terry, 5272 8th Court W, West Fargo, ND 58078, to build a 14' x 14' deck. Defendant solicited and accepted an advance payment from the Terrys of \$4,150.00. Defendant then installed three posts and the four joists for the deck, but did no other work, thereby

abandoning the contract. Defendant ignored the Terrys efforts to communicate with him. They did manage to reach him on one occasion only after contacting Defendant's father. During their conversation, Defendant admitted having diverted the Terrys advance payment. Instead of using their money for material to complete their project, Defendant stated that he used their money to make a vehicle installment payment, and did not have funds to purchase materials to begin – let alone complete – the project he contracted with them to perform. On August 23, 2016, Defendant installed the deck flooring and stair stringers, and was expected to complete the project the next day. Defendant did not return to complete the Terrys' project, again stating he did not have the money to complete the job. The Terrys purchased \$2,000.00 worth of materials on August 25, 2016 so that the project could be completed. Defendant did not return to complete the project. As a result of his fraudulent and deceptive acts, practices, and misrepresentations, Defendant harmed the Terrys in an amount exceeding three thousand dollars. Defendant was not licensed to operate as a contractor when he solicited and accepted their advance payment of \$4,150.00, and for which the Terrys purchased \$25,000.00 worth of materials. Complaint ¶¶ 19.

[¶21] On or about August 31, 2016, Defendant, doing business as NailedIt Home Improvements, contracted with North Dakota consumer Carmen Rohr, 7460 Brynley Blvd., Horace, ND 58047, to construct a garage on her property for a total price of \$16,480.00. On August 31, 2016, Defendant solicited and accepted an advance deposit of \$16,480.00 from Ms. Rohr. A subcontractor, on behalf of Defendant, poured concrete for the garage and driveway. Defendant framed and shingled the garage, but did no further work and did not complete the project, abandoning the project. Ms. Rohr later

learned that Defendant did not shingle to code, and, therefore, another contractor had to add bracing to ensure the integrity of the garage. Defendant failed to pay his subcontractor who poured the concrete for Ms. Rohr's project. It also appeared to Ms. Rohr that Defendant diverted her advance payment and used her money to take a vacation in Bora Bora. As a result of his fraudulent and deceptive acts, practices, and misrepresentations, Defendant harmed Ms. Rohr in an amount exceeding three thousand dollars. Defendant was not licensed to operate as a contractor when he solicited and accepted Ms. Rohr's advance payment of \$16,480.00. Complaint ¶ 20.

[¶22] Defendant's actions constituting violations of N.D.C.C. §§ 43-07-02, 43-07-14, and 51-15-02 include the following:

- a. Engaging in the business or acting in the capacity of a contractor within North Dakota when the cost, value, or price per job exceeds the sum of four thousand dollars without first having a contractor license issued by the Secretary of State in violation of N.D.C.C. § 43-07-02.
- b. Abandoning a contract without legal excuse after a deposit of money or other consideration has been provided in violation of N.D.C.C. § 43-07-14(1)(a).
- d. Diverting funds or property received under express agreement for the prosecution or completion of a specific contract, or for a specified purpose in the prosecution or completion of any contract, and applying or using funds and property for another contract obligation or to defraud or deceive creditors or the owner in violation of N.D.C.C. § 43-07-14(1)(b).

- e. Engaging in fraudulent or deceptive acts or practices or misrepresentations as a contractor in consequence of which one or more persons is injured in excess of three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c).
- f. Failing to refund fully the contracting party's advance payment where a rebuttable presumption of abandonment has arisen and a contracting party has made a request for a refund in violation of N.D.C.C. § 43-07-14(1)(f).
- h. Making false and misleading representations to customers, including false representations regarding Defendant's status as a licensed contractor, and his ability or intent to complete consumer projects, in violation of N.D.C.C. § 51-15-02.

Complaint ¶ 21.

[¶23]Defendant's actions constitute consumer fraud under N.D.C.C. § 51-15-02.

Complaint ¶ 22.

VI. CONSUMER FRAUD LAW VIOLATIONS
(N.D.C.C. § 51-15-01, et seq.)

[¶24]Plaintiff re-alleges paragraphs 1 through 22 of this Complaint. Complaint ¶ 23.

[¶25]Defendant, while doing business as NailedIt Home Improvements, engaged in deceptive acts or practices in violation of N.D.C.C. § 51-15-02, for which North Dakota is entitled to relief, including injunctive relief, penalties, costs, expenses, and attorney fees. Complaint ¶ 24.

[¶26]The deceptive acts or practices alleged in paragraphs 1 through 22 of this Complaint constitute violations of N.D.C.C. §§ 51-15-02 for which the court:

- a. May order injunctive relief as provided in N.D.C.C. § 51-15-07 or as otherwise provided by law;
- b. May order Defendant to pay to the State of North Dakota a civil penalty of up to \$5,000 for each violation as provided in N.D.C.C. § 51-15-11;
- c. Shall order Defendants to pay to the State of North Dakota the costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action as provided in N.D.C.C. § 51-15-10, if Defendants is adjudged in violation of N.D.C.C. ch. 51-15; and
- d. May order such relief as may be necessary to prevent the use or employment of deceptive acts or practices by Defendants or to restore any loss suffered by persons as a result of the deceptive acts or practices of Defendants as provided in N.D.C.C. § 51-15-07.

Complaint ¶ 25.

[¶27]Under N.D.R.Civ.P. Rule 8(b)(6), as a result of Defendant's failure to file or serve a responsive pleading, the allegations contained in the Complaint, and provided in paragraphs 11 – 26 above, are deemed admitted.

IV. LAW AND ARGUMENT

[¶28]As a matter of law, there are no genuine issues as to any material facts preventing the Court from holding that Defendant acted in violation of N.D.C.C. §§ 43-07-02, 43-07-14(1)(a), 43-07-14(1)(b), 43-07-14(1)(c), 43-07-14(1)(f), and 51-15-02.

[¶29] Under N.D.R.Civ.P. 56(a), a party may move for summary judgment on all or part of a claim at any time after twenty-one days have passed from commencement of the action. Plaintiff commenced its action against Defendant on November 27, 2017 and it is now well over twenty-one days since. “The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving 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 the undisputed facts, or if the only issues to be resolved are questions of law. Wheeler v. Gardner, 2006 ND 24, ¶ 8, 708 N.W.2d 908; Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 11, 693 N.W.2d 604. Summary judgment is appropriate if the issues in the case are such that resolution of any factual disputes will not alter the result. Jacob, at ¶ 11; Tibert v. Slominski, 2005 ND 34, ¶ 8, 692 N.W.2d 133.

State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 4, 712 N.W.2d 828.

[¶30] A party opposing a motion for summary judgment must present competent admissible evidence to raise a genuine issue of material fact. Soentgen v. Quain & Ramstad Clinic, P.C., 467 N.W.2d 73, 81 (N.D. 1991). Even if factual disputes exist, they are not material issues unless resolution would alter the ultimate outcome. Olson v. City of Garrison, 539 N.W.2d 663, 664 (N.D. 1995).

[¶31] When a reasonable person can draw but one conclusion from the evidence, a question of fact becomes a matter of law for the court to decide. Stockman Bank of Montana v. AGSCO, Inc., 2007 ND 26, ¶ 9, 728 N.W.2d 142. See also, Grinnel Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 9, 658 N.W.2d 363. “Although actions involving state of mind, such as fraud, are not usually suited for disposition by summary judgment, if a ... [party] fails to support his opposition to a summary judgment

motion with sufficient facts to show that there is a genuine issue for trial, then, even in these cases, summary judgment is appropriate.” Kary v. Prudential Ins. Co., 541 N.W.2d 703, 706 (N.D. 1996); see also, Dahl v. Messmer, 2006 ND 166, ¶ 8, 719 N.W.2d 341 (N.D. 1996).

A. Burden of Proof

¶32]Consumer fraud must be proved by a preponderance of the evidence. The requirement of clear and convincing evidence that applies to common law fraud does not apply to the special circumstances presented by consumer fraud and false advertising cases. State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 902-03 (N.D. 1986). Consumer protection statutes are remedial in nature, and therefore must be liberally construed in favor of protecting consumers. Id. at 903. “In light of the strong public policy underpinnings of our false advertising and consumer fraud statutes, Chapter 51-12 and Chapter 51-15, N.D.C.C., we hold that when an action brought under either chapter is based on allegations of fraudulent conduct the ‘clear and convincing evidence’ standard does not apply; the alleged fraudulent conduct must be proved by a preponderance of the evidence.” Id.

¶33]“Preponderance of the evidence,” in civil actions, is defined as the “greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.” Black’s Law Dictionary 1182 (6th ed. 1990). See, generally, Rooks v. Workers’ Comp. Bur., 506 N.W.2d 78, 80-81 (N.D. 1993); North Dakota Pattern Jury Instruction C-1.40 “Burden of Proof – Greater Weight of the Evidence” (2000)(“The essential elements of a claim or an affirmative defense must be proven by the greater weight of the evidence. Evidence is of greater weight if, when

considered and compared with that opposed to it, it is more persuasive and convinces you that what a party seeks to prove is more likely true than not true.”) Clear and convincing evidence, on the other hand, means “evidence which leads to a firm belief or conviction that the allegations are true.” Zander v. Workforce Safety and Insurance, 672 N.W.2d 668, 671; North Dakota Pattern Jury Instruction C-1.41 “Burden of Proof – Clear and convincing Evidence” (2014)(“Clear and convincing evidence means that the evidence leads you to a firm belief or conviction that the allegations are true. This is a higher standard of proof than proof by the greater weight of the evidence. The evidence need not be undisputed to be clear and convincing.”) Notwithstanding that the required burden of proof is by the preponderance of the evidence, the evidence of Defendant’s deceptive acts, practices, fraud, false pretenses, false promises, and misrepresentations described herein meets the standard of clear and convincing evidence.

B. Argument

i. Violation of N.D.C.C. § 43-07-02

[¶34]There is no genuine issue as to any material fact preventing a finding that Defendant has engaged in a practice declared to be unlawful under N.D.C.C. ch. 43-07, specifically N.D.C.C. § 43-07-02(1). North Dakota Century Code Section 43-07-02(1) states:

43-07-02. License Required – Construction Fraud – Penalty.

1. A person may not engage in the business nor act in the capacity of a contractor within this state when the cost, value, or price per job exceeds the sum of four thousand dollars nor may that person maintain any claim, action, suit, or proceeding in any court of this state related to the person’s business or capacity as a contractor without first having a license as provided in this chapter.

N.D.C.C. § 43-07-02(1).

¶¶35] There are sufficient undisputed facts for the Court to find that Defendant engaged in violations of N.D.C.C. § 43-07-02. Defendant is not, and was not, licensed to operate as a contractor in North Dakota. Aff. Schroeder ¶¶ 7.

¶¶36] Without a contractor's license issued by the North Dakota Secretary of State, Defendant, doing business as NailedIt Home Improvements, entered into a contract with North Dakota consumers Kevin and Luci Terry ("the Terrys") and Carmen Rohr ("Rohr"), to perform work as a contractor, within the meaning of N.D.C.C. § 43-07-02(1). Exhibit 2, pp. 4, 23; Exhibit 3, p. 2; ¶¶ 20-1, *supra*. Defendant was hired by the Terrys to build a 14' x 14' deck for them. Exhibit 2, pp. 4, 23; ¶ 20, *supra*. On August 5, 2016, Defendant solicited and accepted an advance payment of \$4,150.00. Exhibit 2, pp. 4, 23; ¶ 20, *supra*. The advance payment was intended for the purchase of materials. Exhibit 2, pp. 4 ("Collin did return the call said he was stiffed for \$12,000 on a job, and didn't have money to buy the rest of our materials"); ¶ 20, *supra*. The total contract price was \$8,617.00. Exhibit 2, p. 23; ¶ 20, *supra*. Defendant was not licensed at the time Defendant entered into his contract with the Terrys and solicited the advance payment of \$4,150.00. Aff. Schroeder ¶¶ 8.

¶¶37] On August 31, 2016, Rohr hired Defendant, doing business as NailedIt Home Improvements, to construct a garage. Exhibit 3, p. 1; ¶ 21, *supra*. Defendant solicited and accepted an advance deposit of \$16,480.00. Exhibit 3, p. 2; ¶ 21, *supra*. Defendant was not licensed at the time he entered into his contract with Rohr and solicited the advance payment of \$16,480.00.

ii. Violation of N.D.C.C. § 43-07-14(1)(a)

¶¶38] There is no genuine issue as to any material fact preventing a finding that Defendant has engaged in a practice declared to be unlawful under N.D.C.C. ch. 43-07,

specifically N.D.C.C. § 43-07-17(1)(a). North Dakota Century Code Section 43-07-14(1)(a)

states:

a. Abandonment of any contract without legal excuse after a deposit of money or other consideration has been provided to the licensee. A rebuttable presumption of abandonment arises if:

(1) A contractor fails substantially to commence any work agreed upon, unless the failure is due to circumstances beyond the control of the contractor:

(a) Within sixty days of a starting date agreed upon in writing; or

(b) Within ninety days of the contract date if no starting date is agreed upon in writing; or

(2) A contractor fails to complete any work agreed upon in writing within ninety days of a completion date agreed upon in writing, or within one hundred eighty days of the contract date if no completion date is agreed upon in writing, unless the failure is due to circumstances beyond the control of the contractor.

N.D.C.C. § 43-07-14(1)(a).

[¶39] There are sufficient undisputed facts for the Court to find that Defendant engaged in violations of N.D.C.C. § 43-07-14(1)(a).

[¶40] Defendant entered into a contract with the Terrys on July 8, 2016 to build a deck for them. Exhibit 2, pp. 4, 23; ¶ 20, *supra*. In violation of N.D.C.C. § 43-07-14(1)(a), Defendant failed substantially to commence the work within ninety days of July 8, 2016, the date that Defendant was paid by the Terrys. Exhibit 2, pp. 2, 23; ¶ 20, *supra*. As of the date of this Motion, Defendant has not completed the work he contracted with the Terrys to perform, and the presumption of abandonment has arisen.

[¶41] Defendant entered into a contract with Rohr on August 31, 2016 to construct a garage. Exhibit 3, p. 2; ¶ 21, *supra*. In violation of N.D.C.C. § 43-07-14(1)(a), Defendant substantially failed to commence work within ninety days of August 31, 2016, the date that

Defendant was paid by Rohr. Exhibit 3, p. 2; ¶ 21, *supra*. Alternatively, Defendant failed to complete the contract within one hundred eighty days of the contract date, March 3, 2017. Exhibit 3, p. 2; ¶ 21, *supra*.

iii. Violations of N.D.C.C. §§ 43-07-14(1)(b), 43-07-14(1)(c), and 43-07-14(1)(f)

[¶42] There is no genuine issue as to any material fact preventing a finding that Defendant has engaged in a practice declared to be unlawful under N.D.C.C. ch. 43-07, specifically N.D.C.C. §§ 43-07-17(1)(b), 43-07-14(1)(c), and 43-07-14(1)(f). North Dakota Century Code Section 43-07-14(1)(b) states:

b. Diversion of funds or property received under express agreement for the prosecution or completion of a specific contract under this chapter, or for a specified purpose in the prosecution or completion of any contract, and their application or use for any other contract obligation or purpose to defraud or deceive creditors of the owner.

N.D.C.C. § 43-07-14(1)(b). North Dakota Century Code Section 43-07-14(1)(c) states:

c. Engaging in any fraudulent or deceptive acts or practices or misrepresentations as a contractor in consequence of which one or more persons is injured in a total amount exceeding three thousand dollars.

N.D.C.C. § 43-07-14(1)(c). North Dakota Century Code Section 43-07-14(1)(f) states:

f. Failure to refund fully the contracting party's advance payment if a rebuttable presumption of abandonment has arisen and the contracting party has made a request to the licensee for a refund.

N.D.C.C. 43-07-14(1)(f). There are sufficient undisputed facts for the Court to find that Defendant engaged in violations of N.D.C.C. §§ 43-07-14(1)(b), 43-07-14(1)(c), and 43-07-14(1)(f).

[¶43] Defendant solicited and accepted an advance payment of \$4,150.00 from the Terrys. ¶ 20, *supra*. Defendant did not use the advance payment for materials; instead, in

violation of N.D.C.C. § 43-07-14(1)(b), Defendant used the payment received from the Terrys for his own expenses ¶ 20, *supra*; Aff. Schroeder ¶ 8. By failing to provide a requested refund or materials for which the advance payment was intended after the presumption of abandonment has arisen, Defendant injured the Terrys in an amount exceeding three thousand dollars in violation of N.D.C.C. §§ 43-07-14(1)(c) and 43-07-14(1)(f).

¶44] Defendant solicited and accepted an advance payment of \$16,480.00 from Rohr. ¶ 21, *supra*. Defendant did not deliver the materials or pay subcontractors for which Rohr's advance payment was intended, and, in violation of N.D.C.C. § 43-07-14(1)(b), instead used the advance payment for personal expenses. ¶ 21, *supra*; Aff. Schroeder ¶ 9. By failing to provide a requested refund or materials after the presumption of abandonment has arisen, Defendant is in violation of N.D.C.C. § 43-07-14(1)(f).

iv. Fraud and misrepresentations in violation of N.D.C.C. ch. 51-15

¶45] There is no issue of material fact preventing a finding that Defendant has engaged in, or is engaging in, practices declared to be unlawful under N.D.C.C. § 51-15-02. N.D.C.C. § 51-15-02 states:

51-15-02. Unlawful practices – Fraud – Misrepresentation. The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.D.C.C. § 51-15-02. Through his affirmative misrepresentations, material omissions, negligent and deceiving actions, Defendant has violated N.D.C.C. § 51-15-02.

- a) *Defendant's violations of N.D.C.C. §§ 43-07-02 and 43-07-14 constitute violations of N.D.C.C. ch. 51-15.*

[¶46] Under N.D.C.C. § 43-07-14(3) it is a violation of N.D.C.C. ch. 51-15 for a person to engage "in the business or [act] in the capacity of a contractor in violation of section 43-07-02." As shown above, Defendant is unlicensed and has operated as a contractor in violation of N.D.C.C. § 43-07-02. See, ¶¶ 36-7, *supra*; Aff. Schroeder ¶¶ 8-9. Defendant is not licensed and has operated as a contractor where the cost, value, or price per job exceeds four thousand dollars. See, ¶ 36-7, *supra*; Aff. Schroeder ¶ 7-9. That Defendant has been operating as a contractor without a contractor's license is uncontested. See, ¶¶ 20-1, *supra*.

[¶47] Under N.D.C.C. § 43-07-14(3), "any act or omission under [43-07-14] may also constitute grounds for the attorney general to bring an action under chapter 51-15 against the licensee or any unlicensed person engaging in the business or acting in the capacity of a contractor in violation of section 43-07-02 and subjects the licensee or any such unlicensed person to all provisions, procedures, remedies, and penalties provided for in chapter 51-15." Defendant's violations of N.D.C.C. § 43-07-14 are uncontested and described *supra*. ¶¶ 38-44.

- b) *Defendants acted, used, or employed deceptive acts and practices, fraud, false pretense, false promise, or misrepresentations in violation of N.D.C.C § 51-15-02.*

[¶48] N.D.C.C. § 51-15-02 proscribes "the act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise." Defendant violated N.D.C.C. § 51-15-02 in two ways:

[¶49]First, Defendant expressly, impliedly, or by omission falsely represented to consumers that he was a licensed contractor by soliciting and accepting business above the North Dakota statutory amount and operating the contracting business NailedIt Home Improvements. Aff. Schroeder ¶¶ 6, 8-9; ¶ 20-1, *supra*. Defendant acted, used, or employed deceptive acts and practices, fraud, false pretenses, false promises, or misrepresentations by contracting with consumers Kevin and Luci Terry and Carmen Rohr and soliciting and accepting advance payments for the completion of a contracting job, including advance payments in excess of four thousand dollars. Aff. Schroeder ¶¶ 8-9; ¶¶ 20-1, *supra*.

[¶50]Second, Defendant misrepresented to consumers that he would perform services as a contractor for them and solicited and accepted advance payments that were represented as necessary for materials and future labor. Aff. Schroeder ¶¶ 8-9; Exhibits 2 – 3; ¶¶ 20-1, *supra*. Defendant misrepresented his intent or ability to perform services for consumers Kevin and Luci Terry and Carmen Rohr, and, instead of purchasing materials with the advance deposit he solicited, he used consumers' advance deposits for personal expenses. ¶¶ 20-1, *supra*.

[¶51]Pursuant to N.D.C.C. § 47-25-07(3), Defendant's trade name, NailedIt Home Improvements, should be cancelled for Defendant's use of the trade name to engage in deceptive acts and practices in violation of N.D.C.C. chs. 43-07 and 51-15.

C. Injunctive Relief is Appropriate

[¶52]North Dakota requests that the Court, pursuant to N.D.C.C. § 51-15-07, permanently enjoin Defendant from engaging in sales of contracting and home improvements, repairs, or services, including construction work. Defendant may engage in

future contracting services if Defendant applies to the Attorney General and the Court to lift the permanent injunction and the Court finds Defendant has fully complied with the following terms and conditions and otherwise are rehabilitated: 1) three (3) or more years have expired since the entry of judgment; 2) Defendant has paid in full all restitution owed to consumers pursuant to the entry of judgment; 3) Defendant has paid in full restitution to all consumers that have paid Defendant advance payments for services not performed or merchandise not delivered in the State of North Dakota; and 4) Defendant has paid all amounts owed to the Attorney General pursuant to the entry of judgment. "Pay in full" or "paid in full" mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

[¶53]If the Court finds, pursuant to an agreement between Defendant and the Attorney General, or after a hearing, that Defendants are sufficiently rehabilitated pursuant to the terms of the judgment, Defendant, upon order of the Court, may engage in contracting provided they have obtained a contractor's license pursuant to N.D.C.C. ch. 43-07 and have complied with all contractor licensing requirements appropriate and necessary for the work to be undertaken by him.

[¶54]North Dakota is also requesting that the Court enjoin and restrain Defendant from soliciting or accepting from consumers advance payments or consumer deposits in excess of ten percent of the contract amount in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), for a period of three (3) years after becoming properly licensed as a contractor and until Defendant refunds and pays in full amounts owed to any North Dakota consumers that have paid Defendant advanced payments for services not performed or merchandise not delivered and pays in full

amounts owed to the State of North Dakota. "Pay in full" means that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction or discharge of any of the debts or refund obligations.

[¶55]Whenever there is a violation of N.D.C.C. § 51-15-02, the court may, pursuant to N.D.C.C. § 51-15-07, order injunctive relief prohibiting the violator "from continuing the unlawful practice or engaging in the unlawful practice or doing any act in furtherance of the unlawful practice," and may order such other relief as may be necessary to prevent the use or employment of deceptive acts or practices or to restore any loss suffered by persons as a result of the deceptive acts or practices. N.D.C.C. § 51-15-07. The nature and the extent of Defendant's deceptive practices warrants a permanent injunction preventing him from the advertisement or sale of contracting and home improvement repairs or services unless the injunction is lifted after Defendant is sufficiently rehabilitated and paid in full consumer restitution and amounts owed to the Attorney General. Given Defendant's deceptive practices, an injunction preventing him from soliciting or accepting advance payments or deposits in excess of ten percent of the contract amount from consumers in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), for a period of three (3) years after becoming properly licensed is also warranted.

[¶56]Defendant induced consumers to enter into agreements, and to make advance payments to Defendant, by false pretense, false representation, and actual fraud in violation of N.D.C.C. § 51-15-02. See, ¶¶ 48-50, *supra*. Defendant expressly, impliedly, or by omission of material fact represented to consumers that he was properly licensed under N.D.C.C. ch. 43-07, though he knew that he was unlicensed. See, ¶¶ 20-

1, 49, *supra*. Defendant represented himself as a licensed contractor, entered into agreements in excess of the four thousand dollar statutory amount, and operated NailedIt Home Improvements. See, ¶¶ 20-1, 49, *supra*.

[¶57] Defendant's business model is or was aimed at creating income by deceiving consumers. Defendant has demonstrated a pattern of using misrepresentations and false promises in his business, and unless Defendant is enjoined from the advertisement or sale of contracting and home improvement repair or services, there is nothing preventing him from continuing to engage in violations of N.D.C.C. chs. 43-07 and 51-15. Defendant should not be allowed to operate a business in which he is entrusted with typically large advance deposits belonging to consumers.

[¶58] For all the reasons set forth, Defendant should be permanently enjoined from the advertising or sale of contracting and home improvement repair or services until sufficiently rehabilitated and, thereafter, they should be required to be properly licensed under N.D.C.C. ch. 43-07. Defendant should also be enjoined, after becoming properly licensed, from soliciting or accepting from consumers advance payments or deposits in excess of ten percent of the contract amount in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), for a period of three (3) years.

D. Defendant is responsible for Plaintiff's Attorney Fees and Costs

[¶59] North Dakota is entitled to judgment against Defendant for the fees and costs incurred in investigating and prosecuting this matter. N.D.C.C. § 51-15-10 provides as follows:

In any action brought under the provisions of this chapter, or under other provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18, the court shall award to the attorney general reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under this chapter, or under other

provisions of law, including chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18. All attorney's fees, investigation fees, costs, and expenses received by the attorney general under this section must be deposited into the attorney general refund fund.

[¶60] Under N.D.C.C. § 51-15-10, the court "shall award to the attorney general" reasonable attorney's fees, investigation fees, costs, and expenses. The provision includes not only the fees incurred in the legal action, but also any fees and costs incurred during the investigation preceding the legal action. Note that the Attorney General spent months attempting to gain the cooperation of the Defendant in its investigation. See, Case No. 09-2017-CV-01345. In the end, the Attorney General never really had Defendant's cooperation, and accepted an affidavit to resolve Defendant's lack of cooperation with the Attorney General's Civil Investigative Demand. Id.

[¶61] North Dakota requests that the court award it a judgment of \$3,000.00 against Defendant for costs and attorney fees at the rate of \$150.00/hr. See, North Dakota's Statement of Attorney Fees for Motion for Summary Judgment, filed herewith and incorporated herein.

E. Civil Penalties are Appropriate

[¶62] North Dakota requests that the court issue Judgment against Defendant for civil penalties. N.D.C.C. § 51-15-11 provides that the court may order the payment of civil penalties to the State of North Dakota for violations of N.D.C.C. § 51-15-02 as follows:

The court may assess for the benefit of the state a civil penalty of not more than five thousand dollars for each violation of this chapter or for each violation of chapter 51-12, 51-13, 51-14, or 51-18. The penalty provided in this section is in addition to those remedies otherwise provided by this chapter or by chapter 50-22, 51-12, 51-13, 51-14, 51-16.1, or 51-18.

Defendant operated as a contractor in North Dakota without a contractor's license issued under N.D.C.C. ch. 43-07-02, and expressly, impliedly or by omission of a

material fact, misrepresented to consumers that he was a properly licensed contractor in North Dakota while operating the business NailedIt Home Improvements.

[¶63]North Dakota requests that the Court impose a civil penalty in the amount of \$2,000.00 for Defendant's violations of N.D.C.C. chs. 43-07 and 51-15. North Dakota believes this is an appropriate amount considering the nature and extent of Defendant's violations of N.D.C.C. §§ 43-07-02, 43-07-14, and 51-15-02.

IV. REQUEST FOR RELIEF

[¶64]North Dakota respectfully requests that the Court enter Summary Judgment against Defendant as follows:

- A. Plaintiff's Motion for Summary Judgment is granted.
- B. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the contractor law, N.D.C.C. § 43-07-02, for engaging in the business or acting in the capacity of a contractor in North Dakota without first having a license when the cost, value, or price per job exceeded the sum of four thousand dollars.
- C. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for abandoning contracts without legal excuse after a deposit of money or other consideration has been provided in violation of N.D.C.C. § 43-07-14(1)(a).
- D. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for diverting funds or property received under express agreement for the prosecution or completion of a specified contract, or for a specified purpose in the prosecution or completion of any contract, and applying or using funds and property for another contract

obligation or to defraud or deceive creditors or the owner in violation of N.D.C.C. § 43-07-14(1)(b).

E. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in fraudulent or deceptive acts or practices or misrepresentations as a contractor in consequence of which one or more persons is injured in excess of three thousand dollars in violation of N.D.C.C. § 43-07-14(1)(c).

F. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for failing to refund fully a contracting party's advance payment where a rebuttable presumption of abandonment has arisen and a contracting party has made a request for a refund in violation of N.D.C.C. § 43-07-14(1)(f).

G. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in deceptive acts or practices, fraud, false pretenses, false promises, or misrepresentations, with the intent that others rely thereon in connection with the sale or advertisement of merchandise in the State of North Dakota.

H. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from directly or indirectly making false statements, false promises, or misrepresentations and the act, use and employment of any deceptive acts

or practices in connection with the advertisement or sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.

I. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations in connection with the advertisement or sale of contracting and home improvements, repairs, or services, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

J. That Defendant Collin Strehlow, doing business as NailedIt Home Improvements, his agents, employees, representatives, assigns and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, be enjoined and restrained from the advertising or sale of contracting and home improvements, repairs, or services in accordance with paragraph K.

K. That, pursuant to N.D.C.C. § 51-15-07, Defendant Collin Strehlow, doing business as NailedIt Home Improvements, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, is permanently enjoined and restrained from engaging in sales of contracting and home improvements, repairs, or services, including construction work. Notwithstanding the permanent injunction, Defendant may engage in future contracting services if Defendant applies to the Attorney General and the Court to lift the permanent injunction and the Court finds Defendant has fully complied with the following terms and conditions and otherwise is rehabilitated:

1. Three or more years have expired since the entry of judgment herein;
2. Defendant has paid in full all restitution to consumers pursuant to the judgment herein;
3. Defendant has paid in full restitution to all consumers that have paid Defendant advance payments for services not performed or merchandise not delivered in the state of North Dakota;
4. Defendant has paid all amounts owed to the Attorney General pursuant to entry of judgment herein;

If the Court thereafter finds, pursuant to an agreement between the Attorney General and Defendant, or after a hearing, that Defendant is sufficiently rehabilitated pursuant to the terms and conditions herein, the Defendant, upon order of the Court, may engage in contracting provided they have obtained a Contractor License pursuant to N.D.C.C. ch. 43-07 and has complied with all contractor licensing requirements appropriate and necessary for the work to be undertaken by him.

"Pay in full" or "paid in full" mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

L. That in the event Collin Strehlow, doing business as NailedIt Home Improvements, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, is lawfully engaged in contracting pursuant to the terms in this judgment, said Defendant, pursuant to N.D.C.C. § 51-15-07 and for a period of three years after becoming, lawfully engaged in contracting, is enjoined and restrained from soliciting or accepting from consumers advance payments or consumer

deposits in excess of ten percent of the total contract price in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3).

M. That, pursuant to N.D.C.C. § 47-25-02(3), Defendant's trade name, NailedIt Home Improvements, is ordered cancelled for Defendant's use of the trade name to engage in violations of N.D.C.C. chs. 43-07 and 51-15.

N. That Plaintiff shall have Judgment against Defendant Collin Strehlow in the amount of \$2,000.00 for civil penalties, pursuant to N.D.C.C. § 51-15-11.

O. That Plaintiff shall have Judgment against Defendant Collin Strehlow in the amount of \$3,000.00 for costs, expenses, and attorney's fees pursuant to N.D.C.C. § 51-15-10, incurred by the Attorney General in the investigation and prosecution of this action.

P. That Defendant Collin Strehlow, pursuant to N.D.C.C. § 51-15-07, shall pay restitution to all North Dakota consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which has been acquired by Defendant by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

Q. That Defendant Collin Strehlow shall pay to Plaintiff the sum of \$4,150.00, together with interest accruing thereon, as restitution for Kevin and Luci Terry, 5272 8th Court West, West Fargo, ND 58078.

R. The Judgment entered shall be a Judgment for which execution may issue.

S. Interest shall accrue on this Judgment in accordance with the interest rate on judgment as provided by N.D.C.C. § 28-20-34.

T. For such other and further relief as the nature of this case may require and this court may determine to be fair, just, and equitable.

[¶65] For the reasons stated above, Plaintiff respectfully requests that the Motion for Summary Judgment be granted and that the Court issue an order for Judgment granting the relief requested herein.

Dated this 31st day of January, 2018.

State of North Dakota
Wayne Stenehjem
Attorney General

By:



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