

NO. A06-2227

State of Minnesota
In Supreme Court

Gaylords, Inc.,

Appellant,

vs.

Valspar Refinish, Inc.,

Respondent.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE ISSUES

1. **Summary judgment was properly affirmed in Valspar's favor on Gaylord's breach of contract claim because Gaylord's undisputedly failed to satisfy conditions precedent to suit by rejecting Valspar's paint products in accordance with the express terms of the negotiated Supply Agreement.**

Resolution by the Trial and Appellate Courts: Affirmed by the appellate court, the trial court granted summary judgment in favor of Valspar on Gaylord's breach of contract claim concluding that: (1) the parties entered into an unambiguous contract that required the parties to give written notice of a default setting forth in reasonable detail the cause of the default; (2) there was no material evidence that Gaylord's gave Valspar written notice of default prior to November 2004; and (3) even if Gaylord's gave Valspar proper notice, it was not timely when it was first given in November 2004, over one year after Gaylord's alleged it knew about the default. Both the trial and appellate courts rejected Gaylord's position that actual notice is sufficient when the parties agreed by contract to a written notice requirement.

Controlling Authorities:

- a. Cederstrand v. Lutheran Bhd., 117 N.W.2d 213, 219-21 (Minn. 1962);
- b. Minn. Stat. §§ 336.1-205, 336.2-608;
- c. Barry & Sewall Indus. Supply co. v. Metal-Prep of Houston, Inc., 912 F.2d 252, 257 (8th Cir. 1990);
- d. DeWitt v. Itasca-Mantrap Co-op Elec. Ass'n, 215 Minn. 551, 559-60, 10 N.W.2d 715, 719 (1943).

2. **Summary judgment was properly affirmed in Valspar's favor on Gaylord's breach of express warranty claim because Gaylord's undisputedly failed to: (a) give Valspar timely, appropriate written notice of any alleged breach; (b) allow Valspar the opportunity to cure defects after timely written notice; and (c) commence a lawsuit during the contractual statute of limitations period.**

Resolution by the Trial and Appellate Courts: Affirmed by the appellate court, the trial court granted summary judgment in favor of Valspar on Gaylord's breach of warranty claim because by Gaylord's own admissions, it failed to comply with the Supply Agreement's express terms prior to asserting its claims.

Controlling Authorities:

- a. Fuhr v. D.A. Smith Builders, Inc., 2005 WL 3371035 (Minn. Ct. App. Dec. 13, 2005);
- b. National Bankcard Services, Inc. v. Family Express Corp., 2006 WL 2480479 (D. Minn. Aug. 29, 2006);

- c. Blaine Econ. Dev. Auth. v. Royal Elec. Co., 520 N.W.2d 473 (Minn. Ct. App. 1994).
3. **Summary judgment was properly affirmed in Valspar's favor on Gaylord's negligent misrepresentation claim because: (a) Valspar owed no duty to Gaylord's; and (b) Gaylord's cannot establish justifiable reliance as a matter of law.**

Resolution by the Trial and Appellate Courts: The trial court granted summary judgment in favor of Valspar on Gaylord's negligent misrepresentation claim because Gaylord's claim is based upon the Supply Agreement, which is governed by the Uniform Commercial Code, not tort law. The Court of Appeals affirmed concluding that Gaylord's, a sophisticated business entity that was provided months of investigation and due diligence prior to entering into the Supply Agreement, could not prove justifiable reliance as a matter of law.

Controlling Authorities:

- a. Schroeder v. White, 624 N.W.2d 810, 812 (Minn. Ct. App. 2001);
 - b. Safeco Ins. Co. of Am. v. Dain Bosworth, Inc., 531 N.W.2d 867 (Minn. Ct. App. 1995);
 - c. Hapka v. Pacquin Farms, 458 N.W.2d 683, 688 (Minn. 1990).
4. **Summary judgment was properly affirmed in Valspar's favor on Gaylord's fraudulent inducement claim because: (a) Gaylord's fraud allegations sound in contract, not tort; (b) the economic loss doctrine applies; (c) Gaylord's cannot establish justifiable reliance; and (d) Gaylord's waived its right to assert a fraud claim.**

Resolution by the Trial and Appellate Courts: The trial court granted summary judgment in favor of Valspar on Gaylord's fraud claim for the same reason it granted summary judgment on Gaylord's negligent misrepresentation claim. The Minnesota Court of Appeals affirmed concluding that Gaylord's could not prove justifiable reliance as a matter of law.

Controlling Authorities:

- a. Hapka v. Pacquin Farms, 458 N.W.2d 683, 688 (Minn. 1990);
- b. Lassen v. First Bank Eden Prairie, 514 N.W.2d 831, 839 (Minn. Ct. App. 1994);
- c. Nelson Distrib., Inc. v. Stewart-Warner Indus. Balancers, 808 F.Supp. 684 (D. Minn. 1992);
- d. Burnsville Sanitary Landfill, Inc. v. Edward Kraemer & Sons, Inc., 2004 WL 1465828 (D. Minn. June 28, 2004).

II. STATEMENT OF THE CASE

Gaylord's appears before this Court asking it to do something extraordinary -- rewrite the parties' negotiated written agreement, recreate history and rewrite long-standing and well-reasoned contract law principles. A well-respected and experienced trial judge, the Honorable Harry S. Crump, and the Minnesota Court of Appeals properly rejected Gaylord's attempt. Both the trial court and the Court of Appeals concluded that the parties entered into a contract after months of negotiations and due diligence in an arm's length transaction resulting in a clear and enforceable bargain. On Valspar's dispositive motion, the trial court enforced the notice, cure, limitation of remedies, and warranty disclaimer provisions of the Agreement. The Minnesota Court of Appeals affirmed. Based upon the express and unambiguous terms in the parties' contract and Gaylord's under oath admissions, Minnesota law dictates that the Minnesota Court of Appeals and trial court be affirmed.

This case represents exactly why courts in Minnesota, and across the nation, uniformly enforce clear and unambiguous terms of commercial contracts. Notice, cure, limitation of remedies and warranty disclaimer provisions are standard in our commercial system. Why? Because court dockets are not meant to be clogged with commercial cases wherein one party attempts to rewrite history and the contract and abandon express, arm's length agreements made in an essential contract, in which it received extraordinary benefits -- e.g., over \$419,000 of Valspar's money on day one of the deal. Gaylord's had an undeniable opportunity -- and legal obligation -- to provide written notice of alleged defects and termination under the contract and to use the contract's remedial terms. It

failed to do so -- inexcusably. Indeed, it is completely inconsistent for Gaylord's to claim that it revoked its acceptance of Valspar's products when it both failed to give legitimate notice and return over \$419,000 in funds advanced to it by Valspar under the same contract. There is therefore nothing onerous or exceptional about holding Gaylord's to the clear terms of its Agreement. Valspar respectfully requests that this Court affirm the Court of Appeals.

III. STATEMENT OF THE FACTS

A. The Parties.

Valspar is a wholly owned subsidiary of The Valspar Corporation, a paint and coatings supplier headquartered in Minneapolis, Minnesota. (A.2.)¹ Gaylord's is a California corporation which manufactures and sells toppers for light trucks and is located in Santa Fe Springs, California. (A.9.) For a period of approximately one year, Valspar supplied paint products to Gaylord's for application by Gaylord's to its truck toppers.

B. Formation of a Business Relationship Between Valspar and Gaylord's.

Several months prior to October, 2003, when Gaylord's and Valspar entered into a written contract governing their business relationship, Gaylord's started to look for an alternative paint supplier for its truck toppers. (A.99 at 14.) From 1995 up until that time, Gaylord's was utilizing a company called PPG to supply its paint products. (Id. at 13-14.) In considering an alternative paint supplier, Gaylord's evaluated three companies in addition to PPG, including Sikkens, BASF and Valspar. (Id.) Gaylord's two primary

¹ Citations herein referred to as "A. ___" are included in the Appellant's Appendix.

areas of inquiry in considering an alternative paint supplier were the quality of the products being offered and pricing. (Id. at 15.)

At the same time that Gaylord's was considering an alternative paint supplier to PPG, it was also in the process of planning a significant move to a new, much larger facility and purchasing new equipment, which significantly increased its bank debt.² (A.100 at 27.) To assist it with this debt, Gaylord's entered into negotiations with potential, alternative paint suppliers, including Valspar, for the payment of a significant up-front, prepaid rebate³ which would allow Gaylord's to purchase a new spray paint booth without taking on additional bank debt. (A.99 at 16.) Out of the four paint suppliers considered by Gaylord's, Valspar offered the most money to Gaylord's in the form of a \$400,000 up-front prepaid rebate. (A.102 at 34.)

During the six month period prior to Gaylord's ultimate decision to enter into a five-year exclusive dealing contract with Valspar, Gaylord's had the opportunity to have a variety of its truck toppers test sprayed with Valspar's product. (A.101 at 31; A.108 at 66; A.180 at ¶ 4; A.178 at ¶¶ 2-3.) In addition, Gaylord's had a number of special color match samples prepared by Valspar that it approved. (A.101 at 32; A.180 at ¶ 3; A.178 at ¶ 2.) Furthermore, Valspar prepared a special clear coat mix for Gaylord's, which Gaylord's tested during the six-month period prior to entering into a contract with Valspar. (A.101 at 32; A.178 at ¶ 2.) Gaylord's also met with Valspar representatives

² Gaylord's ultimately moved into a new building in two separate phases in July and September 2004. (A.100 at 28.)

³ A prepaid rebate is an up-front cash payment that an entity such as Gaylord's contracts to either earn through future purchases, or to pay back to the extent its purchases did not total a specified amount during the term of the parties' contract.

and engaged in a number of communications with Valspar. (A.104 at 49; A.108 at 66-67; A.178-79 at ¶¶ 2, 4.)

Based upon its due diligence and its negotiations for a significant up-front cash payment and preferred pricing for Valspar's products, Gaylord's selected Valspar as its new supplier of paint products in the fall of 2003. (A.102 at 35.)

C. Negotiation and Execution of the Supply Agreement.

On or about October 8, 2003, Valspar and Gaylord's entered into a written Supply Agreement in which Gaylord's agreed to purchase automotive paint coatings exclusively from Valspar for a minimum period of five years. (A.101 at 30-31; A.104 at 51; A.74 at ¶¶ 1-2.) For Gaylord's, William Lunney, President and majority shareholder of Gaylord's, was responsible for negotiating the terms of the Supply Agreement with Valspar. (A.101 at 31.) Lunney read the Supply Agreement, understood that the five year term contract with Valspar was significant, and expected Gaylord's to be bound by its terms. (A.104 at 50; A.106 at 57-58.)

By the express terms of the Supply Agreement, Gaylord's agreed, among other things, that:

- During the term of this Agreement, Buyer [Gaylord's, Inc.] shall purchase from Seller [Valspar Refinish, Inc.], and Seller shall sell to Buyer, 100% of Buyer's refinish coatings requirements as they presently exist and as they are developed." (A.74 at ¶ 2; A.104 at 51);
- During the term of this Agreement, Buyer agrees not to use any refinish coatings other than Seller's refinish coatings. (A.74 at ¶ 3);
- If either party defaults in performing any material obligation under this Agreement and does not cure the default within 60 days after notice from the non-defaulting

party setting forth in reasonable detail the nature of the default, the non-defaulting party shall have the right to terminate this Agreement. (Id. at ¶ 6);

- All sales from Seller to Buyer, and any technical service provided by Seller, are subject exclusively to the General Warranty provisions attached to this Agreement. (A.75 at ¶ 9);
- This Agreement may be changed only in a written document signed by both parties. (Id. at ¶ 10(a));
- This Agreement, along with its attachments, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, representations and warranties, oral and written, between the parties with respect to the subject matter hereof. (Id. at ¶ 10(b)).

In accordance with the terms of the Supply Agreement, Valspar supplied automotive paint coatings to Gaylord's as requested. Between October 2003, when Gaylord's commenced purchasing product from Valspar, through October 2004, when Gaylord's unilaterally and without notice switched to a new supplier of paint coatings, Gaylord's ordered and received more than \$450,000 in Valspar products. (A.172-73 at ¶ 3; A.176-77.) It only paid for \$179,389.13 of those products. (Id.)

D. Gaylord's Receives the Substantial Financial Benefits of the Supply Agreement.

As an incentive and consideration for Gaylord's purchase of 100% of its automotive paint coatings from Valspar for a period of five years, on November 6, 2003, Valspar provided Gaylord's with a \$400,000 prepaid "rebate" to purchase equipment for Gaylord's business, which rebate Gaylord's accepted and cashed. (A.172 at ¶ 2; A.174.) Thereafter, on July 21, 2004, Valspar further provided Gaylord's with an additional \$19,604.60 for the purchase of equipment, which Gaylord's also accepted and cashed. (Id.)

As part of the negotiated bargain, Gaylord's expressly agreed that it was being provided with the significant prepaid rebate as an incentive to purchase 100% of its products from Valspar for the five-year term: "As an incentive for Buyer to purchase 100% of its refinish coatings requirements from Seller, Seller offers Buyer a prepaid rebate in the amount of \$400,000." (A.74 at ¶ 3.) To the extent Gaylord's at any time failed to purchase 100% of its paint products from Valspar for the five-year term, Gaylord's agreed to return the unearned portion of the prepaid rebate:

- Buyer will be deemed to have fully "earned" the prepaid rebate after Buyer has purchased and paid for \$2,270,000 worth of Seller's refinish coatings. If Buyer has not purchased and paid for at least \$2,270,000 worth of Seller's refinish coatings by the end of the 5-year term, this Agreement and all of its terms shall be automatically extended until Buyer has purchased and paid for \$2,270,000 worth of Seller's refinish coatings. If this Agreement is terminated for any reason before Buyer has purchased and paid for \$2,270,000 worth of Seller's refinish coatings, Buyer shall re-pay to Seller the unearned portion of the prepaid rebate as provided in Section 6. (A.74 at ¶ 3);
- If this Agreement terminates for any reason before Buyer has purchased and paid for \$2,270,000 worth of Seller's refinish coatings, Buyer will repay to Seller within 10 days after termination the "unearned" portion of the prepaid rebate. For example, if the Agreement terminates after Buyer has purchased and paid for \$2,043,000 worth of Seller's refinish coatings (90% of \$2,270,000), the unearned portion of the prepaid rebate would be \$40,000 (10% of \$400,000). (*Id.* at ¶ 6)

Gaylord's used the \$400,000 prepaid rebate it received from Valspar to purchase and install, among other equipment, a new paint booth at its new facility. (A.99 at 16; A.107 at 64; A.113 at 129.) To date, Gaylord's continues to utilize all of the equipment it purchased with Valspar's \$400,000 prepaid rebate to conduct its business. (A.113 at 131.)

E. Gaylord's Material and Multiple Breaches of the Supply Agreement.

After reaping the substantial benefits of the prepaid rebate, in September 2004, Gaylord's unilaterally and *without any notice* to Valspar started purchasing paint products that it was required to purchase from Valspar from another supplier, BASF. (A.102-03 at 36-37.) In November 2004, Gaylord's discontinued purchasing any paint products from Valspar and thereby terminated its contractual obligations under the Supply Agreement. (A.176-77.)

Despite admittedly understanding its legal obligation to purchase its paint products from Valspar exclusively until October 7, 2008, Gaylord's has failed to do so. (A.104 at 50-51.) In addition to failing to purchase its paint products exclusively from Valspar through the term of the contract, Gaylord's has also admittedly ordered and received paint products from Valspar that it has not paid for. (Id. at 51.) Gaylord's admits that it owes Valspar \$179,389.13 (plus interest) for product it ordered and received in September, October and November 2004 and for an unpaid balance that existed in July 2004. (A.114-15 at 172-173.)

With respect to the prepaid rebate, Gaylord's admits that it has also failed to return to Valspar that portion that has been unearned under the terms of the Supply Agreement. (A.104 at 51-52.) Indeed, despite Valspar's demand that the unearned portion of the rebate be returned to Valspar, Gaylord's has refused to return any of it. (Id.; A.82; A.173 at ¶ 5.) Based upon its breaches of the Supply Agreement, Valspar sent Gaylord's a notice of default letter dated May 16, 2005. (A.82; A.104 at 52.) Gaylord's failed to cure its defaults within 60 days of the written notice. (A.104-05 at 52-53.)

F. The Litigation.

Valspar commenced this action against Gaylord's seeking monetary and other relief for Gaylord's several breaches of the Supply Agreement, including: (1) Gaylord's failure to purchase 100% of its coatings requirements from Valspar through October 7, 2008; (2) Gaylord's use of coatings other than Valspar's coatings during the term of the Supply Agreement; (3) Gaylord's failure to continue operating under the Supply Agreement and its exclusive purchase provisions until such time as Gaylord's purchased and paid for the specified amount of coatings from Valspar; (4) Gaylord's failure to return the unearned portion of the prepaid rebate it received within 10 days after the Supply Agreement was terminated by Gaylord's in November 2004; (5) Gaylord's failure to pay invoices on a net 45 day basis; and (6) Gaylord's failure to terminate the Supply Agreement as provided by its terms. (A.4-5.) Based upon Gaylord's admissions and the unambiguous terms of the Supply Agreement, Valspar moved for summary judgment on its breach of contract claim for damages it had suffered in the amount of \$566,943.08, plus statutory interest and taxable costs, which constitutes the sum of the unpaid invoices and unearned portion of the prepaid rebate. (A.172-73 at ¶¶ 3, 5.) In response to Valspar's Complaint, Gaylord's served a Counterclaim alleging that Valspar's products were defective.⁴

⁴ The claims asserted and relief sought by Gaylord's arise exclusively out of the parties' Supply Agreement and are based upon the factual allegation that Valspar's products were defective: (1) Breach of the Supply Agreement, (2) Breach of Express Warranty; (3) Breach of Implied Warranty; (4) Negligent Misrepresentation; and (5) Fraudulent Inducement. (A.11-14).

Gaylord's claims are governed by the General Warranty contained in the Supply Agreement, as noted below:



General Warranty

- 1. Warranty.** Seller warrants to Buyer, and only to Buyer, that the products purchased from Seller ("Products") conform to Seller's published specifications. If Buyer discovers a failure of the Products to substantially conform to Seller's published specifications, Buyer must within 10 days after discovery (but in no event later than 180 days after receipt) notify Seller in writing. Within a reasonable time after timely written notification, Seller will either replace the non-conforming Products or refund the purchase price of the non-conforming Products. These are Buyer's exclusive remedies.
- 2. Exclusions.** Seller does not warrant (a) any products not sold by Seller, (b) any abuse or misuse by Buyer, including but not limited to, failure to provide suitable storage, properly prepare the substrate or properly apply and cure the Products, (c) damage caused by unauthorized modification of the Products or use of the Products for purposes other than those for which they were intended, (d) damage caused by disaster such as fire, flood, wind or lightning, or (e) damage during shipment.
- 3. Disclaimer.** THE WARRANTY SET FORTH ABOVE IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, AND SELLER DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- 4. Limitation of Remedies.** Seller is not liable for any special, incidental or consequential damages based upon breach of warranty or any other legal theory. Such excluded damages include, but are not limited to, lost profits, lost savings or revenue, down time, claims of customers or other third parties and injury to property. Buyer must bring any lawsuit against Seller relating to any of the Products within 6 months after discovery of a claim, but not later than 12 months after receipt of the Products, or the claim or lawsuit is waived and time-barred.
- 5. No Other Warranties.** Unless modified in a writing signed by the officers of both parties, this warranty is understood to be the complete and exclusive agreement with respect to warranties for the Products, superseding all prior agreements, discussions and representations, oral or written, all other communications between the parties relating to Seller's warranties of, and liability with respect to, the Products. No employee of Seller is authorized to make any warranty in addition to those made in this Agreement. Seller is not liable for any warranty Buyer may make to any of Buyer's customers.
- 6. Allocation of Risks.** This warranty allocates between Seller and Buyer the risk of failure of the Products. This allocation of risk is recognized by both parties and is reflected in the price of the Products. This warranty is governed by the laws of the State of Minnesota (without regard for its conflict of laws provisions).

The terms and conditions contained in this warranty apply to and govern all orders of Products by Buyer from Seller, notwithstanding anything to the contrary contained in any purchase order or other document of Buyer or Seller.

Lunney, Gaylord's President, admitted under oath that this General Warranty, attached to the Supply Agreement, constituted a part of the parties' bargain:

Q [Referring to the Supply Agreement] Now, looking down to paragraph 9 where it says "Warranty," do you see that?

A Yes.

Q It says, "All sales from seller to buyer, and any technical service provided by seller, are subject exclusively to the general warranty provisions attached to this agreement." Correct?

A Yes, correct.

Q You understood that at the time you signed it; correct?

A Yes.

(A.105 at 53-54; A.75 at ¶ 9.)

Lunney also testified that Gaylord's determined that Valspar's products were defective from the very beginning of the contract in October 2003, yet there is no written evidence of Gaylord's alleged concerns until a November 12, 2004 e-mail:

Q You signed this contract on October 8th of 2003; correct?

A Correct.

Q When did you first begin experiencing what you felt to be failures by Valspar to live up to this contract?

A From the beginning.

Q Can you tell me what you believe those failures were?

A The product was not performing as they promised.

Q So all of the various problems you had on performance were right from the very beginning; correct?

A Correct.

Q This is something you knew as the president of the company; correct?

A Correct.

(A.105 at 55-56.) When asked whether Gaylord's ever notified Valspar in writing that its products performed inconsistently with the specifications, Lunney testified "not in writing. It was all verbal." (A.110 at 111.)

The trial court properly entered summary judgment in Valspar's favor based upon these admissions by Gaylord's, among others, and by enforcing the terms of the negotiated Supply Agreement. The Minnesota Court of Appeals affirmed the trial court. This Court should also affirm.

IV. LEGAL ARGUMENT

A. **Standard of Review.**

This Court reviews appeals from summary judgment on a *de novo* basis to determine if there are any genuine issues of material fact and if the district court erred in its application of the law. Reads Landing Campers Ass'n v. Township of Pepin, 546 N.W.2d 10, 13 (Minn. 1996). This Court has emphasized that summary judgment is an integral part of the procedural rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997). A party cannot avoid summary judgment by expressing metaphysical doubt as to a material fact. Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993), *review denied* Oct. 7, 1993; Minn. R. Civ. P. 56.05. If the non-moving party does not meet its burden of producing facts in the form of admissible evidence that creates a genuine issue for trial, summary judgment "shall be entered." Minn. R. Civ. P. 56.05; see also, Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn.

1988). Because Gaylord's admits the fundamental facts in this case governing the parties' contractual rights and obligations, judgment in Valspar's favor should be affirmed.

B. Summary Judgment in Valspar's Favor on Gaylord's Breach of Express Warranty and Contract Claims was Correctly Affirmed.

In order to establish a breach of warranty claim under Minnesota law, Gaylord's must establish that: (1) a warranty exists; (2) Gaylord's complied with its contractual obligations; (3) Valspar breached its warranty obligations; and (4) Gaylord's suffered damage as a result of Valspar's breach. Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50, 52 (Minn. 1982). Gaylord's cannot satisfy element one with respect to many of its assertions about Valspar's products and it cannot establish element two by its own admissions. Thus, there is no need to even reach elements three or four.

1. Gaylord's warranty claims are limited to the warranty set forth in the Supply Agreement.

The only express warranty provided to Gaylord's by Valspar is a "General Warranty" that provides as follows:

Seller warrants to Buyer, and only to Buyer, that the products purchased from Seller ("Products") conform to Seller's published specifications. If Buyer discovers a failure of the Products to substantially conform to Seller's published specifications, Buyer must within 10 days after discovery (but in no event later than 180 days after receipt) notify Seller in writing. Within a reasonable time after timely written notification, Seller will either replace the non-conforming Products or refund the purchase price of the non-conforming Products. These are Buyer's exclusive remedies.

(A.77; A.105 at 53-54.) The Supply Agreement expressly provides that the General Warranty is the only warranty being provided by Valspar to Gaylord's:

Disclaimer. THE WARRANTY SET FORTH ABOVE IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, AND

**SELLER DISCLAIMS THE IMPLIED WARRANTIES OF
MERCHANTABILITY AND FITNESS FOR A PARTICULAR
PURPOSE.**

(A.77 at ¶ 3.)

No Other Warranties. Unless modified in a writing signed by the officers of both parties, this warranty is understood to be the complete and exclusive agreement with respect to warranties for the Products, superseding all prior agreements, discussions and representations, oral or written, all other communications between the parties relating to Seller's warranties of, and liability with respect to, the Products. No employee of Seller is authorized to make any warranty in addition to those made in this Agreement. Seller is not liable for any warranty Buyer may make to any of Buyer's customers.

(Id. at ¶ 5.)

All sales from Seller to Buyer, and any technical service provided by Seller, are subject exclusively to the General Warranty provisions attached to this Agreement.

(A.75 at ¶ 9.)⁵ Gaylord's admits, as it must, that Valspar did not make any written warranties to Gaylord's that its products would apply evenly or smoothly, would not vary in color following application or would properly cure, as alleged in its Counterclaim.

(A.110 at 110-111.) Accordingly, these allegations are barred by the parole evidence rule and cannot form a basis of Gaylord's claims as a matter of law. See footnote 7.

⁵ See Valley Paving, Inc. v. Dexter & Chaney, Inc., 2000 WL 1182800 at *3 (Minn. Ct. App. Aug. 22, 2000) (A.120), citing St. Croix Printing Equip., Inc. v. Rockwell Int'l Corp., 428 N.W.2d 877, 800 (Minn. Ct. App. 1988) (finding that a phrase stating that "[t]he whole agreement between the parties is contained herein" was sufficient to constitute an integration clause and exclude evidence of prior express representations that might constitute warranties.")

2. In order to preserve any warranty or contract claim, Gaylord's was contractually required to provide written notice.

Gaylord's erroneously suggests that it was not required to provide written notice to Valspar prior to asserting a breach of warranty or breach of contract claim. (Gaylord's Brief at 12.) The requirement of written notice by Gaylord's is clear as spelled out in three separate provisions of the contract. The first written notice provision provides:

- Supply Agreement, paragraph 10(c): Notices. Except as otherwise expressly set forth herein, all notices, requests, demands and other communications hereunder must be in writing. . .” (A.76)

Paragraph 10(c) is all encompassing requiring “all” communications regarding the terms of the Supply Agreement, i.e., the products, to be communicated in writing. Thus, regardless of how Gaylord's now characterizes its claim, it was required to provide notice of its claim to Valspar in writing. It failed to do so.

The second written notice provision in the Agreement provides:

- General Warranty, paragraph 1: **Warranty**. *** If Buyer discovers a failure of the Products to substantially conform to Seller's published specifications, Buyer must within 10 days after discovery (but in no event later than 180 days after receipt) notify Seller in *writing*. (A.77) (emphasis supplied).

The third written notice provision in the Agreement provides that the parties must provide written notice of and an opportunity to cure any “material defaults” under the Agreement before terminating its obligations:

- If either party defaults in performing any material obligation under this Agreement and does not cure the default within 60 days after notice from the non-defaulting party setting forth in reasonable detail the nature of the default, the non-defaulting party shall have the right to terminate this Agreement. *** If this Agreement terminates for any reason before Buyer has purchased and paid for \$2,270,000 worth of Seller's refinish coatings,

Buyer will repay to Seller within 10 days after termination the “unearned” portion of the prepaid rebate. ***

(A.74 at ¶ 6.) Clearly, any allegations of “defective products” would constitute a “material obligation under this Agreement” since the purpose of the Agreement was to exclusively supply Gaylord’s its paint products. Contrary to Gaylord’s arguments then, this provision is directly applicable to the facts of this case.

3. Gaylord’s admittedly failed to provide written notice of its claims or demands.

Gaylord's cannot recover for any alleged breach of warranties in this case because it failed to satisfy conditions precedent to its claims. First, Gaylord’s failed to give Valspar timely, appropriate written notice of a product specification failure as required by the express terms of the General Warranty. The express warranty (and only warranty) that Gaylord's alleges Valspar breached required Gaylord's to notify Valspar of any failures within 10 days after discovery, but in no event later than 180 days after receipt of the products. (A.77 at ¶ 1.) Gaylord's asserts that it discovered the alleged failure in Valspar's products immediately "from the beginning" of the contract term in October 2003. (A.105 at 55-56.) Yet, Gaylord's did not give Valspar any notice of the purported failure in writing as required by the warranty terms until allegedly in November 2004, more than one year after it states it received bad products (thus not within either the 10 day period after discovery or even the 180 period after receipt). (Id. at 54-55.) Because no timely, written notice of an alleged breach of warranty was ever provided to Valspar

by Gaylord's -- a condition precedent to its maintenance of a breach of warranty claim against Valspar -- Gaylord's breach of warranty claim is barred as a matter of law.⁶

Second, even if the Court were to assume that Gaylord's was not asserting a breach of warranty claim,⁷ i.e., that Valspar's products failed to conform to Valspar's published specifications, but instead some non-existent breach of contract claim, that claim would also be barred by Gaylord's failure to provide written notice and an opportunity to cure "material defaults" prior to its termination of the contract through its actions in commencing the purchase of products from a third-party supplier in September 2004. The Agreement provides in pertinent part:

If either party defaults in performing any material obligation under this Agreement and does not cure the default within 60 days after notice from the non-defaulting party setting forth in reasonable detail the nature of the

⁶ See, e.g., Fuhr v. D.A. Smith Builders, Inc., 2005 WL 3371035 *5 (Minn. Ct. App. Dec. 13, 2005) (A.125) (failure to provide written notice of warranty claim within six month period as required entitles defendant to summary judgment on plaintiff's breach of warranty claim); Production Resource Group, LLC v. Van Hercke, 2004 WL 1445126 *3 (Minn. Ct. App. June 29, 2004) (A.131) (failure to give written notice of breach within 10 days of breach occurring as required by contract entitles defendant to summary judgment); Buchman Plumbing Co., Inc. v. Regents of Univ. of Minnesota, 215 N.W.2d 479, 485 (Minn. 1974) (compliance with provision in construction contract requiring written notice to landowner of claims by mechanical contractor for damage was condition precedent to contractor's maintenance of breach of contract action); Cameo Homes v. Kraus-Anderson Co., 394 F.3d 1084, 1088 (8th Cir. (Minn.) 2005) (failure to give written notice of breach claim as required by terms of contract constitutes a failure to satisfy condition precedent and bars plaintiffs' breach of contract claim); see also, Oslund v. Johnson, 578 N.W.2d 353, 357 (Minn. 1998) ("When a statute supplies a specific notice requirement, any claims under that statute are barred when notice has not been timely given").

⁷ This Court should reject Gaylord's implicit request that the General Warranty be rewritten. Gaylord's wants the General Warranty to be a "product defect" warranty, when in reality it is a product specification warranty. Moreover, the General Warranty is the only warranty claim that Gaylord's can assert as set forth above.

default, the non-defaulting party shall have the right to terminate this Agreement.

It is undisputed that Gaylord's did not provide written notice of anything prior to its termination of the Agreement:

Q. Did you ever in writing notify Valspar that its products in some way performed inconsistently with the specific printed specifications on the can of the product?

A. Not in writing. It was all verbal.

(A.110 at 111.)

Q. Now, BASF is the company that Gaylord's chose to replace Valspar in terms of a supplier, correct?

A. Yes.

Q. You didn't tell Valspar that you were ordering product from BASF, did you?

A. No, I did not call them.

Q. Well, you didn't send them anything in writing either to tell them that you were going to buy product from BASF, correct?

A. No: Correct.

(A.102-03 at 36-37.)

4. Actual notice is insufficient when two sophisticated business equals negotiated a written notice requirement.

Because Gaylord's admits that it failed to follow the notice or cure provisions in the Supply Agreement, it now theorizes that because Valspar allegedly had actual notice

of alleged defects in its products, written notice was not required.⁸ First, “product defect” is not even a claim available to Gaylord’s because it is limited exclusively to the product specification warranty provided in the parties’ negotiated contract; thus, even if Valspar had “actual notice” of product defect, Gaylord’s is still without a valid claim against Valspar. Second, Gaylord’s attempt to rewrite the parties’ notice provisions in the negotiated agreement is directly contrary to Minnesota law. In fact, Gaylord’s does not cite any Minnesota authority, or any authority for that matter, that is supportive of its position. (See Gaylord’s Brief at 15.)

In August 2006, the Honorable Ann D. Montgomery, of the United States District Court for the District of Minnesota, rejected similar arguments in construing a written notice and cure provision under Minnesota law. In National Bankcard Services, Inc. v. Family Express Corp., 2006 WL 2480479 (D. Minn. Aug. 29, 2006) (A.368), the parties entered into a Service Agreement for a 36 month term that required written notice and opportunity to cure upon failure of performance. Id. at *1. Almost immediately, significant problems arose with plaintiff’s services under the Service Agreement; yet, defendant continued to use the services for six months before unilaterally and without notice, switching service providers prior to the end of the 36 month term. Id. at *2-3.

In response to plaintiff’s breach of contract claim, defendant filed a counterclaim premised on the allegation that plaintiff failed to provide conforming operation services.

⁸ Gaylord’s argues several times that Valspar’s alleged “actual notice” of “defective products” is “uncontroverted.” Significant evidence exists refuting these allegations; however, Valspar did not submit this evidence to the trial court because it was not material to the issues on Valspar’s summary judgment motion.

Id. Judge Montgomery granted summary judgment in plaintiff's favor on its breach of contract claim and against defendant on its counterclaim citing plaintiff's failure to provide written notice of the alleged failure of performance, and a subsequent opportunity to cure, in accordance with the terms of the Service Agreement:

Second, it is undisputed that FEC [defendant] failed to give written notice to NBS of its alleged failure of performance or breaches, and did not provide NBS with ten days to cure any such breaches. *** Minnesota courts have held that termination provisions must be enforced. 'A provision in a contract for the termination thereof upon certain conditions can be enforced only in strict compliance with the terms of these conditions.' (citations omitted)

Id. at *4. Thus, while plaintiff had actual notice of the continued problems with its service, the Court concluded as a matter of law that actual notice was insufficient under the terms of the parties' governing contract. Id. Gaylord's similar argument of actual notice was likewise properly rejected as a matter of law by Judge Crump and the Minnesota Court of Appeals.⁹

⁹ Other courts throughout the country are in accord that when written notice is required by contract, actual notice is insufficient. See Brett v. Wheller, 2007 WL 4489332 *3 (Wash. Ct. App. Dec. 7, 2007) ("When a contract requires written notice, actual notice does not suffice."); Guinn Bros. v. Jones Bros., 2007 WL 2874593 *4 (W.D. La. Sept. 26, 2007) ("[A]ny form of actual notice Jones may have had is insufficient; all notice of claims must have been in writing."); Johnson, Inc. v. Spokane County, 78 P.3d 161, 167-68 (Wash. 2003) (written contractual notice requirements must be followed even if actual notice exists); UBS Capital Americas II v. Highpoint Tel. Inc., 2002 WL 377537 *3 (S.D.N.Y. Mar. 8, 2002) (oral notice insufficient when written notice required by contract); Jelonek v. Emergency Medicine Specialists, 2001 WL 988064 *4 (Mich. Ct. App. Aug. 28, 2001) (Actual notice insufficient when contract requires written notice); Kero v. Purcell, 2000 Mont. Dist. LEXIS 1713 *22 (D. Ct. Mont. (22nd Dist.) Oct. 4, 2000) ("When a contract calls for written notice of breach, whether a party had actual notice is immaterial, because the law requires service of notice pursuant to the contract."); O'Sullivan v. Joy Technologies, Inc., 666 A.2d 654, 668 (Pa. Supr. Ct. 1995) ("Consequently, we reject Joy's assertion that notice is dictated by events outside of the

Contrary to Gaylord's argument, the Court of Appeals properly relied upon a decision of this Court -- Dewitt v. Itasca-mantrap Coop Elec. Assoc., 215 Minn. 551, 10 N.W.2d 715 (1943) -- in holding that where parties unambiguously agree to notice requirements, and those requirements were unsatisfied by one of the contracting parties, the court may determine that the notice given was improper as a matter of law. See Valspar Refinish, Inc. v. Gaylord's, Inc., 2007 WL 4237504 *2 (Minn. Ct. App. Dec. 4, 2007) (A.527.) In interpreting a contract that provided a fixed period of time in which one party was required to reject defective merchandise, the DeWitt Court concluded that such language was sufficient to take the timing issue, and contract claims, from the jury based upon the parties' agreement. DeWitt, 215 Minn. At 560, 10 N.W.2d at 710. In other words, the DeWitt Court affirmed the long-standing principle of law that if contract language is definite on an issue, such as timing of rejection or, as in this case, the method of notice required for a product warranty claim, there exists no question of fact for a jury to consider.

Finally, Gaylord's assertion that Valspar waived its right to actual notice under the General Warranty and Supply Agreement is without merit. First, Minn. Stat. § 336.2-209(2) provides: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded." The Agreement here

specifications of the contract." Written notice required; actual notice insufficient.); Williamsburg, Inc. v. Old Dominion Freight Ling, 8 Va. Cir. 489, 491 (Vir. Ch. Ct. Dec. 4, 1969) ("The weight of authority is to the effect that actual notice is not equivalent to, or a substitute for, written notice required by contract or law."); Abell v. The Atchison, Topeka & Santa Fe Railway Company, 164 P. 269, 270 (Kan. 1917) (plaintiff not entitled to recover on claim when it failed to provide written notice, even though defendant had actual notice of the injuries and plaintiff's claim and acted upon the actual notice).

specifically excluded modification of its terms, including the written notice requirements, except by a signed writing, which does not exist:

Modification; Waiver. This Agreement may be changed only in a written document signed by both parties. ***

(A.75 at ¶ 10(a)). Because there is not a signed writing by both parties amending the written notice requirements of the Supply Agreement, as required by the contract terms, actual notice is insufficient.

Second, in order for a party to waive a contractual right, it must do so voluntarily and intentionally. Waiver is defined by Minnesota law as a “voluntary and intentional relinquishment or abandonment of a known right.” Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299, 304 (Minn. 1990). In this case, there is no evidence that Valspar waived its right to written notice under the terms of the Supply Agreement. As noted by the Minnesota Court of Appeals, even if Valspar had knowledge of concerns by Gaylord’s regarding Valspar’s paint products, it did not have notice or knowledge that Gaylord’s intended to assert a breach of warranty claim and seek damages, an important policy purpose of a written notice requirement. See Valspar Refinish, 2007 WL 4237504 at *3. To the contrary, Gaylord’s entered into a contract with Valspar after testing Valspar’s products and conducting due diligence for a six month period. Thereafter, Gaylord’s purchased in excess of \$450,000 worth of Valspar products over the course of one year. There is simply no evidence that Valspar ever voluntarily or intentionally relinquished its important contractual right to written notice,

nor does Gaylord's even attempt to cite to any such evidence. Gaylord's waiver argument should accordingly be rejected.

5. Whether Valspar's products failed to conform to its published specifications is not material.

Assuming that Valspar's products were defective and/or failed to conform to Valspar's published specifications (disputed by Valspar), summary judgment in Valspar's favor was still correctly affirmed because Gaylord's failed to satisfy conditions precedent to bringing an action based upon such defects and/or nonconformities, as discussed above. A condition precedent is one "which is to be performed *before* some right dependent thereon accrues, or some act dependent thereon is performed." Black's Law Dictionary (6th ed.) at 293 (emphasis added). Gaylord's was required to provide written notice of product specification failure or material obligation default prior to accrual of a warranty or contract claim. Its failure to satisfy this condition is fatal to its contract and warranty claims.

The nature, extent or even the existence of defects or failure to comply with specifications in Valspar's products is immaterial to Gaylord's failure to satisfy its conditions precedent. "A material fact" precluding the issuance of summary judgment, "is one of such a nature as will affect the result or outcome of the case depending on its resolution." Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). Because Gaylord's failed to satisfy conditions precedent, any factual disputes regarding Valspar's products are not material.

Moreover, Gaylord's argument that it did not know the product specifications and thus could not provide written notice of failure is disingenuous at best. First, there is no evidence that Gaylord's ever requested any product specifications from Valspar before commencing its counterclaims, despite the fact that it purchased more than \$450,000 worth of products over the course of a one year period and alleges it knew about product problems since the beginning of the contract in October 2003. Second, setting aside the fact that the product specifications were provided to Gaylord's on product data sheets, Gaylord's President made clear in his under oath testimony that he had knowledge of and access to Valspar's product specifications, including on the cans of the products:

Q. Did you ever in writing notify Valspar that its products in some way performed inconsistently with the specific printed specifications on the can of the product?

A. Not in writing. It was all verbal.

Q. The answer to my question is no, nothing in writing, correct?

A. Correct.

(A.110 at 111, lines 15-22.) At no time did Mr. Lunney mention in his testimony that he had no idea what the product specifications entailed.

6. Gaylord's also failed to satisfy the condition precedent of providing a cure period after providing written notice.

Gaylord's cannot recover under its breach of warranty claim or breach of contract claim for yet another reason: it failed to give Valspar the requisite cure period expressed by the parties' negotiated Supply Agreement. The Supply Agreement conditions the availability of a breach of warranty claim on Valspar's failure to replace the non-

conforming products or refund the purchase price of the non-conforming products. Specifically, the Supply Agreement provides: "Within a reasonable time after timely written notification [of failure of the products to conform to Seller's specifications], Seller [Valspar] will either replace the non-conforming Products or refund the purchase price of the non-conforming Products. These are Buyer's exclusive remedies." (A.77 at ¶ 1.) Such notice and cure provisions are valid and enforceable in Minnesota. See, e.g., Blaine Econ. Dev. Auth. v. Royal Elec. Co., 520 N.W.2d 473, 476-77 (Minn. Ct. App. 1994) (holding that owner of property improperly rescinded contract prior to notifying contractor that it considered contractor in breach and giving contractor an opportunity to cure as required by the parties' contract.)

In this case, Gaylord's failed to allow Valspar an opportunity to cure any alleged breaches of warranty as contemplated by the terms of the Supply Agreement. Indeed, Gaylord's started purchasing products from an alternative supplier in September 2004 and discontinued purchasing any products from Valspar in November 2004 prior to sending Valspar anything in writing via e-mail on November 12, 2004. (A.87; A.111-12 at 124-125; A.176-77.) Gaylord's never allowed Valspar the opportunity to replace the alleged defective products or refund the purchase price as expressed by the parties in the Supply Agreement after providing written notice and prior to breaching the terms of the Supply Agreement. By failing to satisfy the condition precedent of giving Valspar an opportunity to provide one of the two remedies set forth in the General Warranty after receipt of written notice, Gaylord's breach of warranty claim is barred.

Similarly, Gaylord's failed to comply with the cure provision in the Supply Agreement relating to defaults of material obligations prior to terminating its obligations under the Agreement. The Agreement provides:

If either party defaults in performing any material obligation under this Agreement and does not cure the default within 60 days after notice from the non-defaulting party setting forth in reasonable detail the nature of the default, the non-defaulting party shall have the right to terminate this Agreement. (A.74 at ¶ 6.)

(See discussion above.) Gaylord's did not provide Valspar a 60-day cure period after providing it written notice of default of a material obligation under the Agreement prior to terminating its contractual obligations by commencing the purchase of its paint products from a third-party supplier. Gaylord's failure to satisfy this condition precedent is a further reason it is barred from recovery and a basis to affirm the Court of Appeals.

- 7. Gaylord's failed to bring a lawsuit against Valspar relating to the products within 6 months after discovery of the alleged breach of warranty, and prior to the expiration of 12 months after receipt of the products.**

Gaylord's cannot recover for breach of warranty for yet a third reason. The parties agreed to limit any lawsuit relating to the products to a period of six months after discovery of a claim and in no event later than 12 months after receipt of the products:

Limitation of Remedies. **** Buyer must bring a lawsuit against Seller relating to any of the Products within 6 months after discovery of a claim, but not later than 12 months after receipt of the Products, or the claim or lawsuit is waived and time-barred.

(A.77at ¶ 4; A.106 at 58-59.) Under Minnesota law, parties to a contract may limit the statute of limitations period to assert claims under the Uniform Commercial Code as long as the limitation is reduced to not less than one year by the parties' agreement. See Minn.

Stat. § 336.2-725; Enervations, Inc. v. Minnesota Mining and Mfg. Co., 380 F.3d 1066, 1068 (8th Cir. (Minn.) 2004) (enforcing one year limitations period set forth in parties' agreement). It is undisputed that Gaylord's did not bring a lawsuit within 6 months after its discovery of the alleged defects in Valspar's products (according to Gaylord's, as late as October 2003), or within one year after receipt of the alleged defective products.

(A.106 at 58-60.) Gaylord's counterclaim was not commenced until on or about May 25, 2005, more than 19 months after discovery and receipt of alleged defective products.

(See A.9-16.) Accordingly, because Gaylord's failed to commence its claim within the governing contractual limitations period, its breach of warranty and breach of contract claims relating to the "products" are waived and time barred.

8. The warranty disclaimer provision is enforceable as a matter of law.

Gaylord's fails in its attempt to create a factual issue regarding the circumstances surrounding the delivery of the General Warranty based upon an erroneous reading of Noel Transfer & Package Delivery Serv., 341 F.Supp. 968 (D. Minn. 1972) and in disregard of its admissions. In Noel, the Court concluded that summary judgment was not proper on warranty claims on the basis of a warranty disclaimer when the parties disputed whether the warranty was part of the parties' contract, whether the warranty was ever delivered to plaintiff, or whether there had been any additional warranties entered into between the parties. Id. at 969. In contrast, in this case, Gaylord's President admitted under oath that the General Warranty attached to the Supply Agreement constituted a part of the parties' bargain, which is expressly incorporated into the executed Supply Agreement:

- Q. [Referring to the Supply Agreement] Now, looking down to paragraph 9 where it says "Warranty," do you see that?
- A. Yes.
- Q. It says, "All sales from seller to buyer, and any technical service provided by seller, are subject exclusively to the general warranty provisions attached to this agreement." Correct?
- A. Yes, correct.
- Q. You understood that at the time you signed it; correct?
- A. Yes.

(A.105 at 53-54; A.75 at ¶ 9.) Moreover, the Supply Agreement provides in pertinent part:

9. Warranty

All sales from Seller to Buyer, and any technical service provided by Seller, are subject exclusively to the General Warranty provisions attached to this Agreement. (A.75 at ¶ 9.)

Based upon the clear testimony of Gaylord's President, there is no dispute that the General Warranty, including the warranty disclaimer provision, was a part of the parties' bargain.

9. Valspar is not equitably estopped from asserting the limitations period or limited remedy provision as legal defenses to Gaylord's claims.

As stated by the Court of Appeals, in order to avail oneself of the doctrine of equitable estoppel, a party must prove that: (1) promises or inducements were made; (2) it reasonably relied on the promises; and (3) it will be harmed if estoppel is not applied. Valspar Refinish, 2007 WL 4237504 at *4, citing Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990). "In order to resist summary judgment on a claim of equitable estoppel, the plaintiff must show specific, admissible facts creating a genuine issue for trial as to the reasonableness of reliance." Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995). Without citing any authority for its

position, Gaylord's asserts that Valspar should be equitably estopped from invoking the limitations period and remedy provision in the warranty because of alleged assurances it received from Valspar. (Gaylord's Brief at 22-23.) The Court of Appeals properly rejected Gaylord's argument for the same reasons Gaylord's waiver arguments must be rejected—Gaylord's cannot prove justifiable or reasonable reliance.

The evidence reflects that the parties are sophisticated equals that were engaged in a commercial transaction. The evidence is undisputed that the contract in this case was negotiated over the course of several months and included six months of testing of Valspar product by Gaylord's before the contract was entered into. The record also establishes that Gaylord's purchased over \$450,000 worth of Valspar's products over the course of one year, despite alleging it was aware of product defects for the entire time period and despite its allegations that it was aware of product defects even before entering into the Agreement (A.303 at ¶ 3). See Hydra-Mac, 450 N.W.2d at 920 (stating that reasonableness of promisee's reliance encompasses examination of whether plaintiff used due diligence in filing claim after it knew, or should have known, that further reliance was unjustifiable.") Because the record shows that Gaylord's, a sophisticated business entity, had ample time and opportunity to investigate the information supplied by Valspar and was given a 6-month opportunity to spray-test, special order and experiment with the products, its alleged reliance on assurances by Valspar is unreasonable as a matter of law. This legal principle is particularly true where the agreed upon contract includes an integration clause and written modification provision. (A.75 at 10(a), A.75 at ¶ 10(b)); see Valley Paving, Inc. v. Dexter & Chaney, Inc., 2000 WL

1182800*4 (Minn. Ct. App. Aug. 22, 2000) (when an agreement includes a written modification clause, reliance on an oral promise is not reasonable as a matter of law), citing Martin v. American Family Mut. Ins. Co., 157 F.2d 580, 582 (8th Cir. 1998).

10. The limited remedy provision did not fail of its essential purpose.

Gaylord's assertion that the limitation of remedies clause fails its essential purpose and therefore is unenforceable is based upon pure speculation. Gaylord's argument is premised upon the assumption that Valspar would have been incapable of replacing its allegedly defective products with conforming ones. (Gaylord's Brief at 24.) This argument constitutes pure conjecture since Gaylord's failed to provide Valspar with written notice and the opportunity to cure as called for in the Supply Agreement. Because of Gaylord's actions in failing to give written notice and a cure period, it is impossible to know whether Valspar would have been able to replace the alleged defective products for Gaylord's. See National Bankcard, *supra* (whether party could complete performance in cure period constitutes pure speculation when the opposing party failed to give proper written notice and opportunity to cure as provided in the contract, even when evidence exists that party was unable to cure defects for a number of months with actual notice of defects.); see also, Valley Paving, Inc. v. Dexter & Chaney, Inc., 2000 WL 1182800 *4 (Minn. Ct. App. Aug. 22, 2000).

Gaylord's assertion that Valspar had knowledge of the product defects and failed to repair them, thus rendering the remedy provision meaningless, is also based upon speculation since Gaylord's failed to fulfill its contractual written notice requirement.

The Court of Appeals agreed:

Appellant's contention that respondent had actual knowledge of the product defects missed the mark because no evidence of what respondent actually knew can change the fact that appellant failed to provide notice to respondent of appellant's intent to assert its right under the warranty. While general knowledge of problems with a product may fulfill the last two purposes of Minnesota's notice requirement, the first purpose of the notice requirement – providing the seller with an opportunity to correct or cure the product defect – can only be fulfilled if the notice given is more than a mere complaint and actually conveys the buyer's intent to claim a breach of some warranty and seek damages for that breach.

Valspar Refinish, 2007 WL 4237504 at *4, citing Truesdale v. Friedman, 270 Minn. 109, 122-23, 132 N.W.2d 854, 863 (1965). It cannot be held that the remedy provision failed of its essential purpose when it cannot be shown that Valspar was allowed to implement the remedy provision after being provided the proper written notice of a warranty claim.

C. Summary Judgment on Gaylord's Breach of Contract Should Be Affirmed Because Gaylord's did not Timely Revoke Acceptance of the Paint Products.

The Uniform Commercial Code ("UCC") recognizes a distinction between breach of contract and breach of warranty claims. Under Minnesota law, a buyer may only pursue a breach of contract claim if it explicitly rejects tendered goods within a reasonable inspection period. See Minn. Stat. § 336.2-711 (allowing buyer who has properly rejected goods to recover the same damages as would be available if the goods had never been delivered). If the buyer accepts the goods, as Gaylord's did in this case, then its remedies are limited to those available for a breach of warranty. See Minn. Stat. § 336.2-714 (stating that, where the buyer has accepted the goods, the buyer may recover warranty damages for any nonconformity); see also Alafoss v. Premium Corp. of Am., Inc., 599 F.2d 232, 235 (8th Cir. 1979) (providing that, under Minnesota law, if a buyer accepts goods it can only sue the seller for any breach of warranty.) "[U]nder Minnesota

law a buyer accepts goods if he fails to explicitly reject them during the reasonable inspection period." Northwest Airlines, Inc. v. Aeroservice, Inc., 168 F.Supp.2d 1052, 1054 (D. Minn. 2001) (citing Minn. Stat. § 336.2-606(1)(b)); Ames Eng'g. Corp. v. Lighthouse Bay Foods, Inc., 1999 WL 595393 *2 (Minn. Ct. App. 1999) (A.117) ("Acceptance of goods occurs when the buyer fails to make effective rejection"), quoting Minn. Stat. § 336.2-606(1)(b)). In this case, it is undisputed that Gaylord's accepted Valspar's paint products.

Because Gaylord's accepted the products at issue, it argues that it revoked its acceptance. This argument also fails. First, Gaylord's has not cited a single legal authority in support of its position that it revoked acceptance of Valspar's products. (Gaylord's Brief at 16.) Second, Gaylord's cannot satisfy the revocation of acceptance requirements.

Revocation of acceptance is not effective until the buyer notifies the seller of its revocation of acceptance and such notice occurs within a reasonable time after the buyer discovered the ground for revocation. Minn. Stat. § 336.2-608. The revocation must be both unequivocal and timely. Barry & Sewall Industrial Supply Co. v. Metal-Prep of Houston, Inc., 912 F.2d 252, 257 (8th Cir. (Minn.) 1990). Further, upon notice of revocation, the buyer must *not* indulge in any action that would indicate that it has reaccepted the goods. Id.

In this case, the undisputed facts, particularly Gaylord's admissions, demonstrate that Gaylord's alleged revocation was untimely as a matter of law. The parties agreed by express contract upon a timely notice requirement. (A.77 at ¶ 4.) See DeWitt v. Itasca-

Mantrap Coop. Elec. Assoc., 215 Minn. 551, 559-60, 10 N.W.2d 715, 719 (Minn. 1943) (there is no question of fact for the jury to consider with reference to the time permitted for a rejection of the goods because it was set forth by express agreement of the parties). Gaylord's undisputedly breached this notice requirement. (A.105-06 at 55-57; A.110 at 111.)

In fact, Gaylord's used Valspar's paint products on its truck lids that it sold to third parties for profit for more than one year. While Gaylord's President, Lunney testified that he had actual knowledge of the alleged defects in Valspar's products *prior to* entering into the Supply Agreement, Gaylord's proceeded to enter into the contract and accept in excess of \$419,000 in up-front cash from Valspar. (A.109 at 69.)

Rather than revoking its acceptance of Valspar's products prior to entering into the contract, or even shortly thereafter when it apparently discovered all of the defects, Gaylord's continued to use Valspar's products, ordered more than \$450,000 in products, accepted in excess of \$419,000 in cash from Valspar and did not notify Valspar in writing of any alleged defects. (A.104-06; A.110 at 111; A.172-73 at ¶ 3.) The reason Gaylord's failed to timely and unequivocally revoke acceptance of Valspar's products is obvious. At the commencement of the contractual relationship, Gaylord's accepted in excess of \$419,000 in cash from Valspar. Gaylord's had no intention of relinquishing this significant benefit.

Moreover, even if the parties had not agreed to written notice, Gaylord's alleged verbal revocation was required to be unequivocally communicated to Valspar. Gaylord's failed to come forward with any evidence that it unequivocally communicated a

revocation to Valspar. Instead, Gaylord's continued to use Valspar's products after discovery of alleged defects *for more than one year*. Its reacceptance of the products through continued and uninterrupted use for more than one year bars Gaylord's from asserting the revocation defense. 912 F.2d at 257.

D. The Appellate Court Correctly Affirmed the Trial Court's Summary Judgment on Gaylord's Negligent Misrepresentation Claim.

A negligent misrepresentation occurs under Minnesota law when: (1) a person who, in the course of her or his business, profession, or employment or in any other transaction in which she or he has a pecuniary interest; (2) supplies false information for the guidance of others in their business transactions; (3) and another justifiably relies on the information; (4) and the person providing the false information failed to exercise reasonable care or competence in obtaining or communicating the information. Smith v. Brutger Companies, 569 N.W.2d 408, 413-14 (Minn. 1997) (employing the Restatement (Second) of Torts § 552); see also Bonhiver v. Graff, 248 N.W.2d 291, 298- 99 (1976) (adopting the Restatement definition as Minnesota law). Gaylord's negligent misrepresentation claim fails because Valspar did not owe Gaylord's any duty and, as correctly concluded by the Court of Appeals, it cannot be found that Gaylord's justifiably relied on any representations other than what is set forth in the terms of the Supply Agreement.

Importantly, the existence of a duty owed by the defendant is an essential element of any negligent misrepresentation claim under Minnesota law. See Schroeder v. White, 624 N.W.2d 810, 812 (Minn. Ct. App. 2001). "[W]here ... parties negotiate at arm's

length, there is no duty imposed such that a party could be liable for negligent misrepresentation. In these situations, the injured party's remedy is to sue either in contract or to sue for intentional misrepresentation." Safeco Ins. Co. of Am. v. Dain Bosworth Inc., 531 N.W.2d 867, 871 (Minn. Ct. App. 1995). Negligent misrepresentation is only available against a person who "provides information for the guidance of others in the course of business or where there is a pecuniary interest." Id. at 872-73. This language has been interpreted to exclude those engaging in arm's length commercial transactions from asserting the cause of action. See id. ("[W]here adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent representations."); Smith v. Woodward Homes, Inc., 605 N.W.2d 418, 424 (Minn. Ct. App. 2000); Posch v. Kurtz, 1997 WL 20303 at *3 (Minn. Ct. App. Jan. 21, 1997) (A.137).

In Safeco, Dain underwrote certain municipal bonds that were to be insured by a third party called a "credit enhancer" that acted much like a guarantor. Dain solicited potential credit enhancers by sending them background information about the bond issue. Safeco eventually agreed to be the credit enhancer. When the bonds went into default, Safeco had to pay the bondholders. Safeco then sued Dain for negligent misrepresentation arguing that Dain provided it with incorrect information that induced it to agree to be a credit enhancer. Dain argued that it did not owe a duty to Safeco because they were both sophisticated parties that negotiated a deal at arm's length, and Dain did not have a fiduciary duty to Safeco. This trial court agreed with Dain granting summary judgment on the negligent misrepresentation claim.

The Court of Appeals affirmed. The Court followed cases from several other states and held that Dain did not commit negligent misrepresentation as a matter of law:

Because Dain was selling a deal to Safeco, and not supplying information for the guidance of Safeco, and because they were sophisticated equals negotiating a commercial transaction, Dain did not owe Safeco a duty for purposes of a negligent misrepresentation tort threshold.

Safeco, 531 N.W.2d at 872. In this case, Gaylord's cannot establish as a matter of law that Valspar owed it any duty of care for purposes of a negligent misrepresentation claim.

Here it is undisputed that the relationship between Valspar and Gaylord's arose out of a sophisticated commercial relationship whereby Gaylord's purchased paint coating products under an exclusive Supply Agreement. Valspar did not force Gaylord's to execute the Agreement. In fact, Gaylord's desired to enter into the Supply Agreement with Valspar after testing its products for six months and freely entered into the Supply Agreement in order to purchase those products on terms negotiated by the parties.

(A.178-79; A.180-81; A.A.101at 31-32; A.102 at 34; A.108 at 66-67.) Indeed, as a result of the negotiations, Gaylord's received in excess of \$419,000 in up-front prepaid rebates and preferred pricing for Valspar's products. In short, after months of negotiations and consideration of other potential suppliers, Gaylord's agreed to enter into a contractual relationship with Valspar because of the significant prepaid rebate and preferred pricing it would receive. (A.102 at 34-35.) Under these circumstances, as a matter of law, Valspar had no duty to Gaylord's sufficient to support a negligent misrepresentation claim.

Moreover, based upon the same undisputed facts, Gaylord's cannot prove that it justifiably relied upon information supplied to it by Valspar.

E. The Appellate Court Correctly Affirmed the Trial Court's Summary Judgment on Gaylord's Fraud Claim.

Recognizing the weakness of its contract-based claims, in a transparent effort to circumvent the bargained-for allocation of risks in the Supply Agreement,¹⁰ Gaylord's alleges that Valspar fraudulently induced it to enter into the Supply Agreement. Like the rest of its claims, Gaylord's fraud claim is based upon the same deficient factual allegation as its contract based claims, i.e., that "Valspar paints would apply evenly, smoothly, and consistently and would cure properly in a timely manner." (A.14.) Gaylord's fraud claim fails for this reason alone. In addition, as determined by the trial court, because the UCC exclusively governs Gaylord's claims, its tort claims are barred as a matter of Minnesota law. Finally, Gaylord's is unable to satisfy the elements of a fraud claim as a matter of law.

1. Gaylord's cannot turn a contract claim into a fraud claim in order to avoid its contractual obligations to Valspar under the Supply Agreement.

Because Gaylord's contract and warranty claims are barred by its failure to satisfy conditions precedent, it seeks to turn its contract-based claims into a fraud claim and thereby avoid its negotiated contractual obligations to Valspar. Minnesota law, however, does not recognize an independent tort for conduct that merely constitutes a breach of contract. Indeed, Minnesota courts have repeatedly refused to expand contract claims into tort claims. See Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983) (where the

¹⁰ The General Warranty expressly provides that the "warranty allocates between Seller and Buyer the risk of failure of the Products. This allocation of risk is recognized by both parties and is reflected in the price of the Products." (A.77 at ¶ 6.)

duties arose out of contract, it was error to submit the theory of "negligent breach" of contract to the jury); Wild v. Rarig, 234 N.W.2d 775, 790 (Minn. 1975) ("a malicious or bad faith motive in breaching a contract does not convert a contract action into a tort action") cert. denied, 424 U.S. 902 (1976); McNeill v. Assocs. v. ITT Life Ins. Corp., 446 N.W.2d 181, 185 (Minn. Ct. App. 1989) (bad faith breach of purchase agreement does not convert breach of contract claim to conversion claim.); UFE Incorporated v. Methode Electronics, Inc., 808 F.Supp. 1407, 1410 (D. Minn. 1992) (recognizing that with respect to a representation claim brought in addition to a breach of contract claim, Minnesota law does not recognize an independent tort for conduct that merely constitutes a breach); Golden v. wwwrrr, Inc., 2002 WL 264947, *3 (D. Minn. Feb. 22, 2002) (A.142). This Court has stated:

We are of the opinion that when a plaintiff seeks to recover damages for an alleged breach of contract he is limited to damages flowing only from the breach except in exceptional cases where the defendants breach of contract constitutes or is accompanied by an independent tort.

Rarig, supra at 789.

In this case, Gaylord's relies upon the same allegations for its breach of contract and warranty claims as it does its fraud claim -- that Valspar would supply Gaylord's products that would apply in a certain manner. Because the factual allegations asserted by Gaylord's to support its fraud claim are the same factual allegations asserted in support of its contract-based claims, its fraud claim fails.

2. Gaylord's is barred by Minnesota law from bringing a tort-based claim for fraudulent inducement outside the purview of the Uniform Commercial Code.

The Court of Appeals properly affirmed the trial court's summary judgment on Gaylord's fraud claim under the reasoning of Hapka.¹¹ In Hapka v. Pacquin Farms, 458 N.W.2d 683, 688 (Minn. 1990), this Court held that "the Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involves property damages only." Gaylord's does not dispute that its claims in this case arise out of a commercial transaction.

In ETM Graphics, Inc. v. H.B. Fuller Co., 1992 WL 61394 (Minn. Ct. App. Mar. 25, 1992) (A.148), the Minnesota Court of Appeals addressed this same issue. The Appeals Court extended Hapka's reasoning to bar claims for economic loss under the theory of fraudulent misrepresentation. Id. at 2. In ETM Graphics, plaintiff contracted with the City of St. Paul to install canvas murals at the Como Park Zoo in two phases. Id. Plaintiff purchased fifty gallons of adhesive from defendant H.B. Fuller Co. to install the murals. Id. Several months after installation, the adhesive failed and the murals in phase one had to be removed. Id. at *3. Plaintiff was paid for phase one but was not hired to perform phase two. Id. Plaintiff brought several claims against the adhesive manufacturer, including breach of warranty and fraudulent misrepresentation, and sought as consequential damages, the lost profits that would have been generated by

¹¹ Minn. Stat. § 604.10 does not apply as suggested by Gaylord's because Gaylord's does not claim economic loss "due to damage to tangible property other than goods sold." See Nelson Distrib., Inc. v. Stewart-Warner Balancers, 808 F.Supp. 684, 688 (D. Minn. 1992).

performance of phase two. In other words, plaintiff sought damages for economic losses arising out of a commercial transaction under the tort theory of fraudulent misrepresentation, just as Gaylord's sought to do in this case. The ETM Graphics Court acknowledged that "the court in Hapka did not directly address the issue presented in this appeal," but held "that the broad language in Hapka clearly prevents [plaintiff] from bringing a tort action outside the purview of the U.C.C." Id. at 4; see also Nelson Distributing, Inc. v. Stewart-Warner Indus. Balancers, 808 F.Supp. 684, 687 (D. Minn. 1992) (fraudulent misrepresentation claim barred because the claims are governed exclusively by the UCC).¹² Under the holdings of Hapka, ETM Graphics, and Nelson Distributing, Gaylord's tort claims, including its fraudulent inducement claim, are barred as a matter of law.

3. Gaylord's cannot show that it justifiably relied upon any oral representations made by Valspar.

Gaylord's is also unable as a matter of law to establish the elements of a fraud claim. In order to succeed on a fraud claim under Minnesota law, Gaylord's must establish that it justifiably relied upon representations. Davis v. Re-Trac Mfg. Corp., 149 N.W.2d 37, 38-39 (Minn. 1967) (emphasis added). The representations Gaylord's points

¹² Gaylord's negligent misrepresentation claim is barred under the holdings of ETM Graphics and Hapka as well. Moreover, Gaylord's negligent misrepresentation and fraud claims are barred under Minnesota's economic loss doctrine because they fail to state claims independent of the warranty claim. The economic loss doctrine precludes a commercial purchaser of products from recovering economic damages through a tort action against the seller of the product. Marvin Lumber and Cedar Co. v. PPG Industries, Inc., 223 F.3d 873, 883-885 (8th Cir. 2000) (fraud and negligent misrepresentation claim must be independent of Article 2 contract claims or they are precluded by Minnesota's economic loss doctrine.)

to as actionable are that "Valspar said that its products were capable of being applied evenly, smoothly, and consistently." (Gaylord's Brief at 39.) Gaylord's cannot establish that it justifiably relied upon these alleged oral representations because contrary representations are contained in the Supply Agreement.

"Under Minnesota law, a party may not claim fraudulent inducement by way of promises that are directly contradicted by a subsequently-executed agreement, absent some factor that justifies the party's reliance." Tisdell v. Valadco, 2002 WL 31368336, at * 9 (Minn. Ct. App. Oct. 16, 2002) (A.153) (citing Prod. Credit Assoc. of E. Cent. Wis. v. Farm Credit Bank of St. Paul, 781 F. Supp. 595, 604-05 (D. Minn. 1991); Boyd v. DeGardner Realty & Constr., 390 N.W.2d 902, 904 (Minn. Ct. App. 1986)). Here, to the extent Gaylord's seeks to hold Valspar liable for any pre-contract representations not contained in the Supply Agreement, Gaylord's is unable to prove reasonable reliance because the terms of the Supply Agreement contradict such a position. There is simply nothing justifying Gaylord's reliance on any pre-contract representations in the face of the clear contract language disclaiming pre-contract representations¹³ and the express

¹³ The Supply Agreement provides: "Unless modified in a writing signed by the officers of both parties, this warranty is understood to be the complete and exclusive agreement with respect to warranties for the Products, superseding all prior agreements, discussions and representations, oral or written, all other communications between the parties relating to Seller's warranties of, and liability with respect to, the Products. No employee of Seller is authorized to make any warranty in addition to those made in this Agreement. Seller is not liable for any warranty Buyer may make to any of Buyer's customers." (A.77 at ¶ 5.) The Supply Agreement also provides: "This Agreement, along with its attachments, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, representations and warranties, oral and written, between the parties with respect to the subject matter hereof." (A.76 at ¶ 10(b)).

General Warranty that provides it constitutes the exclusive embodiment of all warranties negotiated by the parties. See Burnsville Sanitary Landfill, Inc. v. Edward Kraemer & Sons, Inc., 2004 WL 1465828 *5 (D. Minn. June 28, 2004) (A.165) (holding reliance on oral representations which contradicted terms of the contract as well as the contract's integration clause is unreasonable as a matter of law), citing Crowell v. Campbell Soup Co., 264 F.3d 756, 762 (8th Cir. (Minn.) 2001).

Second, when sophisticated businesses "engaged in major transactions enjoy access to critical information but fail to take advantage of that access, ... courts are particularly disinclined to entertain claims of justifiable reliance." Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 737 (2d Cir. 1984).¹⁴ Indeed, Minnesota law uses a subjective standard to measure the reasonableness of a plaintiff's alleged reliance for purposes of fraud claims. See Midland Nat'l Bank v. Perranoski, 299 N.W.2d 404, 412 (Minn. 1980) ("Fraud is proved with reference to the specific intelligence and experience of the aggrieved party rather than a reasonable-man standard"); Lassen v. First Bank Eden Prairie, 514 N.W.2d 831, 839 (Minn. Ct. App. 1994) ("Justifiable reliance

¹⁴ See also, e.g., Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 95(2d Cir. 1997) (stating that reliance by sophisticated business people on misrepresentations generally is not reasonable where these business people had access to critical information but failed to use it); Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc., 250 F.3d 570, 572 (7th Cir. 2001) (stating that a party may not enter into a transaction with its eyes closed to available information and then charge that it has been deceived by the other party; the court must consider all of the facts that the plaintiff knew and all the facts that it could have learned through the exercise of ordinary prudence); Siemens Westinghouse Power Corp. v. Dick Corp., 299 F. Supp. 2d 242, 247 (S.D.N.Y. 2004) (same).

must be established with reference to the specific intelligence and experience of the aggrieved party").

In this case, Gaylord's is a sophisticated business entity that engaged in substantial due diligence over many months before negotiating and entering into the Supply Agreement with Valspar and could have engaged in additional due diligence if it so chose. Gaylord's specified the colors, ran test sprays on its toppers, met with representatives of Valspar, approved of Valspar's base and clear coats, and represented that Valspar's products met its standards and requirements. (A.101 at 31-32; A. 104 at 49; A.108 at 66-67; A. 178-79; A.A.180-81.) Under these circumstances, no reasonable fact finder could determine that Gaylord's reasonably relied on any alleged generic or specific descriptions of the products made by Valspar during the negotiations.

4. Gaylord's waived its right to assert a claim for fraudulent inducement.

Finally, Gaylord's waived its right to recover for fraudulent inducement when it continued to purchase and use Valspar's paint products immediately after discovering the facts that Gaylord's maintains establishes fraud in this case. In Minnesota, "a party to an executory contract who, prior to its [substantial] performance discovers fraud, may not go forward with performance of the contract and subsequently sue for damages." Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971). This rule is grounded in the notion that allowing a person to claim fraud while still having the chance to avoid injury would effectively allow that person to recover for self-inflicted injury. See Thompson v. Libby, 31 N.W. 52, 53 (Minn. 1886) (stating that allowing a person who has discovered fraud while the contract is not substantially completed to sue for fraud

"looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries"). In short, "[e]ven in the case of the partly performed executory contract, the remedy of prompt rescission and disaffirmance is exclusive; and where there is no such rescission, no damages for the fraud can be had, the fraud being waived." Defiel v. Rosenberg, 174 N.W. 838, 839 (Minn. 1919).¹⁵

In this case, Gaylord's concedes that it knew all of the facts and circumstances that it alleges constituted the fraud underlying its fraudulent inducement claim "from the beginning" of the contract. In fact, Gaylord's even asserts that it knew about the alleged defects in Valspar's products *prior to* entering into the Supply Agreement, yet it proceeded to enter into the Supply Agreement and reaped the significant benefit of the multi-hundred thousand dollar prepaid rebate. (A.99 at 16; A.107 at 64; A.109 at 69; a.113 at 131.) Based upon these facts, Gaylord's waived any right to recover on a fraud claim.

F. Gaylord's Admits it Breached the Supply Agreement.

Gaylord's does not, and in fact, cannot, deny that it breached several provisions of the Supply Agreement, including, most notably, its unilateral decision to hire a replacement paint supplier, discontinue purchasing products from Valspar, and its failure to return the prepaid rebate. Gaylord's offers no explanation as to why the prepaid rebate

¹⁵ See also, e.g., Northwest Airlines, Inc. v. Astraia Aviation Serv's., Inc., 111 F.3d 1386, 1393 n.5 (8th Cir. 1997) ("By continuing to perform after the alleged fraud was discovered, Astraia waived any recovery in fraud."), citing Zochrison v. Redemption Gold Corp., 273 N.W. 536, 539 (Minn. 1937).

has not been returned, nor has it cited any legal authority that would entitle Gaylord's to keep the prepaid rebate even *if* Valspar breached the contract by providing it defective products. Indeed, providing conforming products was not a condition precedent to return of the prepaid rebate upon premature termination of the contract. See National Bankcard, 2006 WL 2480479 at *3 (non-breaching services was not a condition precedent to defendant's requirement to continue to purchase services under the Service Agreement.)

In short, the undisputed facts establish that Gaylord's breached the Supply

Agreement by:

- failing to purchase 100% of its coatings requirements from Valspar through October 7, 2008;
- purchasing and using of paint coatings other than Valspar's coatings during the term of the Supply Agreement;
- failing to continue operating under the Supply Agreement and its exclusive purchase provisions until such time as Gaylord's purchased and paid for the specified amount of paint products from Valspar;
- failing to return the unearned portion of the prepaid rebate it received within 10 days after the Supply Agreement was terminated by Gaylord's in November 2004 in the amount of \$368,399.92;
- failing to pay invoices on a net 45 day basis and failing to pay a total of \$198,543.08 for product it ordered and received; and
- failing to terminate the Supply Agreement as provided by its terms.

(A.102-03 at 36-37; A.104 at 51-52; A.114-15 at 172-173; A.172-73 at ¶¶ 2-3, A.174-

77.) Based upon these undisputed facts, the Minnesota Court of Appeals properly affirmed the trial court's grant of summary judgment in Valspar's favor on its breach of contract claim.

G. The Trial Court and Court of Appeals Properly Rejected Gaylord's Objections to Valspar's Evidence.

Gaylord's objections to the affidavits filed by Valspar in support of its summary judgment motion are without merit. Affidavits need only "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." Minn. R. Civ. P. 56.05. The affidavits of three of Valspar's employees, Robert Cross, Brian Lynch and Jeffrey Tiedens, all easily satisfy that standard. All three employees lay the foundation for their affidavits by stating their position at Valspar and set forth facts "based on [their] own personal knowledge." (A.172, 178, 180.) Moreover, the information set forth in the three affidavits has not been disputed by Gaylord's with any evidence. The Minnesota Court of Appeals and the trial court properly rejected Gaylord's meritless objections to Valspar's affidavits.

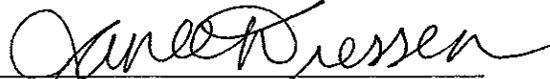
V. CONCLUSION

It is well settled in Minnesota and across the nation that a court may not, even under the guise of interpretation, make a new contract for the parties or change the unambiguous words of a contract. If the parties to a contract, particularly sophisticated business entities, adopt an unambiguous provision which is consistent with public policy, there is no basis for the courts to relieve one of the contracting parties from perceived disadvantageous terms by the process of interpretation. The contract in this case unambiguously required written notice by Gaylord's of the claims it attempts to assert herein. By admission, it failed to provide the required written notice. Its claims were

accordingly dismissed on the full summary judgment record as held by the Honorable Harry S. Crump and affirmed by the Minnesota Court of Appeals. Based upon the foregoing reasons, Valspar respectfully requests that the Minnesota Court of Appeals be affirmed in all respects.

Date: April 10, 2008

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3 for a brief produced with a proportional font. The length of this brief is 13,393 words. This brief was prepared using Microsoft Word 2003.

Date: April 10, 2008

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