

Nos. A07-584, A07-788

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State of Minnesota  
**In Court of Appeals**

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Brian Kidwell,

*Respondent,*

v.

Sybaritic, Inc.,

*Appellant.*

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**REPLY BRIEF OF APPELLANT SYBARITIC, INC.**

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## ARGUMENT

- I. **Sybaritic is entitled to judgment as a matter of law because there is no competent evidence establishing that Kidwell made a report for purposes of exposing an illegality.**

Sybaritic contends that it is entitled to judgment as a matter of law because Kidwell failed present evidence establishing a prima facie case under Minnesota's Whistleblower Act. Minn. Stat. § 181.932 (2006). The Minnesota Supreme Court has held that to establish this statutory action, plaintiff must prove that he made a report for the purpose of exposing an illegality. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). Whether a report was made in good faith is typically a question of fact, but courts may decide as a matter of law that certain conduct does not constitute a report for purposes of the Whistleblower Act. *Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 809 (8th Cir. 2007) (citing *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), review denied (Minn. May 15, 2002)). In doing so, "[t]he Court must look not only at the content of the report, but at the employee's purpose in making the report." *Obst*, 614 N.W.2d at 202.

Relying on this directive, this court and federal courts have held that a report made to fulfill one's job duties is not a report made for purposes of exposing an illegality. *Grundtner v. Univ. of Minn.* 730 N.W.2d 323, 330 (Minn. App. 2007); *Gee v. Minnesota State Colleges & Univ.*, 700 N.W.2d 548, 556 (Minn. App. 2005); *Freeman v. Ace Tel. Assocs.*, 404 F. Supp.2d 1127 (D. Minn. 2005); *Erickson v. City of Orr*, No. A05-481,

2005 WL 2277395 (Minn. App. Sept. 20, 1995) (A.106-112)<sup>1</sup>; and *Andrews v. NW Travel Servs., Inc.*, No. C5-97-1766, 1998 WL 100608 (Minn. App. Mar. 10, 1998) (A.101-05). And that makes perfect sense. Courts are expected to determine and give effect to the legislature's intent. Minn. Stat. § 645.16 (2006). An employee is not "blowing the whistle" when he reports to his employer information that he is required to provide to fulfill his job responsibilities. That is not the kind of activity that the statute was intended to protect.

As Sybaritic's general counsel, Kidwell was expected to provide information and analysis on what the law requires or prohibits and to give compliance advice with respect to those laws and regulations. (T.181, 204, 377-78, 187-89, 196, 198). In fact, Kidwell testified that his duties as general counsel required him to work with Sybaritic's management to identify, prevent and stop all illegal or potentially illegal conduct of the company. (T.242). That is exactly what Kidwell did in the difficult-duty e-mail. Like the plaintiff/attorney in *Michaelson v. Minnesota Mining & Manufacturing Co.*, Kidwell "gave his employer feedback based on legal analysis." 474 N.W.2d 174, 180 (Minn. App. 1991). Kidwell though never stepped outside that advisory role by reporting his allegations to the authorities.

In fact, Kidwell has conceded on several occasions that he sent the e-mail to Sybaritic's management to fulfill his duties as the company's attorney. (T.242 – "as the person responsible for the legal affairs of the company, that's what I had to do"); (Resp.'s

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<sup>1</sup> All appendix references are either to the appendix that Sybaritic submitted with its opening brief — designated "A." — or to the appendix attached to this reply — designated as "R.A."

br. at 6 – “In broad terms, Kidwell felt that he was responsible for Sybaritic’s legal affairs. As a result, when Kidwell learned about the improprieties he reported them to members of Sybaritic’s management who were directly involved in the relevant issues, usually via written memoranda, e-mail or direct conversation”) (citations omitted); (T.377-78 – conceding that advising one’s client about its active litigation is one of the tasks that lawyers are expected to perform); (T.394 – testifying that he directed outside counsel to send any concerns about spoliation to him because it was his job to handle this matter as Sybaritic’s general counsel). Regardless of the harshness or accuracy of Kidwell’s assessments contained in the difficult-duty e-mail, that communication is nevertheless, at its core, legal advice given by counsel to his client. In other words, the very thing Kidwell was paid to provide. Who else but one’s attorney can and should advise about the legal obligation to preserve relevant evidence regardless of whether there has been a discovery request for those documents? The fact that Kidwell cited statutes and rules supporting his legal opinion only further demonstrates that he was doing the job that lawyers do.

Kidwell’s only response to this is that because he drafted the e-mail at home and after regular business hours, this communication did not fall within his normal job duties. But as any lawyer knows, being an attorney is not a nine-to-five job. One does not stop being another’s attorney after the normal work day and after one leaves the office’s physical perimeters. If that were true, attorneys could avoid any disciplinary action simply by waiting to violate ethical rules until after the close of business day. In any event, Kidwell testified that he did legal work for Sybaritic while at home and on

vacation. (T.263). Regardless of the hour when, or the physical location where, Kidwell drafted the legal analysis and advice contained in the e-mail, he was nevertheless supplying the service for which he was professionally trained and hired to provide.

Kidwell argues, however, that because the statute requires an employee-employer relationship, it does not make sense for defendant to argue, or for this court to hold, that an employee must be acting outside the scope of his employment to seek whistleblower protection. But neither the caselaw nor Sybaritic's argument sweep that broadly. By limiting extension of the Whistleblower Act to employees performing their normal job duties, the court does not expose the public to a heightened risk of corporate illegality as Kidwell suggests. To the contrary, it ensures that the risk will actually be less because it will encourage employers to hire employees, such as in-house counsel, who are readily available to advise about what the law does or does not permit. As has always been the case, if the employee steps outside that advisory role by reporting potentially illegal conduct outside of the company or by refusing to further a potentially illegal purpose, whistleblower protection may be implicated.

Nor can Kidwell step outside his role as legal counsel by repackaging advice that he previously provided to various members of Sybaritic's management. The fact that the difficult-duty e-mail contains recycled legal analysis takes this communication out of the category of protected activity because one cannot blow the whistle as to information about which the employer already knows and acknowledges. *Obst*, 614 N.W.2d at 203. In other words, if as Sybaritic's attorney, Kidwell previously counseled his client on the

very same matters, he cannot convert that advice into a “report for purposes of exposing an illegality” merely by regurgitating it in a single e-mail.

It is on this point that Kidwell is less than candid with the court. The record is replete with testimony that Kidwell had previously discussed each of the topics addressed in the difficult-duty e-mail with various members of Sybaritic’s management team. Nevertheless, Kidwell ignores this fact and focuses on small snippets of testimony by four Sybaritic’s managers, none of which establish Kidwell’s point that he was communicating new information. True, Kidwell, who wrote this e-mail on the eve of his expected dismissal, used vexatious and incendiary language for the first time when discussing these legal matters. But while the portrayal of matters discussed was new, the actual content was anything but.

For example, Kidwell first contends that “Steve Daffer, the owner and president of Sybaritic, admitted that Kidwell’s e-mail was the first time that Kidwell reported these concerns.” (Resp.’s br. at 7, 29, citing T. 514). But a review of that testimony reveals that Daffer was only testifying about the NeoQi litigation, not any of the other e-mail topics and that he was referring only to the way Kidwell *characterized* the information in that e-mail, not his unfamiliarity with Kidwell’s previously raised concerns:

The concern that he expressed in his letter only occurred at the time when I saw his letter. Prior to that, the discussion I wouldn’t characterize as concern. It was more him explaining to myself and others that we needed to provide all the documentation including e-mails that had anything to do with the NeoQi company, or our exchange with them. So we were tasked with assembling all the documents that would support or be involved in that lawsuit.

(T.514-15) (*see also* T.212, 215-16, 376). In other words, Kidwell had previously advised Daffer and others that the law required them to preserve, and not spoliage, evidence that was reasonably related to the pending litigation. *See also* (T.304 – Mertikas’s testimony that in early April Kidwell had advised him to retrieve all NeoQi-related e-mails). In fact, Kidwell stated in the difficult-duty e-mail that he previously discussed these topics with various individuals in the company. (A.84).

To further support his contention that the difficult-duty e-mail was the first time Kidwell raised the issues contained in it, Kidwell next states that “Tony Daffer, CEO of Sybaritic, admitted that he was very surprised by the contents of Kidwell’s e-mail.” (Resp.’s br. at 7, 29). But it is quite clear from reading not only that entire answer, but the rest of Tony Daffer’s testimony that while he was admittedly surprised that Sybaritic’s legal counsel would choose the words and tone that he did, he was quite familiar with many of the topics Kidwell raised in the difficult-duty e-mail. (T. Daffer Dep. at 65-66).<sup>2</sup> For example, during the remainder of his deposition, Tony Daffer recounts in detail the fact that he and others had followed up on Kidwell’s previously given legal advice about Mohammed Hagar’s role in the company. (T. Daffer Dep. at 67-69, 72-73; T.746-47). Daffer also testified that Kidwell himself had set up Sybaritic West upon the advice of the company’s tax auditors and accountants so that Sybaritic could comply with the tax laws, not evade them. (T. Daffer Dep. 70, 74; T.747-49). Moreover, both Kidwell and former CEO David Applehof testified that Kidwell had

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<sup>2</sup> Respondent’s appendix includes Tony Daffer’s entire deposition, even though only parts of it were read into the record. (Def.’s ex. 32).

raised his concern about the branch-office website reference earlier that year. (T.204-05, 368, 463-64).<sup>3</sup>

Kidwell's assertion that all of the information in the difficult-duty e-mail was new to George Mertikas is equally without support in the record. (Resp.'s br. at 7, 29). Mertikas testified at length about receiving Kidwell's prior memorandums raising the unauthorized-practice-of-medicine concerns and about the company's decision to "implement" Kidwell's legal advice. (T.301-03). Although Mertikas was not involved in any prior discussions involving Sybaritic West and was thus unfamiliar with that particular e-mail topic, the evidence discussed above establishes that Kidwell raised these matters with others. Nor is it significant that Steve Chesley was unfamiliar with the e-mail topics. Chesley only began working at Sybaritic in January 2005 and did not supervise Kidwell until after he sent the e-mail, and thus he had not been privy to the matters discussed in it. (T.572-73). In any event, Kidwell himself testified in great detail about the prior advice to the company concerning Hagar's activities and about the reasons behind the creation of Sybaritic West. (T.182-85, 187-200; 202-05, 212, 215-16, 368-69, 372, 375-77).

Furthermore, the fact that Tony Daffer and Steve Chesley spent most of April 25 trying to makes sense of Kidwell's vague accusations is not proof that Kidwell was

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<sup>3</sup> It is interesting that Kidwell does not even address the fact that the e-mail also discusses the very first legal project to which he had been assigned at Sybaritic — the investigation into whether some of the company's sales staff were taking kickbacks from a leasing company that did business with Sybaritic. (A.84). That Kidwell included this topic in the April 24 e-mail is further evidence, though, that this e-mail is nothing more than recycled, old news, legal advice of which Sybaritic was well aware.

raising new valid concerns. Instead, it shows the confusion that Kidwell caused by re-raising previously resolved issues — i.e., the kickbacks and Hagar’s work as medical director — and concerns that had no basis in fact — i.e., that Sybaritic was engaging in tax evasion and spoliation of evidence. If anything, it demonstrates that Sybaritic treated the e-mail seriously because it came from its general counsel whose job it was to provide this kind of legal advice and analysis, even if ultimately the company determined that his concerns had no merit whatsoever.<sup>4</sup>

Importantly, Kidwell produced no evidence of any actual violations of law or that he had any real reason to suspect that Sybaritic was engaging in the violations that he characterizes in broadly stated terms — tax evasion, unauthorized practice of medicine, obstruction of justice. But in order to constitute protected activity under the statute, his e-mail “must implicate an actual federal or state law and not one that does not exist.” *Obst*, 614 N.W.2d at 204. Like the attorney in *Michaelson*, Kidwell “offered no proof” of the violations that he listed in the e-mail. 474 N.W.2d at 180.

For example, while Kidwell’s attorneys have now cited to portions of California’s tax code that generally prohibit tax evasion, albeit without referencing any evidence establishing the applicability of these statutes here, Kidwell never did that research himself before sending the e-mail. Although Kidwell was the one who prepared the legal documents to allow Sybaritic to form a separate and legally distinct company in

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<sup>4</sup> This is not to say, as Kidwell argues, that an employer’s knowledge of actual illegal activity would always be a bar to a whistleblower claim. Obviously, if an employer is intentionally violating a law and disregards legal advice to halt that activity, that knowledge would not prevent a whistleblower claim by an employee who reports that fact. There is no such evidence here.

California and although he assumed that Sybaritic West was collecting taxes as the law requires [T.364], he nevertheless made the accusation — without any actual proof — that a mistaken reference by a marketing person on the company’s website somehow constitutes tax evasion. The law, however, requires the whistleblower to at least implicate some violation of law. *Obst*, 614 N.W.2d at 204; *see also Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 624 (Minn. App. 2007) (holding employee must actually know of or suspect actual violation of law at the time he makes report). Yet Kidwell never provided any evidence how a website characterization implicates a violation of any law, let alone tax evasion.

In fact, Kidwell testified that he assumed that Sybaritic West had been collecting sales taxes once it was formed, and thus he did not have any reason to suspect that either Sybaritic, Inc. or Sybaritic West was committing tax evasion. (T.364). The law, however, only protects employee who, *at the time that the report was made*, actually knew of or suspected that a violation of federal or state law had occurred. *Borgersen*, 729 N.W.2d at 624. It is clear from Kidwell’s own testimony that his mere use of the phrase “tax evasion” does not as a matter of law constitute a report for purposes of exposing an illegality under Minn. Stat. § 181.932 because there was no illegality to expose at the time that made his report.

Nor is it relevant that Kidwell’s attorneys are able to provide statutory citations to Minnesota’s prohibition against the unauthorized practice of medicine. The fact remains that at the time of the difficult-duty e-mail, Kidwell could not, and did not, implicate any existing violation of law on the part of Sybaritic. *Borgersen*, 729 N.W.2d at 624; *see also*

*Cokley*, 623 N.W.2d at 630 (holding that “non-specific reference to past practices not in conformance with the [law] is insufficient to implicate a current violation of law so as to constitute a report under the Minnesota Whistleblower Act”). At most, Kidwell was reiterating advice that he had provided months before and that Sybaritic had followed. (T.373-74). Because there was no evidence of any existing violation of law or even any suspected existing violation, the e-mail as a matter of law does not constitute a report made for purposes of exposing any illegality.

With regard to the NeoQi litigation, Kidwell never makes clear what he was blowing the whistle on. The evidence as a whole, and even taken in a light most favorable to plaintiff, demonstrates that there never was any destruction of evidence. Nor was there any evidence of any plan to do so. For example:

- Kidwell had all of the NeoQi e-mails on the laptop he had with him in Estonia, and they were identified with a desktop icon labeled “Estonia e-mails.” (T.691, 702-03; A.78).
- Kidwell testified that while he was in Estonia, he did *not* have “sufficient evidence to know that [Sybaritic’s employees] were destroying documents.” (T.394). Yet he did nothing after returning and before writing the difficult-duty e-mail to determine whether Sybaritic had in fact violated, or was about to violate, a federal or state law. (T.399). Indeed, Kidwell admitted that does not know if any e-mails were ever destroyed. (T.394).
- Hard copies of all of the e-mails were printed and available for review. Yet Kidwell did not ask to see those hard copies when he returned from Estonia on Friday April 22 or at any time before writing the April 24 e-mail, even though, he was shown that very stack of printed e-mails in the meeting following the difficult-duty e-mail. (T.399, 679; A.79; T. Daffer Dep. 75). Moreover, he realized when he got to his office on April 25 that he had still had the NeoQi e-mails on his desktop e-mail account. (T.418).

- Despite being Sybaritic's attorney, Kidwell could not point to a single order or discovery request that would have required Sybaritic to turn these allegedly damaging e-mails over to opposing counsel. (T.426-31).
- After meeting about his difficult-duty e-mail, Kidwell never again recommended that Sybaritic produce the so-called damaging e-mails. In fact, only two weeks after the e-mail, Kidwell advised Sybaritic that *because* there had been no discovery requests for the supposedly damaging e-mails, opposing counsel would never "see" these e-mails, even though Kidwell's difficult-duty e-mail accused Sybaritic of violating federal discovery rules for not producing them. Nor did he advise his client to amend or dismiss any of its causes of action in the NeoQi litigation, despite the fact that the difficult-duty e-mail accuses Sybaritic of making false allegations in its pleadings. (A.89-95).

In short, the evidence conclusively demonstrates that Kidwell did not blow the whistle on anything real. But the Whistleblower Act "clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law." *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 274 (Minn. 2002) (quoting *Hedglin v. City of Willmar*, 582 N.W.2d 897, 901-02 (Minn. 1998)). Thus, to make a statutorily protected report under the Whistleblower Act, the employee must allege "facts that, if proven, would constitute a violation of law or rule adopted pursuant to law." *Abraham v. County of Hennepin*, 639 N.W.2d 342, 355 (Minn.2002). Here, there was no competent evidence establishing that any laws had been, or were about to be, broken. "[T]he statutory language speaks to conduct which has already transpired, and the fact that an avenue of action has been contemplated by the employer and rejected insulates that conduct from the whistleblower proscriptions." *Grundtner*, 730 N.W.2d at 330; *see also Michaelson*, (rejecting attorney's whistleblower claim because he offered no proof of alleged violations). The evidence here, even when

considered in a light most favorable to the verdict, establishes that upon advice of counsel, all of the NeoQi e-mails were retained in multiple forms that were readily available, that Sybaritic did not violate any federal discovery rule or contempt statute, and that it did not obstruct of justice or attempt to obstruct justice. As such, there is no legally sufficient evidentiary basis for a reasonable jury to find that Kidwell engaged in conduct protected by the Whistleblower Act, and Sybaritic is entitled to judgment as a matter of law. Minn. R. Civ. P. 50.01 (a).

**II. Because Kidwell admittedly breached his fiduciary duty to Sybaritic, he was not entitled to recover any post-breach compensation.**

Kidwell contends that because the jury determined that Sybaritic would not have terminated him but for the fact that he sent the difficult-duty e-mail — special-verdict question number 5 — that the jury in effect decided that Kidwell was not terminated because he breached his fiduciary duty and that he is therefore entitled to unearned compensation following that breach. But that argument presupposes that it was proper for the court in the first place to allow the jury to determine that Kidwell was entitled to *any* compensation once it determined that Kidwell breached his fiduciary duty. A breach of a fiduciary duty is not a causally based tort, and thus the jury's findings that Kidwell would have been terminated if he had not engaged in protected conduct is irrelevant once the court found as a matter of law that Kidwell breached his fiduciary duty to Sybaritic.<sup>5</sup>

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<sup>5</sup> Question number five on the verdict form was included here because of the mixed-motive evidence at trial — i.e., plaintiff presented evidence that he was terminated for an illegitimate reason and defendant offered evidence demonstrating that it would have terminated Kidwell regardless of his April 24 e-mail. But once the court determined as a matter of law that Kidwell breached his fiduciary duty, the question, at best, was

*Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. App. 2006)

Unlike money damages that “are awarded as compensation for actual loss or injury, \* \* \* a fee forfeiture is awarded to vindicate a client’s ‘absolute right’ to loyalty, regardless of actual damages sustained.” *Id.* (citing *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (*Perl II*)). In fact, this court has held that “[a] fee forfeiture is thus analogous to punitive or nominal damage.” *Commercial Assocs.*, 712 N.W.2d at 778-79 (citing *Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986) (*Perl III*)). As such, once the court determined as a matter of law that Kidwell breached his fiduciary duty, it was likewise required to find as matter of law that Kidwell forfeited his right to future compensation. *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn.1982) (*Perl I*) (holding that “an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation”). The only discretion that the trial court has after finding that an attorney breached his fiduciary duty is whether to award total or scaled fee forfeiture. *Commercial Assocs.*, 712 N.W.2d at 779 (citing *Perl III*, 387 N.W.2d at 417). In *Perl III*, the Minnesota Supreme Court held that total fee forfeiture is appropriate only when a fiduciary’s breach involves actual fraud, bad faith, or actual harm to the client. *Id.* at 416. But here Sybaritic was not asking for total fee forfeiture — the return of everything Sybaritic paid to its general counsel. Instead, it sought only to have the court find that Kidwell was not entitled to any unearned compensation following his termination and

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superfluous because Sybaritic had the right as a matter of law to terminate Kidwell and, in turn, Kidwell was not entitled to any post-breach compensation.

after he had breached his fiduciary duty, and thus Kidwell's discussion about his absence of bad faith and Sybaritic's failure to establish any harm is irrelevant. Once the court directed verdict on the breach-of-fiduciary-duty claim, it was required as a matter of law to also direct a verdict that Kidwell was not entitled to any compensation following that breach. Its failure to do so was an error as a matter of law, entitling Sybaritic to judgment as a matter of law.<sup>6</sup>

Nor should Kidwell be able to seek refuge in the Whistleblower Act when he simultaneously breached his duty of loyalty and confidentiality by sending that same e-mail to a nonemployee. This court should find as the Fifth Circuit did when it held that any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside the protection of federal employment/retaliation laws. *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 376-77 (5th Cir. 1998). Here, too, the court should find that an attorney cannot violate his professional obligation of confidentiality and, at the same time, seek sanctuary under the Whistleblower Act to prevent him from ever being terminated despite the admitted breach. Because Kidwell breached his fiduciary duty, he is not entitled to compensation

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<sup>6</sup> Kidwell references some off-the-record discussion about the court's alleged admonition that it would stand by the jury's damage award on the fiduciary-duty claim if that question was submitted to the jury. (Resp.'s br. at 24 n.6 – no citation to the record provided). But Kidwell ignores that the court allowed the jury to determine if Kidwell was entitled to unearned compensation only *after* it denied Sybaritic's on-the-record motion that Kidwell was not entitled to *any* post-breach damages as a matter of law. (T.774-75) In any event, this court should strike Kidwell's reference to off-the-record discussion. *Stageberg v. Stageberg*, 695 N.W.2d 609 (Minn. App. 2005), *review denied* (July 19, 2005).

following that breach as a matter of law, and the trial court erred in not granting Sybaritic judgment as a matter of law.

**III. Public policy consideration require that, as a matter of law, Kidwell is not entitled to whistleblower protection.**

Kidwell claims that because the Rules of Professional Conduct now allow an attorney to “reveal information relating to the representation of a client if \* \* \* the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client \* \* \* ” [Minn. R. Prof'l Conduct 1.6(b)(8)], in-house counsel has the unfettered right to bring a retaliatory-discharge claim, despite the Minnesota Supreme Court’s rejection of cases that do “violence to the integrity of the attorney-client relationship.” *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991). Kidwell contends that because attorneys can now reveal a client’s confidential information to establish a claim against that client, the fear that retaliatory-discharge actions will do violence to the attorney-client relationship is no longer warranted. The *Nordling* court’s admonition against such claims, however, involves concerns that are much broader than just the duty of confidentiality.

The need for trust and confidence in counsel’s advice lies at the heart of this fiduciary relationship. *Nordling*, 478 N.W.2d at 501. In-house counsel are typically expected to, and in fact do, provide advice on a wide variety of matters. That was the case with Kidwell. A client needs to be able to trust that advice and to be free to follow or reject it after taking into account a variety of business factors. When that trust and

confidence in the legal advice received is lost, the client must retain the inviolate right to terminate that relationship without fear that it will be sued. Otherwise, the risk of employing in-house counsel will outweigh any benefit the employer may get by having ready access to legal advice. But this case illustrates that if such actions are allowed, in-house counsel will be able to make himself “un-disposable” — as opposed to indispensable — simply by supplying legal advice to the employer/client. What client would ever want to seek advice from in-house counsel if that advice — whether followed or not — could be used to make that attorney immune from termination? In short, the idea that an attorney can support a retaliatory-discharge claim on the basis of the advice it provided to its client does violence to the very heart of the attorney-client relationship because it would effectively eliminate the right of termination by a client who no longer trusts the quality or value of the advice that its counsel is providing for whatever reason. That is especially true here where the client followed that advice, and the attorney took no steps beyond giving that advice.

Thus, even if this court determines that the change in the Rules of Professional Conduct allow a wider range of actions by in-house counsel than provided for in *Nordling* and *Michaelson*, it should not permit actions where, like here, the basis for the action is that counsel provided the kind of advice that he was expected to provide in the normal course of his duties as general counsel. Unlike the cases cited by plaintiff, Kidwell never went outside the scope of his employment — i.e., he never did anything other than reiterate legal advice that he had already provided. For example, he never reported any conduct that he suspected was illegal to an outside regulatory agency [*see*,

*e.g.*, *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852, 856 (Tenn. 2002) (where in-house counsel terminated after reporting that her superior had not completed licensing requirements)]; he was not attempting to cooperate with any outside investigation of the client's alleged wrongdoing [*see, e.g.*, *Heckman v. Zurich Holding Co. of Am.*, \_\_\_ F.R.D. \_\_\_, 2007 WL 1347753, (D. Kan. May 8, 2007) (where in-house counsel was attempting to cooperate with outside investigation of insurer's alleged compliance violations)]; and he was not terminated for refusing to engage in illegal activity that obviously fell outside his job duties. *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1033 (Mont. 2000) (where attorney claims he was ordered to prepare fraudulent patent application).

Here, Kidwell did none of these things. Instead, he gave his client legal advice about active litigation that he was handling for that client and then, when terminated, used that advice to support a retaliation claim against the client. This action does the very kind of violence to the attorney-client relationship against which the *Nordling* court warned, and regardless of whether attorneys in some instances can now reveal client confidences, this action should be barred as a matter of law.

#### **IV. Sybaritic properly protected its attorney-client privilege.**

Plaintiff first contends that Sybaritic waived its attorney-client privilege by defending his whistleblower action. But this argument only further establishes the point made above. By allowing this action, Sybaritic was forced to defend its absolute right to terminate its in-house counsel once it lost confidence and trust in him. But for the lawsuit, Sybaritic would never have had to assert those claims. Moreover, had Kidwell

not waited until trial to finally admit that he had breached his fiduciary duty by sending the difficult-duty e-mail to his father, Sybaritic would have had no need to disclose any privileged document to support that claim.

In any event, Sybaritic attempted without success to have the court prohibit the admission of privileged documents, even while conceding that doing so would negatively impact its ability to defend itself. (T.17-18; 45-47; 218). At hearings the month before trial and on the day before trial began, Sybaritic brought motions to prevent admission of documents Kidwell intended to introduce on the grounds that they were protected by the attorney-client privilege. (T.16-20; Vol. II of transcript; R.A.1-12). Those objected-to documents related to the topics Kidwell addressed in his difficult-duty e-mail. *Id.* While the court did not permit Kidwell to introduce many of these documents, it nevertheless allowed Kidwell to discuss their content at length, despite the fact that doing so allowed Kidwell to reveal the privileged legal advice and analysis that he had previously provided to Sybaritic. (T.189-207, 217-22). Thus, the record demonstrates that Sybaritic properly preserved its objections and did not voluntarily waive its privilege.

This is true even though these particular objected-to documents were not listed in the privilege log that Sybaritic produced during discovery. That log was limited only to documents that Sybaritic had been asked to produce and that were not already in Kidwell's possession. On the other hand, the documents that were subject to the motion in limine on the eve of trial were all documents that Kidwell had produced and, since they were already in his possession, there would have been no point in including them in the log. Moreover, Kidwell cites no law for his suggestion that the failure to stamp a

document “confidential” either waives or invokes the attorney-client privilege. *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 62 N.W.2d 688 (1954) (distinguishing between attorney’s duty to preserve client’s confidences and evidentiary attorney-client privilege).

As was the case throughout trial, Kidwell accuses Sybaritic of attempting to use the attorney-client privilege as both a sword and a shield, citing the fact that Sybaritic called Tom Atmore, its outside counsel, to testify. Essentially Kidwell’s argument is that Sybaritic only invoked its attorney-client privilege when it sought to exclude unfavorable evidence. Kidwell’s argument ignores a few key points. First, more than one month before trial, Sybaritic moved to exclude Kidwell’s difficult-duty e-mail and Atmore’s April 19 and April 25 letters about NeoQi litigation, even though the April 25 letter was helpful to the defense because it established that there was no merit to the accusations of illegal conduct in Kidwell’s difficult-duty e-mail. (T.16-20; A.82-83; A.86). In any event, Atmore took the stand only after the court allowed Kidwell to discuss at length the April 19, 2005 letter that Atmore wrote to Sybaritic about the need to preserve evidence. (T.225-30). Thus, the court had already permitted the privilege to be destroyed, leaving Sybaritic with no other option but to defend itself by questioning Atmore about the privileged information that had already been disclosed during plaintiff’s case-in-chief. In short, Sybaritic could do no more than it did to preserve its attorney-client privilege under the circumstances of this case, and there is no basis for holding that it voluntarily waived its attorney-client privilege.

**V. Sybaritic is entitled to a new trial because the court's jury instructions were erroneous and prejudicial.**

Kidwell argues that even though this court has held on a number of occasions that an employee is not engaging in protected activity if it is that employee's job to bring such matters to the employer's attention, this not the law and thus the jury did not need to be so instructed. As argued above, that is simply not the case. *Grundtner*, 730 N.W.2d at 330; *Gee*, 700 N.W.2d at 556; *Erickson*, 2005 WL 2277395 \*7 (A.111); *see also Skare v. Extendicare Health Serv., Inc.*, 431 F. Supp.2d 969, 979-80 (D. Minn. 2006); *Freeman*, 404 F. Supp. 2d at 1139.

Moreover, the fact that Minnesota's Jury Instruction Guide does not specifically provide an instruction incorporating this aspect of the substantive whistleblower law is inconsequential. In fact, the JIGS specifically note that while the instructions provided contemplate the "more frequently tried civil cases," "every case is different and every trial is different." 4 *Minnesota Practice*, explanatory note at xxix (4th ed. 2006). Thus, "since the instructions are merely *guides* for the trial lawyer and judge, it is intended that they be personalized to the facts of each particular case." *Id.* (quoting JIG, 3d ed., p. xiii) (emphasis added in later edition). Indeed, if the JIGS alone had been sufficient for this case, there would have been no need for Kidwell's own requested special jury instructions.

A party is entitled to jury instructions that set forth its theory of the case if the evidence supports it and if it is consistent with the applicable law. *Kirsebom v. Connelly*, 486 N.W.2d 172, 174 (Minn. App. 1992) (citations omitted). Sybaritic was entitled to its

requested protected-activity instructions because that is the law as this court has held, and it was error for the trial court to deny the requested instruction. Moreover, that error was compounded because the instruction that the court ultimately gave left the jury with an understanding of the law that is quite the opposite of what it is — i.e., that if Kidwell was acting within his job duties as defendant’s general counsel, it should find that he engaged in protected activity. Thus, the court not only erred by omission, but it also plainly misstated what the law requires. The court likewise erred in failing to instruct the jury that an employee does not engage in protected activity if it is merely reiterating advice that it already provided to the employer, even though that is the law. *Obst*, 614 N.W.2d at 203. These errors were prejudicial, entitling Sybaritic to a new trial.

**VI. It was prejudicial error to admit evidence of Steve Daffer’s 25-year-old conviction.**

Kidwell contends that he did not offer evidence of Steve Daffer’s 25-year-old conviction for the improper purposes of proving conformity, but that this evidence was instead introduced to show that Kidwell was acting in good faith when he sent the difficult-duty e-mail. Thus, Kidwell argues that he offered the evidence to prove that he sent the e-mail because he believed that if he did not, Daffer would again engage in an illegal act by destroying evidence. In other words, the evidence was offered to establish that Daffer had once again committed, or was about to commit, illegal and/or unethical conduct just as he did 25 years ago — i.e., that he acted in conformity with early wrongful acts. The Rules of Evidence do not allow past convictions to be used for this purpose, and the court erred in allowing its admission.

Kidwell's claim that he decided to introduce this evidence only after hearing defendant's opening statement is disingenuous. More than one month before trial, Kidwell successfully opposed Sybaritic's motion to exclude this evidence, stating that he intended to use it to show that he believed Daffer would again engage in unlawful conduct. As such, defendant's opening statement didn't cause plaintiff to introduce this evidence because it was already part of his announced trial strategy. In summary, because this evidence was ultimately intended only to establish that Daffer was acting in conformity with conduct that occurred 25-years ago and because that evidence unfairly prejudiced defendant, it is entitled to a new trial.

**VII. The court improperly excluded Sybaritic's letter as an offer of compromise.**

Kidwell contends that the district court properly excluded a letter from Sybaritic's counsel to him, deeming it a settlement discussion barred by Minn. R. Evid. 408. (Resp.'s br. 46). But Rule 408 "does not require exclusion when the evidence is offered for another purpose." Thus, the district court erred when it determined that Rule 408 required it to exclude the letter because the letter was plainly offered for another purpose, i.e., to show the reasons for Kidwell's termination (the few lines pertaining to settlement could have easily been redacted). (A.96-99). While Kidwell is correct that district court could have theoretically excluded the evidence on some other basis, that is not what occurred and so that argument is not before this court. (A.46). Here, the letter was also offered for a legitimate purpose, i.e., to negate Kidwell's insinuation that Sybaritic's reasons for terminating him repeatedly shifted, a point that Kidwell belabored throughout trial in an effort to establish that his admitted breach of fiduciary duty was not a basis for

his termination and that he was instead terminated in retaliation for sending the difficult-duty e-mail. As a result, the evidence does not fulfill the requisites necessary to exclude under Rule 408, and the trial court erred when it excluded it.

**VIII. The district court properly denied Kidwell's punitive-damage motion.**

Kidwell claims that the district court abused its discretion when it denied his motion to add a punitive-damage claim. (A.50). This court will not reverse a district court's decision to deny a motion to add a punitive-damage claim absent an abuse of discretion. *LeDoux v. N.W. Publ'g, Inc.*, 521 N.W.2d 59, 68-69 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994). The district court here did not abuse its discretion when it concluded that there was no clear and convincing evidence that Sybaritic deliberately disregarded Kidwell's rights because it correctly ascertained that Kidwell could not meet this exceedingly high burden of proof. (A.47). Kidwell seems to suggest that the jury's verdict that a wrongful termination occurred is proof that the district court improperly denied his punitive-damages motion. (A.50). But this court's review is limited to the time at which the motion was made. *See Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998) (holding that appellate review is limited to record when district court heard and decided motion). Furthermore, the jury reached its verdict on only a preponderance of the evidence while the district court applied a clear-and-convincing standard to the evidence when denying Kidwell's motion. *See, e.g., Carpenter v. Nelson*, 257 Minn. 424, 427, 101 N.W.2d 918, 921 (1960) (stating that in civil actions, standard of proof required is generally fair preponderance of

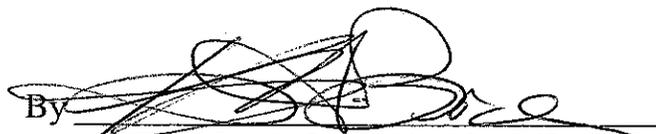
evidence); Minn. Stat. § 549.20, subd. 1(a) (2006) (requiring clear and convincing evidence before allowing punitive-damage claim).

Kidwell also contends, oddly enough, that Sybaritic CEO's knowledge of the existence whistleblower laws proves that he deliberately disregarded them. (A.50). But that is an unsupported leap of logic; knowledge of the existence of law does not remotely support the contention that an individual or company violated that law. In sum, the district court did not abuse its discretion when it denied Kidwell's punitive-damages motion because it correctly concluded that Kidwell did not prove by clear and convincing evidence that Sybaritic deliberately disregarded his rights.

### CONCLUSION

In summary, Sybaritic is entitled to judgment as a matter of law because the evidence failed to establish that Kidwell engaged in protected activity under Minnesota's Whistleblower Act. Moreover, in light of the court's directed verdict that Kidwell breached his fiduciary duty, Kidwell was not entitled to any post-breach compensation, and the court erred as a matter of law by allowing the jury to award those damages. In the alternative, Sybaritic is entitled to a new trial because of prejudicial evidentiary and jury-instruction errors.

Dated: August 13, 2007

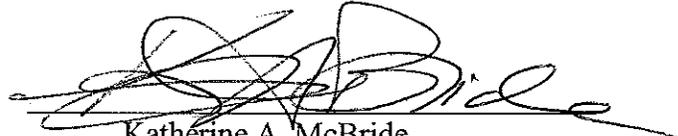
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## CERTIFICATE OF COMPLIANCE

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