

Nos. A07-584, A07-788

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State of Minnesota  
**In Supreme Court**

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Brian Kidwell,

*Appellant,*

v.

Sybaritic, Inc.,

*Respondent.*

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**REPLY BRIEF OF APPELLANT BRIAN KIDWELL**

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## ARGUMENT

### I. A Communication Made Within The Scope of One's Job Duties Can Also Be Made For The Purpose Of Exposing An Illegality

Sybaritic cites to a number of Minnesota-based cases that it believes supports the position that a whistleblower cannot act in good faith if his report contains information that he is obligated to provide in carrying out his job duties. Although the cases involve the plaintiffs' job responsibilities, they have "one simple fact in common...the plaintiffs did not report illegal conduct." (App. 33-34). None of them, not Grundtner, Gee, Michaelson, Skare or Freeman, was decided on the issue of good faith. As a result, they do not serve to strengthen Sybaritic's argument.

Sybaritic also looks to a number federal court decisions for support in its claim that a whistleblower cannot act in good faith if he is obligated by his job duties to make a report. Never mind that these cases, which involve *federal* laws and were decided by *federal* courts outside of Minnesota, possess no precedential authority, these cases also fail to bolster Sybaritic's claim. In fact, under the federal Whistleblower Protection Act ("WPA"), plaintiffs with job-duty related disclosures regularly maintain actionable claims. See Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1354 (Fed. Cir. 2001) (explaining that an employee who is obligated to report wrongdoing is clearly protected under the WPA if the report is made outside of normal channels); Marano v. Dept. of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993) (noting that the WPA applies to the situation where a government

employee discloses information that is closely related to the employee's day-to-day responsibilities). It is only in the limited circumstances when a disclosure does not further the purpose of the WPA, which is "to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it," that a job-duty related disclosure creates a bar to recovery. Horton v. Dept. of Navy, 66 F.3d 279, 282 (Fed. Cir. 1995); see also, Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1349 (Fed. Cir. 2001); Willis v. Dept. of Agriculture, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

Similarly under the False Claims Act ("FCA"), a job related report is not a *per se* bar to recovery; although, because the FCA requires a reporter to provide notice that he is engaging in protected activity, a job related report will not be actionable if it fails to provide notice. See e.g., United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1523 (10th Cir. 1996); Brandon v. Anesthesia & Pain Mgmt. Assoc., 277 F.3d 936, 945 (7th Cir. 2002). In the cases that Sybaritic cites, the failure to provide notice, not the fact that the report was job-related, was the reason for dismissing the plaintiffs' claims.

It stands to reason that the case law fails to strengthen Sybaritic's argument because the underlying assumption behind it, that a whistleblower cannot act in good faith if he makes a job related report, is flawed. Sybaritic's argument, and the Court of Appeals decision, assumes that a report can have one and only one purpose; and if a reporter has an obligation to make a report, then the reporter can have no other purpose for making the report. Common sense suggests otherwise.

Take for example, the case of a teacher that is required to report child abuse. If the teacher reports the abuse, is he doing so only because of his job responsibility? Is it true that by virtue of having an obligation to report the abuse, the teacher has no other purpose (e.g., preventing the abuse) for doing so? The answer is obviously no. Or, take the case of an attorney that is required under the rules of professional responsibility to withdraw from a case if his physical condition materially impairs his ability to represent a client. When the attorney withdraws, it is only because of his professional obligation, or could it also be because he recognizes that the withdrawal is in the best interests of his client? Just as the teacher and the attorney in these examples can, and likely do, have multiple purposes for their actions, so too can a whistleblower under the Minnesota Whistleblower Act (or any other whistleblower statute) have multiple purposes for his report. An obligation to make a report does not, in and of itself, strip a whistleblower from also making the report in order to expose an illegality. Sybaritic's failure to take this into account is fatal.

Indeed, the jury in this case, possibly reflecting upon a whistleblower's ability to have a dual purpose in making a report, decided that Kidwell engaged in protected activity when he sent the Difficult Duty email. (App. 57). The court instructed the jury that that a whistleblower engages in a protected activity if the purpose of the report "was to blow the whistle for the purpose of exposing an illegality that is a violation of federal state or local law." (T. 867-68). During trial, Sybaritic submitted evidence that sending the Difficult Duty email fell

squarely within Kidwell's job responsibilities. Even with this in mind, the jury ultimately concluded that Kidwell sent his email for the purpose of exposing an illegality. (App. 57-58). Because the jury's factual findings in this regard are reasonable, they should stand. Pouliot v. Fitzsimmons, 582 N.W.2d 221, 224 (Minn. 1998).

**II. A Job-Duties Exception Eliminates Whistleblower Protections For In-House Counsel**

Sybaritic asserts that the Court of Appeals holding, which creates a job-duties exception to the Whistleblower Act, does not eliminate the right of in-house counsel to bring whistleblower claims. According to Sybaritic, because Rule 1.13 of the Minnesota Rules of Professional Conduct allows an attorney to disclose confidential information outside of the organization after his corporate client "insists upon or fails to address in a timely and appropriate manner an action, or refusal to act, that is clearly a violation of the law," an in-house lawyer can still seek redress under the Whistleblower Act. Sybaritic posits that the corporate lawyer can (and will) utilize the provision in the Whistleblower Act that allows a report to be made to "any governmental body or law enforcement official." Minn. Stat. § 181.932(1)(a). Sybaritic's theory, however, fails to consider that the Rules of Professional Conduct allow an in-house attorney to report a violation of law to a governmental body or law enforcement official *only after* his client "insists upon or fails to address...an action, or refusal to act, that is clearly a violation of law." Minn. R. Prof. Conduct. 1.13(c). An in-house attorney that is discharged

immediately after he reports a violation or suspected violation of law to his employer receives no protection from the Act. For all practical purposes, then, the job-duties exception to the Whistleblower Act does eliminate the right of in-house counsel to bring whistleblower claims.

The Court does not need to look beyond the facts of this case to see that Sybaritic's theory of protection is mistaken. Kidwell, in accordance with Rule 1.13, reported violations or suspected violations of law his employer before "advis[ing] the appropriate authorities," as he threatened to do in the Difficult Duty email. (R. App. 1-2). Before he had the opportunity to report Sybaritic's violations of law to a governmental body or law enforcement official, he was terminated. For Kidwell, and others like him, a job-duties exception is a bar to protection under the Whistleblower Act.

The Whistleblower Act was enacted to protect the general public through the medium of shielding from retaliation employees who "blow the whistle." Janklow v. Minnesota Bd. of Examiners for Nursing Home Adm'rs., 552 N.W.2d 711, 717 (Minn. 1996). It seems anomalous that a lawyer employee, who has affirmative obligations concerning the administration of justice should be denied recourse for a termination resulting from trying to carry out those very obligations. Crews v. Buckman Laboratories Int'l., Inc., 78 S.W.3d 852, 859 (Tenn. 2002) (citations omitted). The plain language of the statute does not create distinctions between categories of employees, and the enforcement of the Act should not create distinctions either.

### **III. Whether the Difficult Duty Email Fulfilled An Essential Function of Kidwell's Job Has Not Yet Been Decided**

Sybaritic asserts that Kidwell's Difficult Duty email fulfilled an essential function of his job, and therefore asks this Court to find, as a matter of law, that it can not serve as a protected report. Even if this Court agrees that a report that fulfills an essential job function is not a protected under the Whistleblower Act, whether the email fulfilled an essential function of his job (or even constituted a normal part of his job) is a fact issue that must be, but has not yet been, decided by a jury. See Heise v. Genuine Parts Co., 900 F.Supp. 1137, 1153 (D. Minn. 1995) (essential job functions are questions of fact).

Admittedly, as Sybaritic points out, there is evidence in the record that Kidwell was acting within the broad scope of his employment when he sent the Difficult Duty email. However, simply acting within the broad scope of one's employment cannot possibly, as a matter of law, preclude an actionable whistleblower claim. Indeed, the Whistleblower Act requires an employee-employer relationship before liability can attach. Minn. Stat. 181.932.

Sybaritic also asks this Court to find that evidence in the record, that Kidwell's Difficult Duty email fell within the tasks outlined in his job description, prevents him, as a matter of law, from asserting an actionable claim. However, merely fulfilling the tasks outlined in a job description does not necessarily establish fulfillment of an essential job function, or even performance of a normal job duty. See Garcetti v. Ceballos, 547 U.S. 410, 424-25 (2006) (explaining that

“...Formal job descriptions often bear little resemblance to the duties an employee is expected to perform.”). The evidence in the record simply does not support finding, as a matter of law, that in making his report Kidwell was fulfilling an essential job function or even performing his normal job duties<sup>1</sup>.

Moreover, there is evidence in the record to indicate that Kidwell did not fulfill an essential function or engage in his normal job duties when he sent the Difficult Duty email. In his the e-mail, Kidwell did not merely give feedback to his supervisors regarding proposed business decisions. (R. App. 1-2). Rather, he made an unambiguous report that the company was intentionally violating the law, and he threatened to go to the authorities. (*Id.*). He did this outside of regular business hours, on his own time, and not in the normal course of business. (T. 405-09). A jury could certainly use this evidence to decide that Kidwell went beyond the scope of his normal job duties when he “blew the whistle” on Sybaritic’s unlawful behavior.

#### **IV. Kidwell’s Whistleblower Claim Does Not Do Violence To The Attorney Client Relationship**

Sybaritic asks this Court to prohibit whistleblower actions that arise out of, and therefore do violence to the integrity of, the client-attorney relationship. In essence, Sybaritic is asking the Court to ignore existing case law, and rewrite the Rules of Professional Conduct.

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<sup>1</sup> Even Sybaritic acknowledges that a job-duties exception should be limited to “employees performing their normal job duties.” (Res. Br. at 26).

In Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991) (“Nordling II”), the Minnesota Supreme Court ruled “that an employee who is in-house attorney for his corporate employer is not, by reason of the attorney-client relationship, precluded from making a claim against the employer for wrongful discharge.” Id. at 499. The Supreme Court’s decision in Nordling II overruled the decision of the court of appeals in Nordling I that the claims of an in-house attorney for wrongful discharge were precluded by “the general rule allowing a client an unfettered right to discharge its attorney...,” the very same argument that Sybaritic is advancing here. Nordling v. Northern States Power Co., 465 N.W.2d 81, 86 (Minn. Ct. App.1991) (“Nordling I”).

The Supreme Court’s decision in Nordling II was not announced without qualifications. Specifically, the Court observed that the nature of the attorney-client relationship precluded a lawyer-employee’s attempt “to foist himself upon an unwilling client,” and that the relief to which Nordling might be entitled was limited to money damages (i.e., it could not include reinstatement). Nordling, 478 N.W.2d at 503. The Supreme Court also pointed out that an attorney-employee’s right to bring a claim for retaliatory discharge was conditioned upon the ability of the attorney to make his case “without violence to the integrity of the attorney-client relationship.” Id. Specifically, the Court stated:

We assume that the trial court in this case will proceed, if a claim of privilege is raised, as it would with any claim of privilege. The trial court will decide whether or not there is a privilege for the

data sought to be used, and, if so, whether the privilege has been waived.

Id. (footnotes omitted).

The Supreme Court's decision in Nordling II is clear: an in-house attorney is not barred from bringing a claim for wrongful discharge against his employer. In part, the Nordling II court ruled that an in-house attorney could bring a wrongful discharge claim because "the fact remains...that the in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship [to the attorney-employee]." 478 N.W.2d at 502. The Court noted that the employee-employer relationship made the usual concerns of client trust and attorney autonomy less likely to be implicated in the in-house attorney context. Id. With this in mind, the Nordling II Court contemplated the disclosure of privileged information by the attorney. With respect to the permissible circumstances for the disclosure of confidential information, the Court referenced the exceptions provided in Rule 1.6 of the Minnesota Rules of Professional Conduct, indicating that an attorney may introduce confidential information to the extent permitted by Rule 1.6 of the Minnesota Rules of Professional Conduct.

In 2005, Rule 1.6 of the Rules of Professional Conduct was amended and the following provision was added:

A lawyer may 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, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client.

Minn. R. Prof. Conduct, Rule 1.6(b)(8). Pursuant to Rule 1.6(b)(8), an in-house attorney may bring a retaliatory discharge claim against his employer even if he needs to reveal what would otherwise be construed as confidential information to assert his claim.<sup>2</sup> Put another way, Rule 1.6 permits an in-house attorney to make a retaliatory discharge claim "without violence to the integrity of the attorney-client relationship." Nordling, 478 N.W.2d at 503.

Nordling II and the Rules of Professional Conduct conclusively establish that an in-house attorney, like Kidwell, can bring a retaliatory discharge claim against his employer without doing violence to the integrity of the attorney-client privilege.

**V. Sybaritic Is Not Entitled To A New Trial Because The Court's Jury Instructions Were Proper**

Appellate courts review a district court's decision on jury instructions under an abuse of discretion standard. Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002). Generally, the district courts have "considerable latitude" in

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<sup>2</sup> The American Bar Association's Model Rules also allow a lawyer to disclose confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." Model R. Prof. Conduct, Rule 1.6(b)(5). This language is nearly identical to the language of Minnesota's Rules of Professional Conduct. According to a 2001 American Bar Association opinion, a "claim" under this Rule may include "a retaliatory discharge or similar claim by an in-house lawyer against [an] employer." American Bar Assn., Committee on Ethics and Professional Responsibility, Formal Opinion 424, September 22, 2001.

choosing jury instructions. Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002). Although a court errs if it gives a jury instruction that materially misstates the law, State v. Kuhnau, 622 N.W.2d 552, 556 (Minn. 2001), a trial court does not err if it gives jury instructions which “as a whole convey to the jury a clear and correct understanding of the law of the case.” Barnes v. Northwest Airlines, Inc., 47 N.W.2d 180, 187 (1951). “A [jury instruction] which is substantially correct is sufficient.” Id. at 189.

In relevant part, the jury instructions instructed the jury that:

To recover under the [whistleblower] act, Brian Kidwell must prove by a greater weight of the evidence that he engaged in a protected activity, and that there was a causal connection between the protected activity and the adverse employment action.

Protected activity is an employee’s conduct in making a good faith report of an actual or suspected violation of a state or federal law to an employer....

An employee engages in a protected activity under the act if the purpose of the employee’s report to the employer...was to blow the whistle for the purpose of exposing an illegality that is a violation of federal state or local law.

In order to establish that the made a protected report...Brian Kidwell is required to allege facts that if proven constitute a current violation of law.

An employee does not engage in protected activity unless he made a report in good faith. To determine whether a report was made in good faith, you must look not only at the content of the report, but also at Mr. Kidwell’s job and purpose in making the report at the time the report was made, not after subsequent events have transpired.

If Brian Kidwell has sustained his burden of proving that his alleged protected conduct was a substantial or motivating factor

in the adverse employment decision, Sybaritic, Inc., has the opportunity to prove that it would have taken the same adverse action for legitimate reasons.

(T. 867-68). Sybaritic argues that it is entitled to a new trial because the jury instructions given at trial significantly misstated the law. In Sybaritic's view, there is only one way to interpret the given instructions: as advising the jury that Kidwell was acting in good faith and had engaged in protected conduct if Kidwell was simply doing his job when he wrote and sent the Difficult Duty email. Sybaritic is not evaluating the instructions objectively.

Sybaritic urges the Court to focus on only one portion of the instructions: "to determine whether a report was made in good faith, you must look not only at the content of the report, but also at Mr. Kidwell's job and purpose in making the report at the time the report was made..." (T. 868). However, the Court should view the instructions from the standpoint of the total impact or impression upon the jury. Lieberman v. Korsh, 119 N.W.2d 180, 186 (1962). When the total impact of the jury instructions is considered, it is clear that they were proper.

The jury instructions explicitly required the jury to find that "[a]n employee engages in a protected activity under the act if the purpose...was...exposing an illegality." (T. 867-68). In addition, the instructions required the jury to "look not only at the content of the report, but also at Mr. Kidwell's job and purpose in making the report at the time the report." (T. 868). The total impression of the jury instructions is that they advised the jury that Kidwell did not act in good faith if he was merely fulfilling his job duties when he made the report (because if his

purpose was simply to fulfill his job responsibilities, it was not to expose an illegality). Even Sybaritic would agree that such an interpretation is not a misstatement of the law. Taken as a whole, the instructions conveyed “a clear and correct understanding of the law of the case,” Barnes, 47 N.W.2d at 187, and were therefore proper.

Sybaritic also contends, that, as drafted, the jury instructions did not allow the jury to conclude that the Difficult Duty email could create a lawful reason for Kidwell’s termination. This is simply not true. Consider the following section of the jury instructions:

An employee engages in a protected activity under the act if the purpose of the employee’s report to the employer...was to blow the whistle for the purpose of exposing an illegality that is a violation of federal state or local law.

(T. 867-68). If the jury decided that Kidwell’s purpose for sending the email was not to expose an illegality, the Difficult Duty email would have created a lawful reason for Kidwell’s termination. Sybaritic’s argument, that these instructions summarily precluded the jury from finding that the Difficult Duty email created a lawful reason for Kidwell’s termination, is plain wrong.

Sybaritic also asserts that the trial court erred by failing to instruct the jury that:

An employee does not engage in a protected activity if it was the employee’s job to bring to the employer’s attention or the attention of any governmental agency any activities that the employee in good-faith believed were in violation of any federal, state or local law.

(App. 130). However, Sybaritic's proposed jury instruction is not the law. Neither the Whistleblower Act itself, nor the related case law (save the Court of Appeals decision below), indicates that such a jury instruction is appropriate or required.

*A. However, If The Court Holds That There Is A Job-Duties Exception, A New Trial Is Warranted*

Should this Court decide that the Whistleblower Act does encompass a job-duties exception, Sybaritic is correct that a new trial, including jury instructions that address the exception, is required. See Northwestern State Bank v. Foss, 177 N.W.2d 292, 294 (Minn 1970) (explaining that where instructions given to a jury are incomplete, a new trial is appropriate). If a job-duties exception exists, a jury, not the Court, needs to decide whether Kidwell's Difficult Duty email falls within the scope of the exception. Because the jury was not so instructed, the jury instructions at trial were incomplete. Should a job-duties exception to the Whistleblower Act exist, a new trial, allowing the jury to make a determination regarding the exception, is necessary.

**VI. Kidwell Is Entitled To The Jury Award**

Sybaritic urges this Court to find that Kidwell is not entitled to compensation following the trial court's ruling that Kidwell breached his fiduciary duty. The company's argument is premised on the fact that a client may discharge an attorney at any time, with or without cause. However, an employer cannot be shielded from liability simply because it has the "right" to terminate an employee.

In fact, employers regularly enjoy the “right” to terminate its employees. Indeed, as an at-will employer, Sybaritic had the discretion to terminate Kidwell’s employment for “any reason or no reason at all,” so long as the decision was not motivated by retaliatory animus. Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983); Anderson-Johanningmeier, 637 N.W.2d at 273.

The jury, however, found that Syabritic’s decision was motivated by retaliatory animus. In question five of the special verdict form, the jury was specifically asked:

5. Regardless of whether Brian Kidwell engaged in protected conduct, would Sybaritic, Inc. have terminated his employment at the time that they did?

The jury’s answer to this question was “No.” (App. 58). The jury decided that Sybaritic unlawfully terminated Kidwell because he engaged in protected conduct under the Minnesota Whistleblower Act.

Sybaritic argues that the Court should ignore the jury’s finding that Sybaritic’s decision was motivated by retaliatory animus and instead asserts that because Sybaritic also had a legitimate reason to terminate Kidwell, Sybaritic does not have to pay Kidwell’s damages. However, as the Minnesota Supreme Court made clear in McGrath v. TCF Bank Sav., FSB, 509 N.W.2d 365 (Minn. 1993), even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason “more likely than not” motivated the discharge decision. McGrath applies to Kidwell’s case, like it does to any other; Kidwell is entitled to the damages awarded by the jury.

Sybaritic also argues that Kidwell should not be able to seek refuge in the Whistleblower Act when he simultaneously breached his fiduciary duty. Yet, Sybaritic, itself, seeks refuge from its own violation of the Whistleblower Act in Kidwell's breach. While at first blush, this dilemma may seem difficult to resolve, the relevant case law and the jury's findings overwhelmingly weigh in Kidwell's favor.

Particularly relevant to the analysis is this Court's decision in Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986) ("Perl III"). In Perl III, the Supreme Court ruled that "cases of actual fraud or bad faith result in total fee forfeiture." Id. at 417. However, "when no actual fraud or bad faith is involved, when no actual harm is sustained ... we think the better approach is to determine the amount of fee forfeiture by a consideration of the relevant factors set out in Minn. Stat. §549.20, subd. 3 [governing awards of punitive damages in civil cases]." Id. Significantly, the Supreme Court in Perl III held that the amount of any forfeiture is to be determined by the trier of fact. Id.

Sybaritic's claim of disgorgement therefore fails for several reasons. First, Sybaritic cannot prove that Kidwell's breach of fiduciary duty caused the company an independent loss. The record is absolutely void of any evidence that the company suffered financially as a result of Kidwell's communication of the e-mail to his father. Second, Sybaritic cannot not prove that Kidwell's behavior was willful or fraudulent. Kidwell testified that he sent the e-mail to his father because he sought his advice and counsel on how to comply with the law. There was no ill

will or malice in his transmission of the e-mail to his father and Sybaritic did not prove otherwise at trial. Finally, in accord with Perl III, the jury, as the trier of fact, was assigned the task of determining the amount of the forfeiture. Although the jury was instructed that Kidwell had committed a breach of fiduciary duty, and Sybaritic had the ability at trial to present evidence and argument in its favor, the jury nonetheless found that an award of \$0.00 was sufficient to fairly and adequately compensate Sybaritic for the Kidwell's breach of fiduciary duty. Sybaritic's appeal on this issue must fail.

Sybaritic argues that Perl III is not applicable because Perl III involved fees already earned and received, as compared what is at the issue in this case, Kidwell's post-termination award. The distinction between Perl's already earned and received fees and Kidwell's post termination award, however, is a distinction without a difference; the legal analysis is the same. Kidwell's actions were neither willful nor fraudulent, and as a result, he is entitled to keep the jury's award.

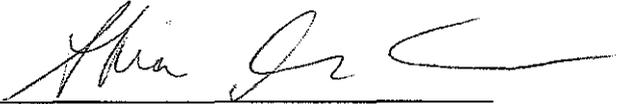
### CONCLUSION

The jury properly found that Sybaritic violated Minnesota's Whistleblower Act when the company terminated Kidwell for making a good faith report of a violation or suspected violation of law. A job-duties exception to the Whistleblower is based on the flawed assumption that a reporter cannot act with more than one purpose – to fulfill a job duty and also to expose an illegality – and is not warranted. However, should the Court decide that a job-duties exception exists, a jury still needs to decide whether Kidwell was engaging in his normal

is not warranted. However, should the Court decide that a job-duties exception exists, a jury still needs to decide whether Kidwell was engaging in his normal work duties when he sent the Difficult Duty email. Minnesota law does not *per se* bar Kidwell from bringing his Whistleblower Claim against Sybaritic, nor does the law prevent him from keeping his award of damages. Thus, Sybaritic is not entitled to judgment as a matter of law. For these reasons, the Court of Appeals decision should be reversed.

Dated: October 30, 2008

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**CERTIFICATE OF COMPLIANCE**

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