

NO. A05-2287

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

Cargill, Incorporated,

Plaintiff/Appellant,

v.

Jorgenson Farms, a family farm corporation,

Defendant/Respondant.

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**APPELLANT CARGILL,  
INCORPORATED'S BRIEF AND  
APPENDIX**

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Dustan J. Cross (#248952)  
Ryan R. Dreyer (#332252)  
GISLASON & HUNTER LLP  
2700 South Broadway  
P.O. Box 458  
New Ulm, MN 56073-0458  
Tel: 507-354-3111

Bruce Jones (#179553)  
Allan A. Thoen (#313889)  
FAEGRE & BENSON, L.L.P.  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
Tel: 612-766-7000

Attorneys for Respondent

Attorneys for Appellant

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## STATEMENT OF ISSUES

1. Did the trial court err in holding, without permitting any discovery, and based on the trial court's determination that two affidavits submitted by Jorgenson Farms were more credible and weighty than the countervailing circumstantial evidence favoring Cargill's position, that there was no genuine fact issue regarding whether Cargill and Jorgenson Farms formed an enforceable contract for the sale of corn?

The trial court found no genuine issue of fact on the existence of such a contract and granted summary judgment in favor of Jorgenson Farms.

Most apposite authority:

Minn. R. Civ. P. 56.03  
Minn. R. Civ. P. 56.06  
Minnesota Statute §336.2-204

2. Should the trial court's order denying Cargill's motion to compel arbitration be vacated?

The trial court denied Cargill's motion to compel arbitration.

Most apposite authority:

*Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344 (Minn. 2003)

3. Did the trial court abuse its discretion in sanctioning Cargill under Minnesota Statute §549.211 for proceeding without adequate evidentiary support, without any finding that Cargill acted in bad faith and based on the trial court's conclusion, before any discovery had taken place, that two affidavits submitted by Jorgenson Farms were more credible and weighty than the countervailing circumstantial evidence favoring Cargill's position?

The trial court granted Jorgenson Farms motion for attorney's fees under Minn. Stat. §549.211.

Most apposite authority:

Minnesota Statute §549.211

## STATEMENT OF THE CASE

This is an appeal from an order dated September 23, 2005 by the Honorable Bruce F. Gross, of the Fifth Judicial District, Cottonwood County District Court.

Appellant/Plaintiff Cargill, Incorporated, commenced this action on January 31, 2005 by service of a Summons and Complaint against Respondent/Defendant Jorgenson Farms.<sup>1</sup> Cargill's Complaint alleges that Jorgenson Farms made and breached a contract with Cargill to sell 80,000 bushels of corn to Cargill, and requests that the court compel Jorgenson Farms to arbitrate the contract dispute, pursuant to the terms of the contract.<sup>2</sup> Jorgenson Farms served its Answer on March 4, 2005, in which it denied the existence of such a contract between Cargill and Jorgenson Farms.<sup>3</sup> Also on March 4, 2005, Jorgenson Farms, through its counsel, made various factual assertions which it claimed proved the non-existence of the contract between Cargill and Jorgenson Farms, and threatened to seek sanctions if Cargill did not withdraw its Complaint.<sup>4</sup>

On June 30, 2005, Jorgenson Farms filed the case with the District Court. On July 7, 2005, Cargill filed a Motion to Compel Arbitration, supported by an affidavit from Cargill employee Kurt Peterson.<sup>5</sup> Jorgenson Farms responded by serving a Notice of Motion and Motion for Sanctions against Cargill.<sup>6</sup> Jorgenson Farms then filed a Motion

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<sup>1</sup> (Cottonwood County Certificate of Service of Process).

<sup>2</sup> (Complaint at pp. 1-2 & Exh. A) (AA2-10).

<sup>3</sup> (Answer, at p.1) (AA11).

<sup>4</sup> (Affidavit of Dustan J. Cross ["Cross Aff."], Exh. A) (AA32-45).

<sup>5</sup> (Affidavit of Kurt Peterson in Support of Motion to Compel Arbitration ["Peterson June Aff."]) (AA14-26).

<sup>6</sup> (Notice of Motion and Motion for Sanction; Cross Aff., ¶4 & Exh. B) (AA33, AA42).

for Summary Judgment on July 13, 2005, based on affidavits from James Jorgenson and former Cargill employee Ben Presthus.<sup>7</sup> In response to Jorgenson Farms' summary judgment motion, Cargill submitted an additional affidavit from Kurt Peterson and an affidavit from former Cargill employee Brad Morrison.<sup>8</sup> In its brief in opposition to summary judgment, Cargill requested in the alternative that Cargill be permitted an opportunity to conduct discovery before the trial court ruled on the summary judgment motion.<sup>9</sup>

All three motions were argued before Judge Gross on August 26, 2005, before any scheduling conference had been conducted or any scheduling order had been issued, and before any discovery had taken place.<sup>10</sup> Again at the hearing, Cargill's counsel requested in the alternative that Cargill be allowed to take discovery before the trial court ruled on the summary judgment motion.<sup>11</sup>

On September 23, 2005, the trial court issued its ruling on the three pending motions, in which it

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<sup>7</sup> (Affidavit of James Jorgenson ["Jorgenson Aff."]) (AA46-53); Affidavit of Ben Presthus ["Presthus Aff."]) (AA27-31).

<sup>8</sup> (Affidavit of Kurt Peterson ["Peterson Aug. Aff."]) (AA54-60); Affidavit of Brad Morrison ["Morrison Aff."]) (AA61-62).

<sup>9</sup> (Responsive Memorandum of Cargill, Incorporated to Motion for Summary Judgment and Motion for Sanctions Brought by Jorgenson Farms, at p. 4, 6).

<sup>10</sup> (Transcript of August 26, 2005 Hearing ["Transcript"]).

<sup>11</sup> (Transcript at p.11, 31). Cargill was represented by different counsel before the trial court than on this appeal.

- (1) granted summary judgment to Jorgenson Farms on Cargill's contract claim against Jorgenson Farms, implicitly rejecting Cargill's request for an opportunity to take discovery;
- (2) denied Cargill's motion to compel arbitration; and
- (3) granted Jorgenson Farms motion for attorney's fees under Minn. Stat. §549.211 as a sanction against Cargill, on the ground that Cargill's claim was not supported by sufficient evidence of the existence of a contract.<sup>12</sup>

This appeal followed.

#### **STATEMENT OF THE FACTS**

Through the affidavits of James Jorgenson, Brad Morrison, Kurt Peterson and Ben Presthus, the record includes the facts set out below. The facts, and all inferences that may reasonably be drawn from the facts, must be viewed in the light most favorable to Cargill, as the nonmoving party. *See, e.g., Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn.1981).

Jorgenson Farms is a family farm corporation operated by three brothers, the "Jorgenson brothers," one of whom is James Jorgenson.<sup>13</sup> Cargill and Jorgenson Farms had an extensive course of dealing over a number of years before July, 2003, in which they would orally enter into contracts for Cargill to purchase grain from Jorgenson

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<sup>12</sup> (Order of 9/23/05 ["Order"]) (AA63-71).

<sup>13</sup> (Transcript at 2; Peterson Aug. Aff., ¶3).

Farms, which Cargill would then memorialize in a written confirmation that Cargill would send to Jorgenson Farms.<sup>14</sup>

On July 17, 2003, former Cargill employee Ben Presthus and a representative of Jorgenson Farms discussed the formation and terms of corn sales contracts between Cargill and Jorgenson Farms.<sup>15</sup> Presthus and Jorgenson Farms made oral contracts for the sale of corn on July 17, 2003.<sup>16</sup> One of the contracts they made was for the sale of 135,000 bushels of corn, and another was for the sale of 100,000 bushels of corn.<sup>17</sup> Both of these two contracts are reflected in a page from Presthus' daily planner for July 17, 2003.<sup>18</sup> That same page from Presthus' daily planner also contains notes that appear to reflect an additional contract or contracts between Cargill and Jorgenson Farms, as well as another unexplained note that may reflect another conversation that day between Presthus and Jorgenson Farms or an additional item that Presthus and Jorgenson Farms had discussed.<sup>19</sup>

After Presthus discussed the formation of corn contracts with Jorgenson Farms on July 17, 2003, he called Cargill's office to report the corn contracts that he had formed on behalf of Cargill with Jorgenson Farms, so that Cargill's office could record the contracts.<sup>20</sup> One of the corn contracts that Cargill recorded and entered into its

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<sup>14</sup> (Jorgenson Aff., ¶2 (AA46); Presthus Aff., ¶2 (AA27); Peterson June Aff., ¶¶8-12 (AA15))

<sup>15</sup> (Presthus Aff., ¶¶1&6) (AA27-28).

<sup>16</sup> (Presthus Aff., ¶6) (AA28).

<sup>17</sup> (Presthus Aff., ¶6) (AA28).

<sup>18</sup> (Presthus Aff., ¶¶6-7 & Exh. A) (AA28, AA31).

<sup>19</sup> (Presthus Aff., Exh. A) (AA31).

<sup>20</sup> (Presthus Aff., ¶7) (AA28).

accounting system after Presthus' phone call to the Cargill office was Contract #27985, for the sale of 80,000 bushels of corn.<sup>21</sup>

Contract #27985 contained uncommon terms and was "not a normal, run-of-the-mill contract."<sup>22</sup> It included features of a type that Ben Presthus was promoting in the summer of 2003.<sup>23</sup> Cargill's system for recording and processing corn contracts requires the confirmation of information before the contract issuance can be completed.<sup>24</sup> In addition to these information confirmation requirements, the unusual terms of Contract #27985 make it unlikely that the contract confirmation could have been created by clerical error as Presthus surmised in his affidavit.<sup>25</sup>

Consistent with the course of dealing between the parties, after Contract #27985 was entered into Cargill's records, Cargill prepared a written confirmation of the terms of Contract #27985, signed it, and mailed it to Jorgenson Farms.<sup>26</sup> Jorgenson Farms does not have adequate staff or a procedure to ensure that it always timely opens and reviews business documents that it receives in the mail.<sup>27</sup>

In the fall of 2003, Ben Presthus approached James Jorgenson of Jorgenson Farms to discuss placing put options on Jorgenson Farms' corn contracts with Cargill, and Jorgenson agreed to do so.<sup>28</sup> On October 3, 2003, Cargill employee Cory Bratland sent

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<sup>21</sup> (Presthus Aff., ¶7 (AA28); Peterson June Aff., ¶¶3-4 (AA14) & Exh. A (AA17-22)).

<sup>22</sup> (Morrison Aff., ¶4) (AA62).

<sup>23</sup> (Morrison Aff., ¶4) (AA62).

<sup>24</sup> (Peterson Aug. Aff., ¶4) (AA55).

<sup>25</sup> (Morrison Aff., ¶4) (AA62).

<sup>26</sup> (Peterson June Aff., ¶¶4, 9 (AA14-15); Presthus Aff., ¶3 (AA27-28)).

<sup>27</sup> (Jorgenson Aff., ¶5) (AA47).

<sup>28</sup> (Jorgenson Aff., ¶5) (AA47).

an email to Presthus informing Presthus that Bratland had placed put options on four contracts for Jorgenson Farms totaling 335,000 bushels, including Contract #27985 for 80,000 bushels.<sup>29</sup> Bratland requested of Presthus, "If I missed anything let me know so I can input asap."<sup>30</sup> Presthus did not respond to Bratland that the inclusion of Contract #27985 was a mistake. During a February 6, 2004 meeting with the Jorgenson brothers and Brad Morrison, Presthus produced notes showing that Jorgenson Farms had agreed to place put options on contracts totaling 335,000 bushels, including the 80,000-bushel Contract #27985.<sup>31</sup> The Jorgensons agreed with that 335,000 number and recalled discussing the put options with Presthus.<sup>32</sup>

In October, 2003, after the put options had been placed on Jorgenson Farms' corn contracts, Cargill sent, and James Jorgenson received, written confirmations for the put options on Jorgenson Farms' contracts, including Contract #27985.<sup>33</sup> Upon receiving the notice that a put option had been placed on an 80,000 bushel corn contract, Jorgenson Farms did not contact Cargill to ask why an 80,000 bushel corn contract was listed, or to assert that no such contract existed.<sup>34</sup> The terms of Contract #27985 required Jorgenson Farms to deliver the 80,000 bushels of corn between December 1 and 31, 2003.<sup>35</sup> Not

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<sup>29</sup> (Peterson Aug. Aff., Exh. 1) (AA57).

<sup>30</sup> (Peterson Aug. Aff., Exh. 1) (AA57).

<sup>31</sup> (Peterson Aug. Aff., Exh. 2) (AA58-59).

<sup>32</sup> (Peterson Aug. Aff., Exh. 2) (AA58-59).

<sup>33</sup> (Jorgenson Aff., ¶5) (AA47).

<sup>34</sup> (Peterson Aug. Aff., ¶3) (AA54).

<sup>35</sup> (Peterson June Aff., Exh. A p.1) (AA17).

until December, 2003 did Jorgenson express any dissatisfaction to Cargill about either the put option or the underlying Contract #27985.<sup>36</sup>

Ben Presthus left Cargill's employ in December, 2003 to work for Pro Pig in Worthington, Minnesota.<sup>37</sup> The record does not reveal, and the trial court denied Cargill's request for an opportunity to take discovery to learn, the extent to which Presthus has ulterior motives for casting Cargill in a negative light and currying favor with Jorgenson Farms. For example, the record does not indicate whether Presthus is related to the Jorgensons or if he currently works in a sales position at Pro Pig in which he views Cargill as a competitor and Jorgenson Farms as a current or potential customer.

In support of its summary judgment motion and in response to the evidence that Contract #27985 was formed based on a conversation or conversations between representatives of Cargill and Jorgenson Farms, Jorgenson Farms obtained an affidavit from Ben Presthus in which he surmised that Cargill's recording of Contract #27,895 following his telephone call to the Cargill office on July 17, 2003 was traceable to a "clerical error" by an unidentified party.<sup>38</sup> In his affidavit, Presthus stated that Jorgenson Farms did not "enter or intend to enter" into Contract #27985 "on or about July of 2003," and that his daily planner for July 17, 2003 contains no mention of Contract #27985.<sup>39</sup> Presthus' affidavit does not state whether Presthus and various representatives of Jorgenson Farms had conversations about Contract #27985 on other dates, or whether

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<sup>36</sup> (Jorgenson Aff., ¶¶5-6 (AA47); Peterson Aug. Aff., ¶3 (AA54)).

<sup>37</sup> (Presthus Aff., ¶1) (AA27).

<sup>38</sup> (Presthus Aff., ¶7) (AA28).

<sup>39</sup> (Presthus Aff., ¶7) (AA28).

there are relevant notes in his daily planner from other dates, and the trial court denied Cargill's request for an opportunity to take discovery to learn these facts. Presthus also recounted in his affidavit unsworn statements that he claims he made to Brad Morrison in which he allegedly told Morrison "that the purported contract never existed" and "that Jorgenson Farms in no way ... approved the ostensible contract...."<sup>40</sup> Presthus' affidavit also purports to recount meetings in December, 2003 and January, 2004 with Presthus, Brad Morrison, and "Jorgenson Farms," in which Presthus alleges that "it was agreed by all present parties" that Contract #27985 "was never entered into" and would be deleted from Cargill's records.<sup>41</sup> Brad Morrison has submitted an affidavit (which must be accepted as true on summary judgment) denying Presthus' account of those meetings.<sup>42</sup>

Also in support of its summary judgment motion, Jorgenson Farms submitted an affidavit from James Jorgenson, one of the three Jorgenson brothers. In his affidavit, James Jorgenson does not purport to speak for his brothers or for Jorgenson Farms, the corporation, but describes his personal communications with Cargill in carefully limited language, stating, "I did not enter into a contract for the sale of 80,000 bushels of corn to Cargill on or about July 17, 2003...."<sup>43</sup> There are no affidavits or other evidence in the record about the involvement of the other two Jorgenson brothers, or other representatives of Jorgenson Farms, in the formation of Contract #27985. James Jorgenson's affidavit does not say, as the trial court mistakenly concluded, that James

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<sup>40</sup> (Presthus Aff., ¶¶7, 9) (AA28-29).

<sup>41</sup> (Presthus Aff., ¶¶8-9) (AA28-29).

<sup>42</sup> (Morrison Aff., ¶3) (AA61).

<sup>43</sup> (Jorgenson Aff., ¶3, emphasis added) (AA46).

Jorgenson's "principal never entered into the reported contract with Cargill."<sup>44</sup> The trial court also rejected Cargill's request for an opportunity to take discovery on this issue.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR JORGENSEN FARMS.

The denial or grant of summary judgment "is a question of law" which is reviewed *de novo*. *In re Estate of Kotowski*, 704 N.W.2d 522, 526 (Minn. App. 2005). "Summary judgment is not a substitute for trial." *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 215 (Minn. 1985). Rather, it "is an extraordinary remedy—a 'blunt instrument' to be used only where it is clearly applicable." *Katzner v. Kelleher Const.*, 535 N.W.2d 825, 828 (Minn. App. 1995). Rule 56.03 permits summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that [the moving] party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03.

A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc., v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997). "A genuine issue of material fact can exist even if it appears that the party opposing summary judgment will not likely prevail at trial." *Afolayan v. Moorhead*

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<sup>44</sup> (Order at 3) (AA68).

*State University*, 1998 WL 798879, \*1 (Minn. App.).<sup>45</sup> “The fact that the nonmoving party is unlikely to prevail at trial does not warrant granting summary judgment.”

*Writers, Inc. v. West Bend Mut. Ins. Co.*, 465 N.W.2d 419, 422 (Minn.App.1991); *see also, e.g., Larson v. Carchedi*, 419 N.W.2d 132, 136 (Minn. App. 1988) (same).

As the moving party, Jorgenson Farms has the burden to show the absence of any genuine fact issue. *See Brookfield Trade Ctr. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000). The court must view the evidence and all inferences that reasonably may be drawn from the evidence in the light most favorable to Cargill, *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn.1981), and “must not weigh the evidence,” *DLH, Inc., v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997), “or determine the credibility of affidavits or other evidence.” *Stringer v. Minnesota Vikings Football Club LLC*, 705 N.W.2d 746, 754 (Minn. 2005). Because “[a]ll doubts and factual inferences must be resolved against the moving party,” *Nord*, 305 N.W.2d at 339, the fact that a movant has submitted affidavits that are not directly contradicted is not necessarily determinative. “Doubts as to the credibility of the movant’s affiants may lead a court to conclude that a genuine issue of fact exists.” *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216 (Minn. 1985). “It is sufficient to create a genuine fact issue if there is circumstantial evidence that supports inferences in favor of the nonmoving party.” *Clemens v. The Committee, Inc.*, 2004 WL 117536, \*2 (Minn. App.).

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<sup>45</sup> Unpublished opinions cited in this brief are referred to by their Westlaw citation and copies have been provided to the Court in a separately bound pamphlet, pursuant to Minn. R. Civ. App. P. 128.04.

In short, the summary judgment standard “deals solely with the existence or non-existence of a genuine fact issue for trial” and does not permit the trial court to weigh the evidence under the guise of determining its “sufficiency”:

Unless there is no evidence whatsoever on an essential proposition—in which case summary will be appropriate—an assessment of the ‘sufficiency’ of the evidence entails weighing evidence, making credibility determinations, and perhaps, drawing inferences. These are all matters properly determinable by the trier of fact and are not appropriate considerations in a summary judgment motion.

*Clemens v. The Committee, Inc.*, 2004 WL 117536, \*3-\*4 (Minn. App.); *see also, DLH, Inc.*, 566 N.W.2d at 70 & n.8 (noting that “substantial evidence” sufficient to defeat summary judgment “refers to legal sufficiency and not quantum of evidence”).

While “the party resisting summary judgment must do more than rest on mere averments,” *DLH, Inc.*, 566 N.W.2d at 71, this presupposes that the nonmoving party has had an adequate opportunity to take discovery and flesh out all the relevant facts. In cases where discovery is not complete, Rule 56.06 provides for denial of summary judgment “to permit affidavits to be obtained or depositions to be taken or discovery to be had....” Minn. R. Civ. P. 56.06. “Continuances should be liberally granted under Rule 56.06, especially when the party seeking more time is doing so because of insufficient time to conduct discovery.” *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216 (Minn. 1985).

The two major factors that govern whether to postpone ruling on a summary judgment motion under Rule 56.06 are (1) “whether the party seeking more time is acting from a good faith belief that material facts will be discovered,” and (2) whether the party

requesting more time “has been diligent in seeking discovery.” *Bixler*, 376 N.W.2d at 216-17 (reversing grant of summary judgment and remanding for additional discovery). A trial court’s denial of a request for discovery under Rule 56.06 is reviewed for abuse of discretion. *See, e.g., Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982). Premature summary judgment without sufficient discovery deprives the non-moving party of its “right to have a jury determine the fact issues upon a trial in which all the evidence ... may be received after thorough investigation, the marshalling of the facts, and the opportunity to thoroughly test the admissibility of the evidence.” *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 605-6 (Minn. 1957).

**A. The record contains sufficient evidence of an oral contract to preclude summary judgment at this early stage before discovery.**

At this early stage of the case, before any discovery has been conducted, the record contains sufficient evidence of an oral contract between Cargill and Jorgenson Farms to preclude summary judgment on the issue of the formation of a contract to sell 80,000 bushels of corn. Minnesota Statute §336.2-204 governs the formation of contracts for the sale of goods, and provides as follows:

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
- (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

**1. The record contains evidence from which reasonable persons could conclude that Cargill and Jorgenson Farms made a contract for the sale of 80,000 bushels of corn.**

Even before any evidence has been gathered through discovery, the record includes specific facts that constitute circumstantial evidence from which a reasonable person could conclude that Cargill and Jorgenson Farms orally formed a legally binding contract whose terms were memorialized in Contract #27985, as follows:

- Cargill and Jorgenson Farms had an extensive course of dealing over a number of years before July, 2003, in which they would orally enter into contracts for Cargill to purchase grain from Jorgenson Farms, which Cargill would then memorialize in written confirmations that Cargill would send to Jorgenson Farms.<sup>46</sup>

- On July 17, 2003, Cargill representative Ben Presthus discussed with Jorgenson Farms the formation and terms of corn sales contracts between Cargill and Jorgenson Farms.<sup>47</sup> Presthus and Jorgenson Farms made oral contracts for the sale of corn on July 17, 2003.<sup>48</sup> One of the contracts they made was for the sale of 135,000 bushels of corn, and another was for the sale of 100,000 bushels of corn.<sup>49</sup> Both of these contracts are reflected in a page from Presthus' daily planner for that day.<sup>50</sup> That same page from Presthus' daily planner also contains notes that, fairly read, reflect an additional contract or contracts between Cargill and Jorgenson Farms, as well as another unexplained note

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<sup>46</sup> (Jorgenson Aff., ¶2 (AA46); Presthus Aff., ¶2 (AA27); Peterson June Aff., ¶¶8-12 (AA15))

<sup>47</sup> (Presthus Aff., ¶¶1&6 (AA27-28)).

<sup>48</sup> (Presthus Aff., ¶6 (AA28)).

<sup>49</sup> (Presthus Aff., ¶6 (AA28)).

<sup>50</sup> (Presthus Aff., ¶¶6-7 & Exh. A) (AA28, AA31).

that may reflect another conversation that day between Presthus and Jorgenson Farms or an additional item that Presthus and Jorgenson Farms had discussed.<sup>51</sup>

- After Presthus discussed the formation of corn contracts with Jorgenson Farms on July 17, 2003, he called Cargill's office to report the corn contracts that he had formed on behalf of Cargill with Jorgenson Farms, so that Cargill's office could record the contracts.<sup>52</sup>

- One of the corn contracts that Cargill recorded and entered into its accounting systems after Presthus' phone call to the Cargill office was Contract #27985 for the sale of 80,000 bushels of corn.<sup>53</sup>

- Contract #27985 contained uncommon terms and was "not a normal, run-of-the-mill contract."<sup>54</sup> It included features of a type that Ben Presthus was specifically promoting in the summer of 2003.<sup>55</sup>

- Cargill's system for recording and processing corn contracts requires the confirmation of information before the contract issuance can be completed.<sup>56</sup> In addition to these information confirmation requirements, Cargill personnel have stated that the unusual terms of Contract #27985 make it unlikely that the contract confirmation could have been created by clerical error.<sup>57</sup> Given the detailed, special terms of Contract

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<sup>51</sup> (Presthus Aff., Exh. A) (AA31).

<sup>52</sup> (Presthus Aff., ¶7) (AA28).

<sup>53</sup> (Presthus Aff., ¶7 (AA28); Peterson June Aff., ¶¶3-4 (AA14) & Exh. A (AA17-22)).

<sup>54</sup> (Morrison Aff., ¶4) (AA62).

<sup>55</sup> (Morrison Aff., ¶4) (AA62).

<sup>56</sup> (Peterson Aug. Aff., ¶4) (AA55).

<sup>57</sup> (Morrison Aff., ¶4) (AA62).

#27985, it is reasonable to infer that it was created based on a conversation or conversations between representatives of Cargill and Jorgenson Farms.

- Consistent with the course of dealing between the parties, Cargill prepared a written confirmation of the terms of Contract #27985, signed it, and mailed it to Jorgenson Farms.<sup>58</sup>

- In the fall of 2003, Ben Presthus approached James Jorgenson of Jorgenson Farms to discuss placing put options on Jorgenson Farms' corn contracts with Cargill, and Jorgenson agreed to do so.<sup>59</sup>

- On October 3, 2003, Cargill employee Cory Bratland sent an email to Presthus informing Presthus that Bratland had placed put options on four contracts for Jorgenson Farms totaling 335,000 bushels, including Contract #27985 for 80,000 bushels.<sup>60</sup>

Bratland requested of Presthus, "If I missed anything let me know so I can input asap."<sup>61</sup>

Presthus did not respond to Bratland that the inclusion of Contract #27985 was a mistake.

- During a subsequent meeting with the Jorgenson brothers and Brad Morrison, Presthus produced notes showing that Jorgenson Farms had agreed to place put options on contracts totaling 335,000 bushels, including the 80,000-bushel Contract #27985.<sup>62</sup>

The Jorgensons agreed with that 335,000 number and recalled discussing the put options with Presthus.<sup>63</sup>

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<sup>58</sup> (Peterson June Aff., ¶¶4, 9 (AA14-15); Presthus Aff, ¶3 (AA27-28)).

<sup>59</sup> (Jorgenson Aff., ¶5) (AA47).

<sup>60</sup> (Peterson Aug. Aff., Exh. 1) (AA57).

<sup>61</sup> (Peterson Aug. Aff., Exh. 1) (AA57).

<sup>62</sup> (Peterson Aug. Aff., Exh. 2) (AA58-59).

<sup>63</sup> (Peterson Aug. Aff., Exh. 2) (AA58-59).

- In October 2003, James Jorgenson received from Cargill written confirmation of the put option that had been placed on Contract #27985.<sup>64</sup> Jorgenson Farms did not contact Cargill to ask why the 80,000 bushel contract was listed, or to assert that there was no such contract.<sup>65</sup> Not until December, 2003 – when it was time for Jorgenson Farms to deliver the 80,000 bushels of corn under Contract #27985 – did Jorgenson express any dissatisfaction to Cargill about either the put option or the underlying Contract #27985.<sup>66</sup>

- In December 2003, and again in 2004, James Jorgenson met with Ben Presthus and Brad Morrison to discuss Contract #27985.<sup>67</sup> During James Jorgenson’s meeting with Brad Morrison, Jorgenson referred to Contract #27985 by its number, even though at the time he claimed never to have received a written copy of it.<sup>68</sup>

The evidence described above constitutes substantial circumstantial evidence sufficient for reasonable persons to conclude that Jorgenson Farms and Cargill entered into a legally binding contract for the sale of 80,000 bushels of corn.

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<sup>64</sup> (Jorgenson Aff., ¶5) (AA47).

<sup>65</sup> (Peterson Aug. Aff., ¶3) (AA54).

<sup>66</sup> (Jorgenson Aff., ¶¶5-6 (AA47); Peterson Aug. Aff., ¶3 (AA54)).

<sup>67</sup> (Jorgenson Aff., ¶¶6-7 (AA47); Presthus Aff., ¶¶8-9 (AA28-29); Morrison Aff., ¶2 (AA61); Peterson Aug. Aff., Exh. 2 (AA58-59)).

<sup>68</sup> (Morrison Aff., ¶2) (AA61).

**2. The trial court improperly weighed the evidence in finding the affidavits of Ben Presthus and James Jorgenson to be more credible and weighty than the countervailing circumstantial evidence that a contract existed.**

In response to the circumstantial evidence that a contract existed between the parties, Jorgenson Farms relies on carefully-worded and qualified affidavits by Ben Presthus and James Jorgenson that they did not enter into Contract #27985 on certain dates. In its order granting summary judgment, the trial court acknowledged that the circumstantial evidence favoring Cargill “could ordinarily constitute a binding agreement between the parties.”<sup>69</sup> But the court did not stop there and conclude that the circumstantial evidence favoring Cargill and the affidavits favoring Jorgenson Farms created a fact issue, as it should have done. Instead, the court

- improperly credited the denials in the Presthus and Jorgenson affidavits at face value;
- improperly drew inferences from the Presthus and Jorgenson affidavits in favor of Jorgenson Farms rather than in favor of Cargill; and
- improperly weighed the evidence and found that the Presthus and Jorgenson denials outweighed the countervailing circumstantial evidence that the parties in fact had entered into a contract.

The trial court’s reliance on the Presthus and Jorgenson affidavits in granting summary judgment was erroneous because, as explained below, reasonable persons can draw different conclusions about the credibility and weight of the Presthus and Jorgenson

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<sup>69</sup> (Order at 5) (AA70).

affidavits as compared to the significant circumstantial evidence that Cargill and Jorgenson Farms in fact did enter into a contract. At most, the Presthus and Jorgenson affidavits simply illustrate why Cargill should have been allowed a chance to conduct some discovery before the trial court ruled on Jorgenson Farms' summary judgment motion.

**a. Affidavit of Ben Presthus.**

Ben Presthus is a former Cargill employee who states in his affidavit that he was the only Cargill representative to deal with Jorgenson Farms during the period in question.<sup>70</sup> Presthus left Cargill's employ in December, 2003 to work for Pro Pig in Worthington, Minnesota.<sup>71</sup> The record does not reveal, and the trial court's premature grant of summary judgment prevented Cargill from discovering, the extent to which Presthus has ulterior motives for casting Cargill in a negative light and currying favor with Jorgenson Farms. For example, it would bear directly on Presthus' credibility if he is a close relative of the Jorgensons or currently works in a sales position at Pro Pig in which he views Cargill as a competitor and Jorgenson Farms as a current or potential customer. The trial court's order failed to consider and short-circuited any inquiry into these matters relating to Presthus' credibility, and instead simply credited Presthus' statements at face value.

The key passage in the Presthus affidavit that the trial court relied on is Presthus' curiously qualified assertion that "[a]t no time did Jorgenson Farms ever enter, or intend

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<sup>70</sup> (Presthus Aff., ¶2) (AA27).

<sup>71</sup> (Presthus Aff., ¶1) (AA27).

to enter, into contract MILO-AH-27987 in or about July of 2003.<sup>72</sup> This statement simply begs the question of whether Presthus would agree, if deposed under oath, that Jorgenson Farms did enter or intend to enter Contract #27,987 at some other time (such as in June, 2003). Notably, rather than directly denying under oath that he ever entered into the contract with Jorgenson Farms, Presthus' affidavit contains a number of statements in which he recounts unsworn statements he made to others, such as "I told my supervisor ... the purported contract never existed," and "I have no entry in my journal that such contract was created," and "it was agreed by all present parties that [the contract] was never entered into," and "I reiterated to Mr. Morrison that Jorgenson Farms in no way ... approved the ostensible contract."<sup>73</sup> The trial court improperly inferred an unqualified and direct denial from these qualified and indirect denials, and rejected Cargill's request for an opportunity to depose and cross-examine Presthus about the various inferences that might reasonably be drawn from his qualified, indirect denials.

Depositions of Presthus and the Jorgenson brothers and examinations of all relevant calendar and diary entries and other notes by Presthus and Jorgenson Farms for the entire period in question are reasonably likely to reveal additional, material evidence about communications between Cargill and Jorgenson Farms regarding Contract #27985. For example, Presthus flatly asserts in his affidavit that "[m]y daily records only show the 100,000 and 135,000 bushel contract that was performed by Jorgenson Farms."<sup>74</sup> Yet even the notes Presthus attached to his affidavit appear to directly contradict this

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<sup>72</sup> (Presthus Aff., ¶7, emphasis added) (AA28).

<sup>73</sup> (Presthus Aff., ¶¶7-9) (AA28-29).

statement by referring to more than just the two contracts for 135,000 and 100,000 bushels that he acknowledges in his affidavit.<sup>75</sup> Additionally, Brad Morrison's notes refer to a February 6, 2004 conversation in which Presthus showed the Jorgensons notes in which Presthus had written that Jorgenson Farms had corn contracts with Cargill totalling 335,000 bushels, a figure corroborated by the October 3, 2003 email Cory Bratland sent to Presthus, which references a 135,000 bushel contract, a 100,000 bushel contract, an 80,000 bushel contract, and a 20,000 bushel contract.<sup>76</sup> If the 100,000- and 135,000-bushel contracts were the only corn contracts Presthus made with Jorgenson Farms in 2003, why did Presthus' notes indicate additional contracts, and why did he allow put options to be placed on four contracts for Jorgenson Farms totalling 335,000 bushels, including Contract #27985? This inconsistency raises doubts about the accuracy of Presthus' notes, his assertions in his affidavit, or both. The trial court failed to resolve these doubts in favor of Cargill, as required under the summary judgment standard. In fact, the court failed to consider these issues at all, and rejected Cargill's request for time to take discovery regarding these issues that bear directly on the credibility of Presthus' affidavit.

Finally, Presthus' affidavit is conspicuously silent about which of the three Jorgenson brothers (or other representatives of Jorgenson Farms) Presthus dealt with in each of his communications regarding Contract #27985 and the other Cargill contracts in

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<sup>74</sup> (Presthus Aff. ¶7) (AA28).

<sup>75</sup> (Presthus Aff., Exh. A) (AA31).

<sup>76</sup> (Peterson Aug. Aff., Exh. 1 & 2) (AA57-58).

2003, a fact that bears directly on the relevance of James Jorgenson's affidavit, as noted below.

**b. Affidavit of James Jorgenson.**

Even more than the Presthus affidavit, the affidavit of James Jorgenson raises questions about what it does not say. Jorgenson states: “I did not enter into a contract for the sale of 80,000 bushels of corn to Cargill on or about July 17, 2003....”<sup>77</sup> James Jorgenson, however, is just one of the three Jorgenson brothers who operate Jorgenson Farms.<sup>78</sup> Thus, the fact that James Jorgenson may not have entered into the contract “on or about July 17, 2003,” says nothing about what another representative of Jorgenson Farms may have done. On this point, the trial court simply misread what James Jorgenson's affidavit actually says, and erroneously stated that “[i]n his affidavit, James Jorgenson asserts that his principal never entered into the reported contract with Cargill.”<sup>79</sup> In fact, Jorgenson makes no such claim in his affidavit, but rather, as noted above, conspicuously limits the statements in his affidavit to what he personally did on July 17, 2003, as opposed to what other representatives of Jorgenson Farms did, or what he did on dates other than July 17, 2003. The trial court erred by drawing an inference in favor of Jorgenson Farms that James Jorgenson was speaking for Jorgenson Farms and his two brothers, rather than solely for himself. The trial court also erred by depriving Cargill of the opportunity to depose each of the Jorgenson brothers about their communications with Cargill regarding Contract #27985.

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<sup>77</sup> (Jorgenson Aff., ¶3, emphasis added) (AA46).

<sup>78</sup> (Peterson Aug. Aff., ¶3) (AA54).

Finally, in its reliance on the Jorgenson affidavit, the trial court ignored points that cast doubt on the credibility of James Jorgenson's claim that he never entered into Contract #27985 and was "partially stunned" to learn of it.<sup>80</sup> This claim by Jorgenson is inconsistent with his having agreed in October 2003 to place a put option on Contract #27985 without ever questioning the existence of the contract at that time. Likewise, the credibility of Jorgenson's claim that he never received the written confirmation of Contract #27985 is undercut by evidence that Jorgenson referred to Contract #27985 by its number in a meeting with Brad Morrison, even though at the time he claimed never to have seen a copy of it.<sup>81</sup> The trial court improperly resolved these credibility issues – which should have been left to the factfinder – in favor of Jorgenson Farms, the *moving* party, and improperly rejected Cargill's request for time to depose Jorgenson regarding these issues.

**B. The trial court did not consider or decide whether the contract satisfies the statute of frauds and thus that issue is not before this Court.**

Because Contract #27985 is a contract for the sale of goods with a price greater than \$500, it is subject to the UCC's statute of frauds, which is set out in Minnesota Statute §336.2-201. However, since the trial court based its decision solely on the conclusion that no contract was ever formed, it did not reach or pass upon the issue of

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<sup>79</sup> (Order at 3) (AA68).

<sup>80</sup> Again, this claim by James Jorgenson is simply beside the point if one of the other Jorgenson brothers, or another representative of Jorgenson Farms, made the contract in the first instance, a fact issue that Cargill should have been permitted to explore in discovery.

<sup>81</sup> (Morrison Aff., ¶2) (AA61).

whether Contract #27985 satisfied the statute of frauds.<sup>82</sup> Accordingly, especially given that no discovery has yet been conducted, this Court need not and should not reach the issue of whether the contract satisfies the statute of frauds. *See, e.g., Thorson v. Billy Graham Evangelistic Ass'n*, 687 N.W.2d 652, 658 (Minn. App. 2004) (declining to address issues not decided by the district court). Cargill requests that the Court reverse and remand for further discovery on both issues of contract formation and the statute of frauds.

**C. The trial court abused its discretion in rejecting Cargill's request for time to take discovery before ruling on Jorgenson Farms' summary judgment motion.**

As previously noted, a request under Minn. R. Civ. P. 56.06 to continue a summary judgment motion to allow time for discovery should be liberally allowed if (1) "the party seeking more time is acting from a good faith belief that material facts will be discovered," and (2) the party requesting more time "has been diligent in seeking discovery." *Bixler v. J.C. Penney Co., Inc.*, 376 N.W.2d 209, 216-17 (Minn. 1985). Both conditions are satisfied here. By rejecting Cargill's request for an opportunity to conduct

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<sup>82</sup> The issue of contract formation is antecedent to and distinct from the issue of whether the contract is subject to the statute of frauds. "It is important to distinguish the statute of frauds' writing requirement from the issue of whether a contract exists. The writing required by the statute 'is not the contract, but only the written evidence of it.'" *Simplex Supplies, Inc. v. Abhe & Svoboda, Inc.*, 586 N.W.2d 797, 800 (Minn. App. 1998). Thus, the statute of frauds does not alter the standard for contract formation (specifically, it does not prohibit the formation of oral contracts), but merely provides that a party to an existing, otherwise valid contract that is subject to the statute of frauds may object to enforcement of the contract unless it complies with the statute of frauds or one of its exceptions. *See id.*

discovery and granting summary judgment before any discovery had been conducted, the trial court abused its discretion.

As to the first prong, as noted throughout the discussion in Parts I.A. and I.B. above, there are a number of areas in which discovery would be likely to lead to additional material facts, demonstrating that Cargill's request for time to conduct discovery was made in good faith. As to the second prong, the record establishes that Cargill acted diligently in seeking discovery when it did. As originally commenced, Cargill did not intend or seek to litigate this case in district court, but sought to arbitrate the case as provided in the contract, in part out of a legitimate desire to avoid costly and drawn-out civil discovery proceedings.<sup>83</sup> As soon as Cargill's motion to compel arbitration was heard, Cargill requested the opportunity to commence discovery in the district court in the event its motion to compel arbitration was denied.<sup>84</sup>

Under these circumstances, where there was ample reason to believe that allowing discovery would uncover additional material facts bearing directly on Jorgenson Farms' summary judgment motion, and where no discovery had yet been conducted, it was an abuse of discretion for the trial court to reject Cargill's request for time to conduct discovery.

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<sup>83</sup> (Complaint, at pp. 2-3) (AA3-4).

<sup>84</sup> (Responsive Memorandum of Cargill, Incorporated to Motion for Summary Judgment and Motion for Sanctions Brought by Jorgenson Farms, at p. 4, 6; Transcript of August 26, 2005 Hearing, at p.11, 31).

## **II. THE DISTRICT COURT'S ORDER DENYING CARGILL'S MOTION TO COMPEL ARBITRATION SHOULD BE VACATED.**

In denying Cargill's motion to compel arbitration, the trial court relied solely on its conclusion that there was no genuine fact issue as to the existence of a contract between Cargill and Jorgenson Farms.<sup>85</sup> Because this conclusion was based on erroneous credibility determinations and weighing of the evidence, as described above in Part I, Cargill requests that this Court vacate the trial court's order denying Cargill's motion to compel arbitration, without prejudice to Cargill's ability to again move to compel arbitration after an opportunity to conduct discovery.

## **III. THE DISTRICT COURT ERRED IN GRANTING JORGENSON FARMS' MOTION FOR SANCTIONS UNDER MINN. STAT. §549.211.**

Because the trial court's award of sanctions against Cargill under Minnesota Statute §549.211 was premised on the court's erroneous conclusion that there was no genuine fact issue on Cargill's contract claim, the trial court's award of sanctions should be reversed for the same reasons that its grant of summary judgment should be reversed. *See, e.g., Hampton Bank v. River City Yachts, Inc.*, 528 N.W.2d 880, 891 (Minn. App. 1995) (noting that party whose claim survives dispositive motion is not subject to sanctions for proceeding with a frivolous claim).

However, even assuming for the sake of argument that the trial court was correct in granting summary judgment against Cargill, the court still abused its discretion in

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<sup>85</sup> (Order at pp. 2-3) (AA67-68). A trial court's order on a motion to compel arbitration is reviewed de novo. *See Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 349 (Minn. 2003).

assessing sanctions against Cargill. The bar for assessing sanctions against a party under Minn. Stat. §549.211 for proceeding without evidentiary support is much higher than the bar for entering summary judgment against a party. Unlike a grant of summary judgment, an award of sanctions under §549.211 “requires a finding that an attorney or party acted in bad faith.” *Alexander v. DaimlerChrysler Services North America, L.L.C.*, 2003 WL 22183564, \*4 (Minn. App.); *see also Peterson v. Albert*, 2000 WL 720011, \*2 (Minn. App.) (same). Bad faith “has been defined as ‘a frivolous claim which increases the opponent’s costs, an unfounded position taken to delay the action or harass the opponent, or fraud upon the Court.’” *Id.* (quoting *Radloff v. First Am. Nat’l Bank*, 470 N.W.2d 154, 156 (Minn. App.1991)).

Here, the trial court’s sole basis for imposing sanctions under §549.211 is stated thus:

[T]he validity of this [sanctions] motion and the levy of costs is dependant on whether Cargill’s claim lacked ‘evidentiary support or ... [a likelihood] to have evidentiary support after a reasonable opportunity for further investigation or discovery’ as well as whether the continuance of the claim ‘was a needless increase in the cost of litigation’. Minn. Stat. § 549.211, Subd. 2(1, 3) (2004). Jorgenson advocates the assessment of costs upon Cargill due to its willingness to continue it’s [sic] claim against Jorgenson without adequately addressing those assertions made by Mr. Presthus (which they had advanced [sic] notice of). The court agrees.<sup>86</sup>

Nowhere did the trial court make a finding that Cargill or its counsel proceeded in bad faith.

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<sup>86</sup> (Order at p. 6) (AA71).

While trial courts do have considerable discretion in the imposition of sanctions, a mere “failure to adequately address” the opposing party’s factual arguments, before discovery has even commenced, is a far cry from the bad faith, harassment, undue delay, or frivolous prosecution required for the imposition of sanctions under §549.211. The trial court’s misapplication of the legal standard for imposing sanctions is the very definition of an abuse of discretion: “Misapplication of the law is an abuse of discretion.” *Hawkes v. Hawkes*, 2003 WL 21060771, \*2 (Minn. App.). If the standard used by the trial court were correct, sanctions under §549.211 would be appropriate virtually any time a court granted a motion for summary judgment, because almost any grant of summary judgment involves one party “failing to adequately address” the other party’s legal or factual arguments. The trial court’s ruling is particularly troubling given that discovery had not even begun in this case. Under the trial court’s approach, a plaintiff whose claim is supported by substantial evidence (which even the trial court acknowledged would “ordinarily” be sufficient to establish a contract<sup>87</sup>) can be denied his day in court, shut out from any discovery, and sanctioned for bringing his claim, all on the basis of a questionable, untested and uncross-examined affidavit put forth by the defendant.

Moreover, even under the incorrect standard articulated by the trial court, sanctions would still be inappropriate in this case, because the the affidavits of Brad Morrison and Kurt Peterson submitted by Cargill did adequately address Presthus’s

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<sup>87</sup> (Order at p. 5) (AA70).

affidavit, as explained above in Part I, and demonstrated that Cargill had a reasonable basis for believing that discovery, particularly depositions of Presthus and the Jorgenson brothers, would reveal additional evidence to support its claim. Only by making improper credibility determinations and weighing the evidence was the trial court able to conclude, before any discovery had occurred, that the circumstantial evidence favoring Cargill did not “adequately address” the affidavits submitted by Jorgenson Farms.

As detailed above in Part I, Cargill did and does have reason to believe that its claims have evidentiary support and will continue to have evidentiary support after a reasonable opportunity for discovery. Accordingly, the trial court’s award of sanctions under §549.211 was an abuse of discretion.

### **CONCLUSION**

For the foregoing reasons, Cargill respectfully requests that the Court reverse the trial court’s grant of summary judgment in favor of Jorgenson Farms, vacate the trial court’s order denying Cargill’s motion to compel arbitration, reverse the trial court’s award of sanctions against Cargill under Minn. Stat. §549.211, and remand this case for discovery and trial.

Dated: December 19, 2005

FAEGRE & BENSON, LLP



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Bruce Jones (#179553)

Allan A. Thoen (#313889)

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-3901

(612) 766-7000

Attorneys for Appellant Cargill,  
Incorporated

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).