

No. A07-2134

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*State of Minnesota  
In Court of Appeals*

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Liberty Mutual Insurance Company,

*Respondent,*

v.

Northeast Concrete Products, LLC, Hallamore Corporation, Hallmark Mechanical Corporation,  
Brockton Rental Service, Inc.,

*Appellants,*

and

Northeast Concrete Products, LLC,

*Appellant,*

vs.

Liberty Mutual Insurance Company,

*Respondent.*

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**RESPONDENT'S BRIEF**

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## QUESTIONS PRESENTED

I. Did the District Court err in determining that Liberty Mutual Insurance Company (“Liberty”) acted in good faith when Liberty agreed to honor its Performance Bond obligations to M.A. Mortenson (“Mortenson”) following Mortenson’s default of Liberty’s bond principal, Northeast Concrete Products, LLC?

II. Did the District Court err in determining that Liberty acted in good faith in executing a settlement agreement with Mortenson which did not waive or otherwise compromise any of NECP’s arbitral claims against Mortenson?

III. Did the District Court err in determining that Liberty did not act in bad faith in making a settlement offer to NECP to resolve all outstanding issues between Liberty and NECP and then writing and calling NECP to reaffirm that Liberty’s settlement offer was negotiable?

IV. Did the District Court err in finding that Liberty was entitled to the \$400,000 payment that Mortenson made to NECP in satisfaction of NECP’s claims under the Subcontract where NECP had previously assigned to Liberty as collateral for its indemnity obligations all of NECP’s “rights, title and interest . . . in and growing in any manner out of” the Subcontract?

## I. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

In order to induce Liberty to execute certain bonds in favor of Mortenson on behalf of NECP, the Appellant/Indemnitors (collectively “NECP”) executed a General Agreement of Indemnity whereby they promised to indemnify and exonerate Liberty for “*any and all losses, fees, costs and expenses of whatever kind or nature*” incurred by the Surety as a result of issuing Bonds to NECP (or as a result of enforcing the covenants and conditions of the Indemnity Agreement). Likewise, in the event of any breach by NECP, all of NECP’s “rights, title and interest . . . *in and growing in any manner out of*” the Subcontract were assigned to Liberty as collateral for NECP’s indemnity and exoneration obligations.

In the proceedings below, Liberty moved for summary judgment on its First Claim for Relief (Exoneration) and its Fourth Claim for Relief (Indemnity) to enforce the plain terms of the Appellants’ exoneration and indemnity obligations. (A.234-266). Liberty also moved for summary judgment on its Second Claim for Relief (Assignment of Collateral) and its Seventh Claim for Relief (Conversion) based upon NECP having wrongfully converted Liberty’s property when it attempted to abscond with a \$400,000 settlement payment from Mortenson which “grew out of” the Subcontract in question. (*Id.*)

NECP’s defense to these claims was premised entirely upon its misplaced contention that Liberty acted in bad faith and therefore cannot enforce its otherwise ironclad rights under the General Agreement of Indemnity. Notably, this bad faith

*defense* was also cast in a separate complaint by NECP as an *affirmative claim*. All parties agree that NECP's "bad faith defense" and its "bad faith claim" are one and the same and these two actions were therefore consolidated by Order dated October 12, 2006.

In ruling upon Liberty's Motion for Summary Judgment on its affirmative claims, the Honorable William R. Howard determined as a matter of law that Liberty acted in good faith as NECP's surety and that Liberty was therefore entitled judgment as a matter of law on its claims for indemnification, exoneration, assignment of collateral and conversion.<sup>1</sup> Following the District Court's award of summary judgment on Liberty's affirmative claims, Liberty filed a Motion to Disburse a \$400,000 settlement payment from Mortenson to NECP which the District Court had frozen and was holding at that time pending final disposition of NECP's bad faith claims. Having already determined that no genuine issue of material fact existed as to whether Liberty acted in "bad faith," the Court granted Liberty's Motion to Disburse these funds by Order dated May 24, 2007 (R.137-39). The \$400,000 in question was then disbursed to Liberty as collateral for NECP's outstanding indemnity and exoneration obligations. (R.139).

Further, inasmuch as NECP's bad faith claims were simply the mirror image of its bad faith defense, Liberty moved for (and obtained) summary judgment on NECP's affirmative claims. Notably, however, in granting judgment in Liberty's favor on its claims (and NECP's claims), the District Court did not enter a specific monetary award. In fact, the District Court concluded that although Liberty was entitled to exoneration, it

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<sup>1</sup> The District Court's April 2007 Order did not mention these claims by name but instead noted that Liberty's Motion for Summary Judgment was granted. (A.227).

had failed to provide sufficient “legal justification to warrant an exoneration reserve of \$1,008,719.40 *at this point in time.*” (A.376, note 1). Rather than determining the specific amount to which Liberty was entitled, the District Court simply noted that it had already “awarded Liberty \$400,000 to cover its indemnity claim and corresponding legal expenses.” (*Id.*)

In view of this unique procedural posture, and in the interest of avoiding a cross-appeal by Liberty, the parties entered into a Stipulation concerning their mutual understanding of the District Court’s September 18, 2007 Order granting summary judgment. (R.140-143). In reliance on this Stipulation, Liberty did not cross-appeal the District’s Court’s denial of its request for an exoneration reserve of \$1,008,719.40 or its failure to award Liberty sufficient exoneration reserves to cover its indemnified expenses in responding to this appeal. The \$400,000 distribution to Liberty is not sufficient to cover Liberty’s indemnified loss (inclusive of legal fees), let alone the costs of responding to this appeal. Accordingly, pursuant to the provisions in the General Agreement of Indemnity entitling Liberty to its legal fees, and pursuant to MINN.R.CIV.APP.P. 127 and 139.06, Liberty will be bringing a motion seeking an award of its attorneys’ fees and costs incurred in responding to this appeal. As the District Court is most familiar with the facts and circumstances of the case, and is in the best position to conduct any necessary hearings/argument on Liberty’s fees, Liberty will be seeking remand to the District Court for the *limited purpose* of determining the award of attorneys’ fees and costs pursuant to MINN.R.CIV.APP.P. 139.06, subd. 2.

## B. SUMMARY OF ARGUMENT

In the case below, NECP could not challenge the fact that Liberty proved its *prima facie* case with respect to Liberty's claims under the General Agreement of Indemnity, and did not even bother to try. Rather, and having nowhere else to turn, NECP sought absolution for its debts through its spurious claims of "bad faith takeover" and "bad faith settlement." See NECP Opposition at 13 ("the paramount question on which *all issues ride* is whether Liberty acted in bad faith.") (A.32); Hearing Transcript, at 5 ("*If [it is] determined [that Liberty] didn't act in bad faith, obviously we're going to lose.*") (emphasis added) (R.126).

Liberty (like this Court and the Court below) has heard all about NECP's fanciful tale of "blackmail," fictitious "waivers," and alleged conspiracies. For that very reason, in its Brief in Support of its Motion for Summary Judgment, Liberty set out a detailed recitation of the facts surrounding the default, Liberty's investigation of the default and Liberty's decision to settle with Mortenson. See Liberty's Summary Judgment Brief, at 5-14 (A.238-247). After thirty-seven pages of NECP briefing before the District Court (and a nearly identical thirty-nine pages of NECP briefing on appeal), those material facts remain uncontested. Rather than attempting to challenge even one of the material facts, NECP uses its appeal brief to attempt, yet again, to "spin" these facts to create false waivers and bogus claims of "blackmail." Quite simply, NECP fails to appreciate the distinction between a genuine dispute of material fact as compared to a dispute concerning NECP's "unique" interpretation of those facts.

With regard to its “bad faith takeover” claim, NECP has no facts (material or otherwise) to share with the Court and therefore offers only a wild, wholly unsubstantiated conspiracy theory. Specifically, NECP surmises that Liberty – who *undisputedly* attempted to get Mortenson to reverse NECP’s default termination – actually agreed to the default (and a year of highly contentious arbitration) so that it could cement its business relationship with Mortenson. The illogic of this supposed “business development plan” is startling.

NECP’s far-fetched conspiracy theories notwithstanding, it is undisputed that Liberty *did* investigate the basis for NECP’s default termination, but NECP offered no explanation as to why a Project that was supposed to be completed as of the date of the default, was, in fact, only half-built.<sup>2</sup> Despite receiving no meaningful information from NECP, all parties agree that Liberty nonetheless attempted to broker a deal whereby Mortenson would rescind the default, subject to Mortenson’s prescribed list of conditions.<sup>3</sup> Yet, by early August 2004, Mortenson advised that it would not rescind the default and that, if Liberty did not undertake its obligation to complete the Project, Mortenson would declare Liberty in default under its Performance Bond, thereby exposing Liberty to limitless liability.<sup>4</sup> To use the District Court’s apt metaphor: “[Liberty] had to take over because Mortenson put a gun to their head.” (R.94-95).

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<sup>2</sup> See Statement of Material Facts, *infra*, pp. 12-13, ¶¶8-9; January 12, 2007 Affidavit of Dennis Pisarcik (“Pisarcik Aff.”), ¶¶6-7 (R.55-56).

<sup>3</sup> See Pisarcik Aff., ¶9 (R.56); August 5, 2004 letter from Mortenson to Liberty (R.12-13).

<sup>4</sup> See Supplemental Affidavit of Dennis Pisarcik (“Supp. Pisarcik Aff.”), ¶¶3-6 (R.61-62); August 5, 2004 letter from Mortenson to Liberty (R.12-13).

Confronted with these undisputed facts, NECP's approach on appeal is simple – say nothing about its “bad faith takeover” claim and hope that the Court of Appeals simply looks past NECP's abandonment of this frivolous claim.

NECP fails to appreciate that the abandonment of its bad faith takeover claim provides yet another nail in the coffin for its baseless “bad faith settlement” claim. To this end, NECP itself confirms that the only reason that it failed to honor its indemnity obligations in the summer of 2006 was because Liberty purportedly acted in “bad faith” when it took over the Project following Mortenson's declaration of default. (Appellants' Br. at 11; Transcript from September 22, 2006 Hearing on Liberty's Motion for TRO, at pp. 38:5-39:13) (R.95-96).

Of course, inasmuch as the Court below determined that NECP had no legally cognizable “bad faith takeover” claim, and with NECP having now essentially abandoned this claim on appeal, NECP's claim of “blackmail” becomes (if possible) even more absurd. That is, NECP claims that Liberty “blackmailed” NECP by offering to assign its \$1.66 million Subcontract Balance claim in exchange for honoring its contractual commitments and foregoing a “bad faith takeover” claim that was never legally cognizable to begin with. In NECP's view, this supposed “blackmail” continued when Liberty made phone calls and sent letters to NECP, advising that Liberty was willing to be flexible concerning the financial terms of the proposed assignment. (R.74-75).

NECP's attempt to parlay Liberty's stipulation concerning the value of the unpaid Subcontract Balance into a waiver of NECP's claims is equally specious. Although NECP makes much of Liberty having stipulated to the Subcontract balance, NECP fails

to mention the undisputed fact that Liberty obtained the \$1,839,358 Subcontract balance figure ***from NECP*** and only included that figure in the settlement agreement when it matched Mortenson's number to the penny. *Id.*, ¶14 (R.74). Nor does NECP explain how stipulating to the unpaid Subcontract balance could waive NECP's claim when NECP itself admits that the unpaid Subcontract Balance did "***not*** include NECP's claims for additional change orders . . . ***nor does it include the almost \$2,000,000 claims NECP has made for losses based on Mortenson's breach.***" (R.90).

For purposes of the upcoming oral argument, Liberty looks forward to NECP's efforts to reconcile the sworn affidavits of the two parties to the Mortenson/Liberty settlement – both of whom have sworn that there was no waiver. Liberty also looks forward to how NECP intends to reconcile the fact that the damages summary which NECP submitted five days ***after*** the Liberty settlement matches (to the penny) the damages summary which NECP submitted five months ***before*** the Liberty settlement. (R.77-80). For that matter, Liberty anxiously awaits NECP's explanation as to why Mortenson needed a "release" from NECP on September 6, 2006 for claims that Liberty ***supposedly*** released on NECP's behalf two weeks earlier. *See* NECP/Mortenson Settlement, ¶3 (R.38).

Liberty cannot prevent NECP from trumpeting the same tired tune on appeal. Yet, by falsely attempting to portray its outlandish claims of "waiver" as a "fact," and recklessly labeling a negotiable settlement offer as "blackmail," NECP's shrill message strikes the wrong chord. The District Court determined as a matter of law that "***the express terms of the [Liberty/Mortenson] settlement agreement did not waive NECP's***

*claims against Mortenson*” (A.231). Consistent with the foregoing, Mortenson has confirmed that – but for the *Mortenson/NECP* settlement agreement – it fully expected that “NECP would have continued to assert in the Arbitration all of the arbitral claims.” See Affidavit of Bradley Funk (“Funk Aff.”), ¶3-4 (R.82). There was no “waiver” of NECP’s arbitral claims and NECP’s unique “interpretation” to the contrary certainly does not create a genuine issue of material fact.

## **II. STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Notwithstanding NECP’s implicit abandonment of its “bad faith takeover” claim, Liberty has set forth the factual background underlying its takeover in some detail. Liberty’s rationale in doing so is simple – the infirmity of NECP’s “bad faith takeover” claim fatally infects its “bad faith settlement” claim as well. That is, in NECP’s view, Liberty “blackmailed” NECP by having the temerity to ask that NECP forego litigation of a “bad faith takeover” claim which is not only legally uncognizable, but is outright sanctionable. Thus, in a very real sense, NECP’s “bad faith takeover” claim is the genesis of this entire case. It is the only grounds that NECP ever gave for failing to pay its indemnity ledger in August 2006 and is therefore the only reason that NECP and Liberty had anything to “settle” in the first place.

### **A. THE P-904 PARKING GARAGE PROJECT**

1. In 2003, Mortenson and the United States Navy (“Navy”) entered into a design/build contract (the “Prime Contract”) relating to the construction of a five-level, 750-space, parking structure known as the P-904 AT/FP Parking Garage (the “Project”).

(Findings of Fact to the District Court's October 24, 2006 Order Granting Liberty's Temporary Injunction ("FOF") at ¶1 (R.109)).

2. On September 25, 2003, Mortenson and NECP entered into a Subcontract (the "Subcontract") whereby Mortenson was to pay NECP \$4,667,000 to structurally design, fabricate and erect the precast concrete superstructure for the Project. (FOF at ¶2 (R.109)).

3. Liberty issued the performance bond for the Project (the "Bond"), naming NECP as principal and Mortenson as obligee. (FOF at ¶2 (R.109); Performance Bond (R.7)). Consistent with the purpose of performance bonds in general, Liberty's Bond assured that, in the event of a breach by NECP, Liberty would remedy the breach and complete the Subcontract in accordance with its terms and conditions. As the Bond "principal," NECP remained liable in the first instance for any breach of the Mortenson/NECP Subcontract. (FOF at ¶3 (R.110); General Agreement of Indemnity, "Indemnity" and "Takeover" Paragraphs (R.1.2-2.1)).

#### **B. THE INDEMNITY AGREEMENT**

4. In order to induce Liberty to provide the surety Bond, Liberty and NECP (together with several additional Indemnitors)<sup>5</sup> entered into a General Agreement of Indemnity ("Indemnity Agreement"). This Agreement contains expansive exoneration and indemnification protections for Liberty. Specifically, pursuant to Paragraph SECOND: INDEMNITY of the Indemnity Agreement, NECP (and the other Indemnitors) agreed to:

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<sup>5</sup> The other Indemnitors include Hallamore, Hallmark, and Brockton. (R.1.1)

[E]xonerate, hold harmless, indemnify, and keep indemnified the Surety from and against *any and all liability for losses, fees, costs and expenses of whatsoever kind* or nature including, but not limited to . . . losses fees, costs and expenses which the Surety may sustain or incur ... (2) by having executed or procured the execution of any Bond; or (3) by reason of the failure of [NECP] or the Indemnitors to perform or comply with the covenants and conditions of this Agreement; or (4) in enforcing any of the covenants or conditions of this Agreement.....

See FOF at ¶4 (R.110); Indemnity Agreement, Paragraph Two, “Indemnity” (emphasis added) (R.1.2).

5. Likewise, in the event of any breach by NECP, all of NECP’s “rights, title and interest . . . *in and growing in any manner out of*” the Subcontract were assigned to Liberty as collateral for NECP’s indemnity and exoneration obligations. (FOF at ¶5 (R.111); Indemnity Agreement, Paragraph Third “Assignment” (emphasis added) (R.1.2)).

**C. MORTENSON’S JULY 14, 2004 TERMINATION OF NECP**

6. NECP’s obligations under the Indemnity Agreement took on added significance when, on July 14, 2004, Mortenson terminated NECP’s Subcontract for default and demanded that Liberty complete the Subcontract. (FOF at ¶6 (R.111)). Two days later (July 16, 2006), Liberty wrote to NECP and the other Indemnitors, advising of Mortenson’s default notice and demanding that NECP “exonerate and indemnify Liberty from and against all asserted liability for losses, fees, costs, and expenses of whatever kind and against all losses, fees, costs and expense that Liberty may sustain or be required to sustain as a result of having executed the [Performance Bond] on behalf of

NECP.” (FOF at ¶6 (R.111); July 16, 2004 letter from Liberty to the Indemnitors (R.9-10)).

7. Mortenson’s default termination of NECP was predicated generally upon the following three issues. *First*, Mortenson claimed that the time for substantial completion of NECP’s subcontract work expired on June 1, 2004 and yet – six weeks after the work was supposed to be substantially complete – NECP was at best only half done. *Second*, Mortenson claimed that the precast pieces that NECP had installed prior to the default exhibited numerous quality and workmanship defects. *Third*, Mortenson claimed that NECP’s failure to honor Mortenson’s July 13, 2004 request to move its crane reflected an “abandonment” of the Project. *See* Pisarcik Aff., ¶ 6 (R.55).

8. NECP’s subcontract with Mortenson specified a substantial completion date of June 1, 2004. Yet, Liberty’s post-default investigation confirmed that, as of the date of the default (July 14, 2004), NECP had only installed half of the precast pieces. (*Id.* at ¶7). When Liberty asked NECP to explain any delays that may be attributable to Mortenson, the only information that NECP provided concerned Mortenson’s failure to construct a crane ramp which was required for NECP to move to the next phase of construction. (*Id.*). It is undisputed that NECP was ready to move to the next phase on June 28, 2004 and that Mortenson constructed this crane ramp on July 6, 2004. In other words, Mortenson was claiming (and the precast piece count confirmed) that the Project was months behind schedule and yet NECP only raised an issue regarding a crane ramp that accounted for, at most, eight days of Project delay. (*Id.*).

9. With regard to the remaining issues, NECP disputed the extent of Mortenson's claims of defective work but agreed that certain aspects of its work were nonconforming and in need of repair. (*Id.* at ¶ 8). Finally, NECP admitted that – in view of alleged nonpayment by Mortenson – NECP did not move its crane on July 13, 2004 despite Mortenson's demand that it do so. (*Id.*). In view of NECP's failure to provide a meaningful explanation as to the basis for Project delay, Liberty was unable to reach any substantive conclusion (one way or the other) regarding the propriety of the default. (*Id.*).

10. Liberty initially attempted to render this issue moot by trying to persuade Mortenson to rescind the default and allow NECP to remain as Mortenson's subcontractor. (*Id.* at ¶9). However, on August 5, 2004, Mortenson informed Liberty that it would not rescind the default, and that failing a takeover by Liberty:

***Mortenson will be forced to directly take over performance of NECP's work, and look to Liberty Mutual for reimbursement of costs incurred.*** The costs of the options available to Mortenson for completion of the work will undoubtedly be much higher than those available to Liberty Mutual.

(*Id.* at ¶9; FOF, ¶7 (R.111-112); August 5, 2004 letter from Mortenson to Liberty (emphasis added) (R.12-13)).

11. Liberty's Senior Surety Counsel (Dennis Pisarcik) was responsible for determining Liberty's obligations under the Performance Bond and the appropriate course of action in response to Mortenson's declaration of default. (Supp. Pisarcik Aff., at ¶2 (R.61)).

12. Because a declaration of default under the Performance Bond could expose Liberty (and derivatively NECP) to very significant liability, and consistent with Liberty's desire to mitigate any further losses or Project delays, Liberty (acting through Mr. Pisarcik) agreed to takeover and complete the Project subject to a full reservation of Liberty's (and NECP's) rights. Notably, this reservation of rights included the right to contest the validity of NECP's default. (FOF at ¶8 (R.112); Supp. Pisarcik Aff., ¶2-6 (R.61-62)).

13. Mr. Pisarcik testified that he made the decision to takeover the Project based upon the following considerations:

- a. The status of the Project (it was only half built and yet the contractually defined substantial completion date had already lapsed);
- b. NECP's failure to provide any meaningful explanation or documentation as to why the Project was so far behind schedule;
- c. The parties' agreement that a substantial amount of remedial work was required;
- d. Liberty's belief that allowing Mortenson to default Liberty's bond and reprocur with a new precaster would dramatically increase the scope of damages at issue and could be argued to waive the penal sum limitations of the performance bond; and
- e. The likelihood that inaction by Liberty could result in a bad faith claim by Mortenson, especially if the Navy carried through on its threat to terminate Mortenson's contract based upon the delays attributable to NECP.

Supp. Pisarcik Aff., ¶6 (R.62).

14. Mr. Pisarcik further testified that the extent to which Liberty writes bonds or insurance for Mortenson played no role whatsoever in his decision-making process

and, in fact, he did not even learn that Liberty wrote insurance for Mortenson until 2.5 years *after* the default. *Id.*, ¶¶7-8 (R.62).

**D. NECP WAS LIBERTY'S INDEMNITOR, NOT ITS SUBCONTRACTOR**

15. Following the takeover demand by Mortenson, Liberty took over the Project and proceeded to complete it, as was its right to do under the Indemnity Agreement's "Takeover Clause." See Indemnity Agreement, (R.2.1). Specifically, the Indemnity Agreement's "Takeover" clause states in relevant part:

In the event of any breach or default *asserted by the obligee* in any Bond . . . the Surety shall have the right, at its option and in its sole discretion *and is hereby authorized . . . to take possession* of any part or all of the work under any contract or contracts covered by any Bond, *and at the expense of the Principals and Indemnitors to complete or arrange for the completion of the same*, and the Principals shall promptly, upon demand, pay to the Surety all losses, fees, costs and expenses so incurred.

*Id.* (emphasis added).

16. Following its default, NECP performed its work on the Project pursuant to the Indemnity Agreement's Takeover Clause. That is, rather than having Liberty hire another precaster (and send the Indemnitors the bill), NECP did much of the work itself, and thereby reduced its indemnity tab. *Id.*; Liberty's Verified Response to NECP's Tenth Request for Admission ("RFA") (A.189).

17. Notwithstanding the foregoing, NECP falsely claims – without citation to a Subcontract or any other document – that NECP performed as Liberty's "subcontractor." (Appellants' Br. at 5). NECP was Liberty's Indemnitor, not its subcontractor. See

Liberty's Verified Response to RFA No. 10 (A.189); Indemnity Agreement, Paragraph Fifth "Takeover" (R.1.2).

**E. MORTENSON'S BACKCHARGES AND THE RESULTING ARBITRATION**

18. Immediately after the default, NECP relinquished its right to receive any further payments under the Subcontract. Specifically, on July 30, 2004, NECP "irrevocably" requested that Mortenson send "any and all payments due or to be become due of any kind or nature" under the Subcontract directly to Liberty. (FOF at ¶10 (R.112); July 30, 2004 letter from NECP to Mortenson (R.11)). Consistent with this irrevocable assignment, "*NECP admits that payments under the subcontract . . . were to be sent to Liberty.*" See NECP Reply to Counterclaims, at p. 3, ¶12 (R.99) (emphasis added).

19. After the Project was essentially completed, Mortenson withheld from its payment to Liberty in excess of \$1.8 million in Subcontract funds. During the ensuing arbitration, Liberty and NECP claimed that Mortenson owed them damages whereas Mortenson argued that Liberty and NECP owed Mortenson damages. (FOF at ¶11, R.112).

20. As of March 10, 2006, Mortenson sought over \$290,000 in damages from Liberty and NECP. Further, this potential damages exposure was subject to upward adjustment inasmuch as Mortenson claimed that it was entitled to its legal fees pursuant to Paragraph 14.2 of the Subcontract. Liberty sought summary judgment as to Mortenson's attorneys' fee claim. In late July 2006, the Arbitration Panel ruled in Mortenson's favor, meaning that Liberty and NECP faced potential exposure not only for

Mortenson's direct damages, but also for the entirety of its claimed fees. Factoring Mortenson's legal fees into the equation, Liberty and NECP's potential "downside exposure" at the Arbitration was in excess of \$600,000. (FOF at ¶12 (R.112-113); Groscup Aff., ¶6 (R.71)).

21. Consistent with its rights under the Indemnity Agreement, Liberty repeatedly demanded that NECP defend Liberty and hold it harmless for all losses, fees and expenses (including Mortenson's claims in the arbitration). Yet, no such defense was ever provided. (FOF at ¶13 (R.113); January 2007 Pisarcik Aff., ¶¶5, 11-14 (R.55, R.57-58)).

#### **F. THE PARTIES' SETTLEMENT DISCUSSIONS**

22. With the arbitration hearings set to commence on September 11, 2006, Mortenson, NECP and Liberty conducted a mediation in Minneapolis on July 26, 2006. During the mediation, it became clear that NECP and Mortenson were very far apart and that a global settlement of all claims between all parties was not possible at that time. Under the circumstances, Liberty commenced discussions with Mortenson concerning a potential bilateral settlement. NECP was advised of those discussions that same day and commented to its counsel that "Liberty gets made whole over [NECP's] dead body." *See* Groscup Aff., ¶7 (R.71-72).

23. This "dead body" statement was repeated to counsel for Liberty on August 11, 2006 when he contacted NECP to determine whether any progress had been made in bridging the settlement gap between Mortenson and NECP. During the discussion that followed, NECP's counsel (Kyle Hart) told Liberty that NECP and Mortenson remained

very far apart, making a global settlement between all parties all but impossible. *Id.*, ¶8 (R.72).

24. That being the case, Liberty raised with NECP's counsel the possibility of a "three-party deal" whereby Liberty could settle all current claims with Mortenson and NECP. Counsel for Liberty further noted that if no such "three-party deal" could be reached, Liberty would preserve its right to assign prosecution of its Subcontract balance claim as part of any future settlement with Mortenson. *Id.*, ¶8 (R.72).

25. Counsel for NECP registered no objection to a potential carveout (and subsequent assignment) of *Liberty's* Subcontract balance claim. Nor did they ever indicate that a settlement between Liberty and Mortenson – which reserved the Subcontract balance claim – would result in a waiver of NECP's arbitral claims. *Id.*, ¶8 (R.72); FOF at ¶15 (R.113-14).

26. In order to assist NECP's counsel in explaining the logic of a "three party settlement" to his client, counsel for Liberty reiterated NECP's obligation under the General Agreement of Indemnity to pay Liberty's counsel fees in the arbitration and noted that paying for one set of lawyers at the arbitration (instead of two) made considerably more sense. (*Id.*, ¶9 (R.72); August 16, 2006 e-mail to NECP counsel (R.16)). NECP's counsel (Kyle Hart) noted that he understood the logic of this position but that, in view of his lack of an ongoing relationship with NECP, he could not be of much assistance in convincing his client to do anything. (R.72).

27. Several days later, Liberty contacted NECP's counsel to further discuss the issue and was told that, despite NECP's liability to Liberty under the Indemnity

Agreement, NECP had no interest in any settlement which left NECP to pursue its arbitral claims against Mortenson on its own. Liberty's counsel confirmed NECP's position on this issue by e-mail dated August 16, 2006. (R.16). Two days later, NECP confirmed in writing that it "does not believe that it is obligated to reimburse Liberty for the costs of participating in this action." (R.17); Groscup Aff., ¶10 (R.73).

28. At that point, Liberty was confronted with a principal (NECP) who refused to pay Liberty's fees and costs as required by the General Agreement of Indemnity, and who refused, despite multiple invitations, to be party to any settlement that did not resolve all claims between all parties in the arbitration. On the other side of the table, Mortenson was seeking over \$600,000 in damages, fees and costs and professed no interest in settling anywhere near NECP's number (whatever that number was). Accordingly, Liberty elected to proceed with bilateral settlement discussions with Mortenson directed towards extricating Liberty from the arbitration and eliminating any potential downside risk.<sup>6</sup> *Id.*, ¶12 (R.73). Yet, at no time did Liberty settle (or even contemplate settling) any of NECP's arbitral claims against Mortenson. *See* Pisarcik Aff., ¶ 17 (R.60).

29. Liberty entered into a final settlement agreement with Mortenson on August 23, 2006. (R.19-28). Mortenson has confirmed its understanding that this agreement contained no waiver of NECP's claims and that *all of NECP's arbitral claims*

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<sup>6</sup> Mortenson and Liberty continued their mediated settlement discussions on Monday, August 21, 2006, but not before Liberty contacted NECP to invite its participation in order to attempt to broker a three party deal, which NECP refused. (*Id.*) (R.32-33).

remained at issue until September 6, 2006 when NECP released those claims through its separate settlement agreement with Mortenson. See Funk Aff., ¶4 (R.82). Notably, Mortenson was the only party adverse to NECP in the Arbitration and, therefore, the only party who could have challenged NECP's right to assert the full scope of its arbitral claims.

30. Consistent with the terms of the settlement agreement, and in keeping with Mortenson's understanding of the issue, Liberty's Senior Surety Counsel (Dennis Pisarcik) testified that there was no waiver of NECP's arbitral claims against Mortenson. As explained by Mr. Pisarcik:

I was directly involved in the Mortenson/Liberty settlement. Consistent with Mr. Funk's affidavit, *at no time did Liberty settle (or intend to settle) any of NECP's arbitral claims.* Quite to the contrary, *I insisted that any of NECP's arbitral claims (whether asserted directly or indirectly through Liberty) not be released.* To the extent that any such claims flowed through Liberty, Liberty intended to assign those claims to NECP but NECP refused to return our calls (or letters) regarding the terms of that proposed assignment.

See Pisarcik Aff., ¶17 (emphasis added) (R.60).

31. Notwithstanding the foregoing, NECP points to the settlement agreement's stipulation of the unpaid Subcontract balance to infer a waiver of NECP's arbitral claims against Mortenson. (Appellants' Br. at 9). To be sure, as part of the Mortenson/Liberty settlement agreement, the parties confirmed their mutual understanding that the unpaid Subcontract Balance was \$1,839,358. (R.22, Section 2, Item I). This figure reflected current Project accounting at that time – *i.e.*, the figure was calculated by taking the

original Subcontract value, adding any approved change orders and subtracting payments that Mortenson had already made to Liberty/NECP. *See* Groscup Aff., ¶14 (R.74).

32. Liberty fails to understand NECP's concern with this \$1,839,358 Subcontract Balance number inasmuch as Liberty obtained this number *directly from NECP* and only agreed to the inclusion of that figure in the settlement agreement when it matched Mortenson's number to the penny. *Id.*, ¶14 (R.74).

33. Notably, in its Pre-Arbitration Brief, NECP recognizes that the unpaid subcontract balance is \$1,839,358. Equally problematic for NECP's "waiver" argument, NECP confirmed in writing that the \$1,839,358 Subcontract Balance (referenced in the Liberty/Mortenson settlement) did "***not*** include NECP's claim for additional change orders ... ***nor does it include the almost \$2,000,000 claim NECP has made for losses based on Mortenson's breach.***" (R.90).

34. Under the terms of its August 23, 2006 agreement with Mortenson, Liberty reserved the right to assign to NECP all or part of Liberty's Residual Subcontract Balance claim with this right of assignment expiring on the evening of the first day of the Arbitration (September 11, 2006). (R.21, Items H-I). Mortenson requested this September 11, 2006 cut off date such that – once the Arbitration was underway – it would know what claims remained at issue. *See* September 2007 Affidavit of C. William Groscup, ¶15 (R.68).

35. This Residual Unpaid Subcontract Balance claim was valued at slightly in excess of \$1.66 million and was derived by taking the agreed Subcontract Balance

(\$1,839,358) and then subtracting the \$175,000 settlement payment from Mortenson. (See Liberty/Mortenson Settlement, Sections 2. I and 4. A-B (R.22); FOF at ¶16 (R.114)).

**G. LIBERTY'S EFFORTS TO NEGOTIATE THE ASSIGNMENT OF ITS UNPAID SUBCONTRACT BALANCE CLAIM**

36. Concurrently with the execution of the August 23, 2006 agreement, Liberty made an initial offer to NECP to assign Liberty's \$1.6 million Subcontract balance claim to NECP. That offer contained two terms. *First*, Liberty sought NECP's agreement to reimburse Liberty for its actual out of pocket losses as of August 23, 2006 arising from Liberty's issuance of the Bonds. In other words, Liberty asked that NECP honor its obligations under the Indemnity Agreement. *Second*, Liberty requested that NECP release Liberty from NECP's claim that Liberty's post-default decision to complete the Project (subject to a full reservation of its and NECP's rights) was made in "bad faith." See FOF, ¶ 17 (R.114); August 23, 2006 Letter from W. Groscup to J. Doherty and K. Hart (R.18-19). In return, Liberty agreed that it would "release NECP (and its fellow indemnitors) for any losses suffered by Liberty to date." (R.19).

37. Thereafter, and still not having received any phone call or letter from NECP to negotiate the terms of the proposed assignment, on September 1, 2006, counsel for Liberty sent NECP a letter notifying NECP that "*Liberty remains willing to discuss the terms of a potential assignment of its \$1.6 million Subcontract balance claim.*" See Groscup Aff., ¶17 (R.74-75); (R.33).

38. Again hearing no response to his proposal, counsel for Liberty followed up with a phone call the next day, reaffirming “that Liberty was willing to *be somewhat flexible* relative to its settlement demands.” (R.74-75).

#### H. NECP’S CONVERSION OF ASSIGNED SUBCONTRACT PROCEEDS

39. Instead of responding to Liberty’s settlement offer, and notwithstanding NECP’s “irrevocable” assignment to Liberty of all monies arising out of the Subcontract, NECP agreed to accept a \$400,000 payment from Mortenson in return for releasing Mortenson from all claims arising out of the Subcontract and the Project. (FOF at ¶18 (R.115)); Mortenson/NECP Settlement Agreement, ¶¶2-3 (R.38). NECP entered into this agreement to be paid from Mortenson despite having assigned to Liberty as collateral for its indemnity obligations all of the proceeds “*in and growing in any manner out of*” the Mortenson Subcontract. (FOF at ¶5 (R.111); Indemnity Agreement, Paragraph Third “Assignment” (R.1.1); July 30, 2004 letter (R.11)). NECP further admits that it was repeatedly reminded of this assignment of proceeds in the days leading up to NECP’s settlement with Mortenson. (NECP Reply to Counterclaims, ¶39 (R. 104)).

40. Mortenson sent the \$400,000 payment to NECP’s counsel (Fabyanske, Westra Hart and Thomson (“Fabyanske”)) on Tuesday, September 12, 2006. On September 15, 2006, three days after this payment was made, Liberty sought and received a Temporary Restraining Order freezing the \$400,000 payment in the Fabyanske client trust account and directing that the funds not be disbursed to NECP pending further direction from the Court. (FOF, ¶19 (R.115)).

41. On October 20, 2006, the District Court granted Liberty's request for injunctive relief, directing the Fabyanske law firm to deposit the \$400,000 with the District Court pending further notice. In entering this Order, the District Court noted that "NECP's contractual commitments strongly suggest that Liberty will prevail on the merits." (R.118, ¶ 28). The District Court explained its rationale as follows:

From the moment that Mortenson issued its notice of default, NECP understood that Liberty, as takeover surety, was entitled to the Subcontract proceeds. Further, as detailed above, the Indemnity Agreement reflects a transfer and assignment from NECP to Liberty of all of NECP's "right, title and interest . . . in and *growing in any manner out of*" the Subcontract. Thus, to the extent that the payment in question arose out of the Subcontract, *Liberty is likely to prevail on its claim that NECP took Liberty's property.*

Findings and Conclusions, at ¶ 28 (emphasis added) (R.118-19).

42. Following the District Court's Entry of Summary Judgment on April 18, 2007, Liberty filed a Motion to Disburse the \$400,000 then being held in the Court's escrow account. The Court granted this Motion by Order dated May 24, 2007 (R.137-39) and, in so doing, stated as follows:

The \$400,000 in question was the settlement amount between Liberty [sic] and Mortenson, originally withheld by counsel for NECP pending its lawsuit but deposited with the Court to freeze the deck pending the Court's decision on whether or not Liberty acted in bad faith.... *Because the Court found as a matter of law that Liberty acted in good faith with regard to its settlement with M.A. Mortenson, the \$400,000 settlement amount should now properly be released to Liberty.*

(May 24, 2006 Order (emphasis added) (R.138)). The \$400,000 in question was then disbursed to Liberty as collateral to be used in partial satisfaction of NECP's outstanding indemnity obligations. (R.139).

### III. ARGUMENT

#### A. SUMMARY JUDGMENT UNDER A GENERAL AGREEMENT OF INDEMNITY IS THE NORM, NOT THE EXCEPTION.

The General Agreement of Indemnity at issue here is tailor made for summary adjudication. To this end, Paragraph SECOND of the General Agreement of Indemnity provides that the Surety is entitled to charge NECP for any payments made in "good faith" and that "vouchers or other evidence of any such payments made by the Surety shall be *prima facie* evidence of the fact and amount of liability to the Surety." (R.1.1). In reviewing indemnity clauses of this nature, the Minnesota Court of Appeals has determined that:

once the surety submits the required documentation to the court, *summary judgment is appropriate "except in the rare case* where indemnitors are able to submit sufficient admissible evidence (as opposed to mere speculation or argument), to demonstrate an entitlement to go to trial on the issue of 'bad faith' or to contest the amount of the surety's payments...." Armen Shahinian, THE GENERAL AGREEMENT OF INDEMNITY, IN THE LAW OF SURETYSHIP 498-99 (Edward G. Gallagher ed., 2000).

*Old Republic Surety Co. v. H.E.A.T., Inc.*, 2005 WL 288790 (Minn. Ct. App. 2005) (emphasis added) (R.169).

NECP's belief that it can derail summary judgment by asserting the most flimsy claims of bad faith is out of step with reality, not to mention years of suretyship

jurisprudence. See *Old Republic Sur. Co. v. H.E.A.T., Inc.*, 2005 WL 288790, at \*3 (Minn. Ct. App. Feb. 1, 2005) (granting surety summary judgment on general agreement of indemnity notwithstanding indemnitor's unsubstantiated allegations of bad faith) (R.169-70); *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 721 (5th Cir. 1995) (affirming summary judgment for surety on an indemnity agreement where principal produced no factual support for its "conclusory allegations of bad faith"); *Gen. Accident Ins. Co. of America v. Merritt-Meridian Constr. Corp.*, 975 F. Supp. 511, 518 (S.D.N.Y. 1997) ("[c]onclusory allegations of bad faith are insufficient to defeat a motion for summary judgment in favor of a surety seeking to enforce an indemnification agreement"); *Banque Nationale de Paris S.A. v. Ins. Co. of North America*, 896 F. Supp. 163, 165 (S.D.N.Y. 1995) (granting summary judgment in favor of surety and noting that "[t]here is not a scintilla of evidence, as distinct from conclusory allegations, that [the surety] acted inappropriately"); *Transamerica Ins. Co. v. H.V.A.C. Contractors, Inc.*, 857 F.Supp. 969, 974 (N.D.Ga. 1994) (granting surety's summary judgment where defendant's allegation of bad faith consisted of an "unsupported accusation").

Here, NECP's claim of "bad faith takeover," has nothing to do with what it knows, but rather is based entirely on what it surmises. That is, NECP looks right past the uncontroverted testimony of Liberty's Senior Surety Counsel (Pisarcik Aff., ¶¶ 2, 7 (R.61-62)), and speculates instead that Liberty elected to honor its bond obligations as some sort of business development plan. Of course, on summary judgment, the Court must operate off of facts, not speculative and fanciful theories. See *Dyrdal v. Golden Nuggets, Inc.*, 89 N.W.2d 779, 783 (Minn. 2004) (in opposing a motion for summary

judgment, a party may not rely on “unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts”).

Likewise, NECP’s attempt to create a genuine issue of material fact concerning its claim of “bad faith settlement” ignores a critical point. NECP has not disputed any of the material facts concerning this claim; rather, it disputes the *proper interpretation* of those facts. In Minnesota, it is well settled that a party cannot object to an award of summary judgment where *mere interpretation* of the facts (as opposed to the actual facts themselves) are in dispute. See *Murr Plumbing, Inc. v. Sherer Bros. Financial Servs.*, 1998 WL 5311817 (Minn. Ct. App. 1998) (R.157).

During oral argument on Liberty’s Motion for Summary Judgment last February, the District Court immediately picked up on the fact that “conclusory allegations” are all that NECP has to offer:

I guess that’s one of the things that, you know, as I’ve read into this that I’ve been concerned about. *Mr. Hart makes these overall sort of general overarching claims in regard to Liberty and in regard to Mortenson* but he provides not one example to justify his claim that there is – there’s nefarious behavior going on between Liberty and Mortenson and there’s no refutation that this project was way behind. There is absolutely – *I’ve looked very carefully – there has not been provided to me one shred of evidence that Northeast Concrete Defendants were performing on their contract as they were told to – as they had agreed to do.* They were only 50 percent into the contract and they were supposed to on that date be 90 to 95 percent.

To me we’re right at – summary judgment is about dealing with *real facts*, facts that might change the outcome of the case, *not facts that are just claimed as sort of what I would call plaster on the wall but there isn’t any mat behind them.*

Feb. 28, 2006 Transcript of Summary Judgment Hearing, p. 7:13 – 8:7 (emphasis added) (R.130-31).

Having failed with this “plaster on the wall” approach in the Court below, NECP is back at it again on appeal with its wild allegations of “blackmail,” trumped up conspiracies, and bogus “waivers.” NECP and its counsel are certainly shrewd enough to change their tack on appeal. NECP’s failure to do so has everything to do with the fact that it simply lacks the requisite factual “matting” necessary to make its frivolous claims stick.

**B. IN MINNESOTA, BAD FAITH REQUIRES FRAUDULENT INTENT.**

In its appeal brief, NECP goes to great lengths – analogizing to various cases from other jurisdictions and in other contexts – to dodge a frank reality: NECP is asserting a “bad faith” claim *in Minnesota*, and, here in Minnesota, “bad faith” requires fraudulent intent. *See Citation Homes, Inc. v. Felton*, 2002 WL 1331745, at \*4 (Minn. Ct. App. June 18, 2002) (“[b]ad faith is not easily defined but includes the commission of a malicious, willful wrong *and requires fraudulent intent*”) (emphasis added); *Prichard Bros., Inc. v. Grady Co.*, 436 N.W.2d 460, 466 (Minn. Ct. App. 1989) (“[b]ad faith *requires a fraudulent intent*”) (emphasis added); *North Prior, L.L.C. v. Outsourcing Solutions, Inc.*, 2003 WL 1961975, at \*4 (Minn. Ct. App. April 29, 2003) (equating “bad faith” with “fraudulent intent”) (R.164).

The courts in Minnesota have applied this exacting bad faith standard under circumstances very similar to those at issue here. For example, in *Old Republic Surety*, 2005 WL 288790 (Minn. Ct. App.), an indemnitor claimed that the surety acted in bad

faith by settling with the obligee because the indemnitor purportedly had several defenses to the obligee's claims. The court disagreed, however, and, *in upholding the surety's summary judgment motion*, emphasized the difficulty of proving a bad faith claim against a surety in this context:

“A majority of courts considering the issue have concluded that bad faith does not mean negligence, lack of diligence, or bad judgment, but rather implies a ‘*conscious doing of wrong because of dishonest purpose or moral obliquity.*’” THE SURETY'S INDEMNITY AGREEMENT: LAW PRACTICE 173-74 (Marilyn Klinger, *et al.* eds., 2002) (footnote omitted).

*Id.* at \*3 (emphasis added) (R.169).

Accordingly, in order to proceed with its “bad faith” claims, NECP would have to submit “sufficient admissible evidence” of some “*conscious doing of wrong*” that amounts to malicious or fraudulent intent. Notably, NECP quibbles with this bad faith standard only at the margins. Specifically, NECP does not care for the term “fraudulent intent” and therefore cites to cases from other jurisdictions which define “bad faith” to mean actions undertaken with an “improper motive” or “dishonest purpose.” Although this Court has expressly held that, here in Minnesota, “bad faith” requires proof of “fraudulent intent,” (*Citation Homes, Inc. v. Felton*, 2002 WL 1331745, at \*4), there is no point in prolonged debate inasmuch as both parties agree that the “bad faith bar” has been set very high. Even under NECP's bad faith standard, NECP acknowledges that it must prove deliberate wrongdoing on the part of Liberty undertaken with a “dishonest purpose.” (Appellants' Br. at 23). As detailed below, NECP's threadbare, conclusory allegations of bad faith fall far short of this exacting standard.

**C. NECP’S DEFENSE OF “BAD FAITH TAKEOVER” DOES NOT PRECLUDE SUMMARY JUDGMENT ON THE GENERAL AGREEMENT OF INDEMNITY**

**1. Liberty’s “Gun-to-the-Head” Decision to Complete the Project Was No “Choice” at All.**

To describe NECP’s “bad faith takeover” claim as novel is charitable. No court in Minnesota has ever upheld such a claim. In fact, NECP has not referred the Court to a single decision in the history of American jurisprudence where a surety was actually found liable – or where summary judgment was denied – based upon a claim of “bad faith takeover.”

NECP’s attempt to break new ground on the facts of this case is especially remarkable. Mortenson terminated NECP for default on July 14, 2004. By then, the time contractually allotted to NECP for completing the P-904 Parking Garage had lapsed and yet the Project was only half done. *See* Statement of Material Facts (“SOMF”), *supra*, Section III, ¶¶ 7-8. Under the circumstances (and candidly having no desire to step in and complete), Liberty asked NECP for an explanation as to why the Project was months behind schedule. NECP pointed only to an issue concerning a missing crane ramp that explained at most eight days of Project delay. (*Id.*, ¶8). As emphatically noted by the Court below, NECP offered no other documentation as to why the Project was so far behind schedule. (R.130-31). Of course, if NECP had any meaningful excuse as to why a Project that *was supposed to be done* in July 2004 was only half-built, the Court can rest assured that it would have heard all about it in NECP’s appeal brief. Instead, this Court heard the same thing from NECP on appeal that Liberty heard from NECP in the wake of the July 2004 default termination – stone-cold silence.

Obviously disappointed with NECP's lack of explanation (but again having no desire to step in and complete), Liberty initially attempted to broker a deal whereby Mortenson would rescind the default, subject to Mortenson's prescribed list of conditions. (SOMF, ¶10). Yet, by early August 2004, Mortenson advised that it would not rescind the default and that, if Liberty did not undertake its obligation to complete the Project, Mortenson would declare Liberty in default under its bond. *Id.* Faced with a principal who had been defaulted for using the entire contract period to perform half the work, and an obligee who was threatening to declare Liberty's performance bond in default, Liberty made the only "choice" it could. That is, Liberty reluctantly agreed to complete the Project to mitigate its liability exposure subject to a full reservation of its (and NECP's) right to contest the validity of the default. *Id.*, ¶¶12-13.

Although Liberty's "gun to the head" decision truly needs no explanation, Liberty has provided the affidavit of its Senior Surety Counsel confirming what everyone knows but NECP conveniently chooses to ignore. Liberty agreed to complete the Project (subject to a full reservation of its and NECP's rights) because, had it failed to do so, Mortenson could have declared a default under Liberty's bond and then used Liberty's open-ended liability as a *de facto* "blank check" to be used with its new precaster. *Id.*; *see also Continental Realty Corp. v. Andrew J. Crevolin Co.*, 380 F. Supp. 246 (D. W.Va. 1974) (holding that a surety that has breached its completion obligation "could be held liable in excess of the penalty sum of the bond."); *Triangle Elec. Supply Co. v. Mojave Elec. Co.*, 238 F. Supp. 815 (D. Mo. 1965) (allowing recovery for penal sum plus interest upon surety's default). Under the circumstances, Liberty's "decision" not to allow its

bond to be thrown into default can scarcely be called a decision at all, and it certainly cannot be called “bad faith.”

2. **The Problem with Indemnitors Like Hallamore is Not Earning Money, it is Parting With it.**

NECP claims that – because the Indemnitors are solvent – Liberty was not truly “at risk.” (Appellants’ Br. at 32). That is, according to NECP, Liberty should have allowed its bond to be defaulted, its liability to become uncapped and its bond obligation to remain unsatisfied – all so that Liberty could cloak itself in the indemnity protection offered by *these* Indemnitors. Last fall, the District Court heard this same “solvent indemnitor” argument and saw right through it:

*NECP’s Counsel:* [W]e claim that they wrongfully took over the project... .

*The Court:* ***But they had to take over because Mortenson put a gun to their head.***

*NECP’s Counsel:* No, they didn’t have to take over.... That was their decision, and one of the reasons they did, we believe, is that they do about a billion dollars worth of insurance with Mortenson, so when Mortenson said “jump” they did.

*The Court:* ***But you would agree that if they hadn’t jumped, they could have been liable to – Mortenson could have sued them directly for their entire company treasury up to the amount of the loss?***

*NECP’s Counsel:* **Yes** [but they could have looked to the Indemnitors].

*The Court:* And how many years would that have taken to work its way through our wonderful court system, twenty?

See Transcript from September 22, 2006 Hearing on Liberty’s Motion for TRO, at pp. 38-39) (R.94-95) (emphasis added). From NECP’s perspective then, the unanswerable

question is as follows: if the District Court understood right away that Liberty had no practical alternative other than to takeover, how can Liberty's identical conclusion be deemed "bad faith"?

Beyond the obvious fact that relying on *these* Indemnitors to honor their obligations is a recipe for financial ruin, there is a more fundamental point. Even if the Indemnitors could be trusted to pay (which obviously they cannot), Liberty executed a bond that *required* the Surety to complete the remaining work upon a declaration of default. See Performance Bond ¶¶3-5 (requiring the surety to remedy the default, takeover the subcontract itself, or hire another subcontractor to complete the work) (R.8). From Liberty's perspective, honoring the terms of its bond contract is not a choice, but rather a contractual duty. The fact that this point is lost on *these* Indemnitors is hardly surprising.<sup>7</sup>

3. ***NECP's Claim of "Bad Faith Takeover" Cannot Be Reconciled With the Express Terms of the General Agreement of Indemnity.***

Following the demand by Mortenson, Liberty took over the Project and proceeded to complete it, as was its right to do under the Indemnity Agreement's "Takeover Clause":

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<sup>7</sup> According to NECP, it needs to take discovery to determine whether Liberty analyzed the Indemnitors' financial condition. See Appellants Br. at 32. Liberty will save NECP the trouble. Liberty has never disputed that certain of the Indemnitors have money – *i.e.*, the issue for the Indemnitors was not making money, rather it was parting with that money in fulfillment of its contractual obligations. Having themselves been stiffed by its "solvent" Indemnitor clients (and having been forced to file an attorneys' lien against the Mortenson settlement payment in order to get compensated for its legal services in this matter (R.91-92)), Liberty would think that counsel for NECP would be far more circumspect about equating a company's "ability to pay" with the "risk of non-payment."

In the event of any breach or default asserted by the obligee in any Bond . . . the Surety shall have the right, at its option and in its sole discretion and is hereby authorized . . . to take possession of any part or all of the work under any contract or contracts covered by any Bond, and at the expense of the Principals and Indemnitors to complete or arrange for the completion of the same, and the Principals shall promptly, upon demand, pay to the Surety all losses, fees, costs and expenses so incurred.

(R.2.1) (emphasis added). In other words, the moment that Mortenson asserted a default, NECP “authorized” Liberty to take possession of the Project and complete the work. Having granted its express contractual authorization, NECP can hardly claim that Liberty’s exercise of its *contractual rights* constitutes “bad faith.”

In view of this language, claims of “bad faith takeover” are exceedingly rare and not well received. For example, in *Fidelity & Deposit Co. of Maryland v. A-Mac Sales & Builders Co.*, 2006 WL 1555985 (E.D. Mich. June 5, 2006), the court considered this *exact* Takeover Clause in holding that the surety acted in good faith *as a matter of law* when taking over its defaulted principal’s contract. Like NECP, the indemnitors in *A-Mac* sought to avoid their unambiguous indemnity obligations by contesting the propriety of the default, objecting to the takeover, and claiming “breach of good faith” against the surety.

The court swiftly rejected these claims, noting that the indemnity agreement gave the surety “sole discretion” to takeover the Project. The court also made clear that the surety was not obligated to investigate the obligee’s statements regarding the default or accept the principal’s explanations as to why the default was improper. *Id.* at \*5. The

irony is that, here, Liberty *did* solicit NECP's "explanation." NECP simply didn't offer one.

As noted by the Court below in granting summary judgment, "[t]he record is clear as a matter of law with respect to [NECP's "bad faith takeover" claim] – Liberty's takeover of NECP's obligations upon its default did not violate Liberty's duty of good faith." (A.229). In the wake of that ruling, NECP's approach on appeal is eerily reminiscent to its reaction to the default termination itself. In both instances, NECP summarily concludes that the default (and takeover) were "wrongful" while failing to offer a single fact as to why. The District Court determined that NECP's "bad faith takeover claim" fails as a matter of law and NECP has not offered any facts (let alone a material fact) that would warrant overturning the District Court's ruling.

**D. NECP'S DEFENSE OF "BAD FAITH SETTLEMENT" DOES NOT PRECLUDE SUMMARY JUDGMENT ON THE GENERAL AGREEMENT OF INDEMNITY.**

During the proceedings below, the District Court and Liberty heard all about NECP's fanciful tale of "blackmail," alleged "multi-million dollar waivers" and so-called "self-help." On appeal, NECP has pulled out the same misplaced labels. Either NECP does not understand the common sense meaning of these terms, or there is a more serious problem afoot. In either event, Liberty offers the following translation concerning NECP's false catch-phrases and misplaced buzzwords. In NECP's vernacular, "waiver" refers to Liberty having supposedly released Mortenson from liability for \$2,000,000 of NECP's arbitral claims by referencing the undisputed Subcontract balance (which Liberty obtained directly from NECP) in its August 23, 2006 settlement agreement with

Mortenson.<sup>8</sup> As detailed below, nobody – including NECP – understood that its arbitral claims had been waived or compromised. In fact, NECP undisputedly asserted all of its claims against Mortenson five days *after* the settlement in question.

“Blackmail” refers to Liberty’s initial August 23, 2006 *settlement offer* to NECP relating to the proposed assignment of the unpaid Subcontract balance claim. Specifically, Liberty asked that, in return for the assignment of its \$1.6 million Subcontract balance claim, NECP honor its indemnity obligation and release Liberty from further frivolous litigation concerning NECP’s sanctionable “bad faith takeover” claim. Finally, “self help” refers to Liberty getting paid \$175,000 of Subcontract funds from Mortenson (R.22), releasing Mortenson only from the \$175,000 that it actually paid, and then using that payment to reduce, in commensurate fashion, NECP’s indemnity obligation to Liberty.

Liberty understands the allure of buzzwords and catch-phrases. Here, however, their repetitive (and deceptive) use portends a much larger problem – *i.e.*, NECP and its counsel have dangerously blurred the line between zealous advocacy and half-truths. It is one thing to aggressively argue for an interpretation to enable your client to evade its indemnity obligations; yet, it is quite another to invent illusory waivers and then compound the deception by referring to negotiable settlement offers and a request to forego frivolous litigation as “blackmail.”

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<sup>8</sup> Although the Liberty/Mortenson agreement was effective August 22, 2006, it was not actually executed until the afternoon of August 23, 2006.

*1. NECP's "Interpretation" of the Liberty/Mortenson Settlement has been refuted by Liberty, Mortenson and, ironically, NECP.*

On August 11, 2006, Liberty contacted NECP to propose a "three-party deal" whereby Liberty could settle all current claims with Mortenson and NECP. (SOMF, ¶ 22-23). Far from keeping NECP in the dark, counsel for Liberty specifically noted that it was his preference to reach a global settlement, but that if no such deal could be reached, Liberty would preserve its right to assign to NECP its Subcontract balance claim as part of any future settlement with Mortenson. (*Id.*, ¶¶23-25; FOF, ¶¶14-15 (R.113-14)). NECP raised no objection. *Id.*

Liberty then entered into a settlement with Mortenson on August 23, 2006 which released Mortenson from nothing other than the \$175,000 in unpaid Subcontract balance funds that Mortenson paid to Liberty as part of the settlement. (Settlement Agreement, ¶¶4 A.-B, 5.A. (R.22-23). All that Mortenson got in return was Liberty's agreement that the remainder of Liberty's unpaid Subcontract balance claim would be prosecuted (if at all) by NECP, not Liberty. *Id.*, ¶¶5-6. As confirmed in the parties' contemporaneous correspondence (and in Liberty's claim for damages in this action), every dollar that Liberty received from Mortenson was applied directly to NECP's indemnity ledger. *See* Liberty's August 23, 2006 Proposal to NECP (R.18-19); Liberty's Summary Judgment Brief at pp. 12-14 (applying Mortenson's entire \$175,000 as a reduction to NECP's indemnity ledger) (A.245-47).

Having received the benefit of every dollar paid under this agreement, and with Liberty having preserved the right to assign its unpaid Subcontract balance claim (just as

it said it would do), NECP had no claim of prejudice. Therefore, it invented one. Specifically, NECP claims that, by listing the unpaid Subcontract balance (\$1,839,358) in the settlement agreement, Liberty somehow “waived” NECP’s ability to assert millions of dollars of NECP’s arbitral claims. (Appellants Br. at 9). As Liberty explained to the Court below, the unpaid Subcontract balance is merely a mathematical computation which reflects the original Subcontract value, plus any *approved* change orders, minus payments by Mortenson. (SOMF, ¶¶31-32). NECP’s contention that Liberty used the wrong Subcontract balance is curious, especially since it is *undisputed* that Liberty contacted *NECP* in mid-August 2006 *to ask what this number was. Id.*

Again, if this sequence of events was disputed, the Court can be certain that NECP would have taken issue with it in its appeal brief and in the proceedings below. Once more, however, the true facts are *not* disputed, but rather conveniently ignored. In any event, having used NECP’s own number, Liberty is at a loss to understand how including the *agreed upon* Subcontract balance could possibly have waived millions of dollars of NECP’s arbitral claims.

Mortenson does not understand NECP’s waiver claim either. In fact, Mortenson has submitted a sworn affidavit, attesting to its understanding that – *but for its subsequent September 6, 2006 settlement with NECP* (and assuming that Liberty made the assignment) – Mortenson fully expected NECP “to assert in the Arbitration all of the arbitral claims.” *See Funk Aff.*, ¶¶3-4 (R.82). Mortenson’s affidavit begs the question: if the only party with whom NECP was adverse does not claim a waiver, how can the claim be waived? Notably, the answer to this question is supplied by NECP itself. There

was no waiver. In fact, just five days *after* the August 23, 2006 Liberty settlement (which purportedly eviscerated all of NECP's claims), NECP submitted a damages summary in the Arbitration seeking \$4,281,821.48 in damages from Mortenson.<sup>9</sup> Notably, this is the exact same \$4,281,821.48 damages figure that NECP claimed in March 2006 – five months *before* the Liberty settlement. Of course, if NECP truly believed that its claims were waived on August 23, 2006, it would not have asserted the full panoply of its claims five days later on August 28, 2006.

The sheer fiction that Liberty “waived” NECP’s arbitral claims is further revealed by tracking the money and the releases. To this end, two weeks *after* the Liberty settlement that supposedly dispensed with all of NECP’s arbitral claims against Mortenson, NECP entered into a settlement agreement with Mortenson whereby NECP agreed to accept a *\$400,000 payment from Mortenson in return for releasing Mortenson from all claims relating to the Subcontract and the Project.* (Mortenson/NECP Settlement Agreement, ¶¶2-3 (R.38); FOF at ¶18 (R.115)). Of course, if NECP’s arbitral claims against Mortenson had *already* been released through the August 23, 2006 Liberty/Mortenson settlement, it is curious that Mortenson would have required a “*re-release*” of these same claims two weeks *after* the Liberty/Mortenson agreement. Further, if Liberty had *already* released NECP’s arbitral claims against Mortenson on August 23, 2006, it is unclear why Mortenson would have agreed to pay

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<sup>9</sup> See Supplemental Affidavit of C. William Groscup (“Supp. Groscup Aff.”), ¶¶3-5, and Exhibits 1-2 attached thereto (R.77-80).

NECP anything on September 6, 2006 – let alone \$400,000. Of course, the answer to all of this is simple. Liberty did not waive NECP's arbitral claims. *See* District Court Findings and Conclusions, p. 8 (A.231).

Although NECP's actions and agreements speak volumes, so too does its briefing. Indeed, five days after Liberty stipulated to the unpaid Subcontract balance (but before settling with Mortenson), NECP submitted a brief to the Panel stating that the \$1,839,358 unpaid Subcontract balance “does *not* include NECP's claims for additional change orders . . . *nor does it include the almost \$2,000,000 in claims NECP has made for losses based on Mortenson's breach.*” *See* NECP's Pre-Arbitration Brief (August 28, 2006), at 16 (emphasis added) (R.90). Liberty and Mortenson agree with NECP's contemporaneous briefing, but not its bad faith-driven “flip flop.”

The agreements, letters, e-mails and affidavits are a matter of record and no amount of *ad hominem* rhetoric can alter their content. These documents are the facts and each of them lead inexorably to the same conclusion. Liberty did not waive NECP's arbitral claims against Mortenson. *See* District Court's Findings and Conclusions of, p. 8 (A.231)).

## 2. *A Negotiable Settlement Offer is Not Blackmail.*

Not surprisingly, Liberty did not want to settle with Mortenson only to then have to deal with NECP's inane claim of “bad faith takeover.” Accordingly, within hours of settling with Mortenson on August 23, 2006, (and with NECP having refused to entertain settlement discussions with Liberty to that point), Liberty made a proposal to NECP to

resolve *all* claims involving Liberty and NECP (whether asserted or not). See FOF, ¶17; August 23, 2006 letter (R.18-19); SOMF, ¶36-38.

Liberty's offer contained the following terms. *First*, Liberty sought NECP's agreement to reimburse Liberty for its actual out of pocket losses as of August 23, 2006 arising from Liberty's issuance of the Bonds. In other words, Liberty asked that NECP honor its obligations under the Indemnity Agreement. *Second*, Liberty requested that NECP release Liberty from NECP's claim that Liberty's post-default decision to complete the Project (subject to a full reservation of its and NECP's rights) was made in "bad faith." See FOF, ¶17 (R.114); August 23, 2006 Letter from W. Groscup to J. Doherty and K. Hart (R.18-19). In exchange, Liberty agreed that it would "release NECP (and its fellow indemnitors) for any losses suffered by Liberty to date." (R.19).

Thereafter, and having not heard any response to its phone calls or August 23, 2006 settlement proposal, on September 1, 2006, counsel for Liberty sent NECP a letter notifying NECP that "*Liberty remains willing to discuss the terms of a potential assignment of its \$1.6 million Subcontract balance claim.*" See Groscup Aff., ¶17 (R.74-75); September 1, 2006 letter (emphasis added) (R.33); SOMF, ¶37. Again hearing no response to its proposal, counsel for Liberty followed up with a phone call the next day, reaffirming "that Liberty was willing to *be somewhat flexible* relative to its settlement demands." (R.74-75); SOMF ¶38. Yet, instead of responding to Liberty's *settlement proposal*, NECP agreed to accept a \$400,000 payment from Mortenson in return for releasing Mortenson from all claims arising out of the Subcontract and the Project. (FOF, ¶ 18; SMOF, ¶ 39).

NECP's repetitious allegations notwithstanding, Liberty has never understood that negotiable offers of compromise constitute "blackmail." The reality is that there was no "blackmail" and, if NECP's counsel had bothered to return any of Liberty's calls concerning its *negotiable* settlement offer, NECP would have found out exactly how negotiable Liberty was willing to be. NECP's counsel is correct in one respect, however – he never called back to find out. *See* Appellants' Br., at 13 ("NECP was not legally required to engage Liberty in any settlement talks").

**E. MR. DOWNEY'S "OPINIONS" ARE NOT FACTS.**

According to NECP, the District Court improperly failed to consider the "expert" *opinions* of Brian Downey concerning what is (and what is not) "bad faith." As an initial matter, there is no evidence in the record that the District Court failed to consider any of the evidence in the record in determining whether NECP raised a *genuine issue of material fact* on its bad faith claims. Indeed, "the mere fact that the district court did not specifically address the expert testimony in its order does not imply that the testimony was not given appropriate consideration by the district court." *Precision Diversified Industries v. Colgate*, 2004 WL 2093532 \*11 (Minn. Ct. App. 2004).

Beyond this, however, lies a more fundamental point. Namely, Mr. Downey's "what it would mean if" opinions cannot possibly raise a genuine issue of material fact because there is no dispute as to any of the facts, only NECP's "interpretation" of those facts. NECP cannot use Mr. Downey to impute to Liberty any malicious or improper motive. In fact, Mr. Downey has no knowledge whatsoever of the surety's motivations in "electing" to honor the terms of its Performance Bond. Moreover, he certainly has no

knowledge concerning any alleged “improper motive” or “dishonest purpose” on the part of Liberty when it had the temerity to make a negotiable offer to its principal to settle NECP’s indemnity tab, with both parties executing mutual releases.

As previously stated, “there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997). Mr. Downey’s *opinions* cannot possibly raise a genuine issue of material *fact* inasmuch as his opinions are not facts. The record, taken as a whole (and including Mr. Downey’s *opinions*), could not lead a rational trier of fact to find for NECP on its bad faith claims.

**F. NECP’S UNEXPLAINED DECISION TO WAIT TO TAKE DEPOSITIONS IS NOT GROUNDS FOR OVERTURNING THE DISTRICT COURT’S RULING.**

In the proceedings below, the District Court determined as a matter of law that “the Liberty/Mortenson Settlement Agreement is clear – Liberty did not waive NECP’s claims against Mortenson.” (A.231). In other words, the Court below based its ruling on the *four corners of the document* and concluded that there was no waiver of NECP’s arbitral claims as a matter of law. Incredibly, however, NECP now claims that it needs to take discovery to better understand whether Liberty acted with an improper motive *when it entered into an unambiguous settlement agreement with Mortenson which did not waive any of NECP’s arbitral claims.*

As an initial matter, Liberty notes that NECP *did* undertake written discovery in the form of Requests for Production, Requests for Admission, and Interrogatories. *See* NECP's January 8, 2007 First Set of Discovery (A.157-170). Liberty provided comprehensive and *verified* responses to NECP's written discovery on February 9, 2007 (A.171-209), and NECP undisputedly had this written discovery at its disposal prior to filing its Opposition to Liberty's Motion for Summary Judgment. Thus, NECP's argument comes down to its apparent belief that it should have (but failed to) take depositions during the first six months of this case.

Although NECP made no formal motion for continuance below, it did request that it be given additional time so that it could notice the depositions which it had inexplicably failed to take during the first six months of this case. The decision to grant or deny NECP's informal request for a continuance is within the District Court's sound discretion and will not be reversed absent an abuse of discretion. *State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999). In order to obtain such a continuance, NECP must satisfy two independent requirements. *First*, NECP must prove that it was diligent in obtaining or seeking discovery prior to the Rule 56.06 motion. *Second*, NECP must prove that it is seeking discovery in the good faith belief that material facts will be uncovered, as opposed to a mere "fishing expedition." *Rice v. Pearl*, 320 N.W.2d 407 (Minn. 1982). Although NECP must satisfy both requirements, here, it met neither.

1. *NECP Never Explained Why It Had Not Taken a Single Deposition Six Months Into the Case.*

Liberty commenced this action on September 15, 2006 and the dispute was quickly framed. Indeed, NECP recognized from the very beginning that “[i]f [it is] determined [that Liberty] didn’t act in bad faith, obviously we’re going to lose.” See Hearing Transcript, at 5 (R.126, lines 12-24). Not only did NECP recognize right away that its entire defense to liability rested upon its specious claims of “bad faith takeover” and “bad faith settlement,” but just five days after the commencement of this action, NECP filed a pleading setting forth the *exact* same “plaster on the wall” allegations of “bad faith” which it presented below (and again on appeal). (A.3-4).

Further, NECP’s counsel knew of Liberty’s intention of moving for summary judgment all along and even exchanged voice mails with Mr. Hartnett (counsel for Mortenson) on this very subject in late October 2007. See November 10, 2006 e-mail from Jim Hartnett to Kyle Hart (seeking approval for affidavit language to be used for summary judgment and noting Mortenson and NECP’s prior communications on this subject) (R-47). Despite all this, and notwithstanding Liberty’s Notice of Motion, NECP arrived at oral argument on the last day of February 2007 without having noticed (let alone taken) a single deposition in this case. NECP never explained why.

Instead, and without even pausing to discuss the “reasonable diligence” standard from *Rice v. Pearl*, NECP blithely concludes that the District Court abused its discretion by failing to defer the summary judgment proceedings. NECP is mistaken. NECP had ample time in the six months between when the case commenced until the hearing on the

initial motion for summary judgment to conduct whatever discovery it believed it needed but simply failed to diligently pursue the discovery that it now claims it needed. See *Miller Largo v. Northern States Power Co.*, 566 N.W.2d 94, 96 (Minn. Ct. App. 1997) (holding that a party's desire to conduct discovery that could have been conducted earlier is insufficient justification for a continuance), *aff'd in part, rev'd in part, and remanded on other grounds*, 582 N.W.2d 550 (Minn. 1998); *Cargill Incorporated v. Jorgenson Farms*, 719 N.W.2d 226 (Minn. Ct. App. 2006) (holding that a continuance is not warranted when party had approximately seven months to conduct discovery); *Dunham v. Roger*, 708 N.W.2d 552 (Minn. Ct. App. 2006) (holding that the District Court did not abuse its discretion by denying continuance when appellant had ten months to complete discovery), *review denied* (Minn. Mar. 28, 2006).<sup>10</sup>

2. **NECP Failed to Establish that it Was Seeking Additional Discovery in the Good Faith Belief that Material Facts Will Be Uncovered.**

NECP concedes that its entire defense to liability on the General Agreement of Indemnity rests upon its frivolous claims of “bad faith takeover” and “bad faith settlement.” Framed by reference to these claims (and the uncontested facts), it is evident that NECP is not seeking discovery in the good faith belief that material facts will be uncovered; rather, it seeks to embark upon a wasteful (and belated) “fishing expedition.”

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<sup>10</sup> This authority is to be contrasted with *Rice* in which the court determined that a continuance was appropriate where the defendant had moved for summary judgment roughly *two weeks* after filing of complaint and the plaintiff immediately sought discovery and a continuance. *Rice v. Pearl*, 320 N.W.2d at 413.

Addressing these claims in turn, Liberty has submitted the sworn affidavit testimony of Dennis Pisarcik who was responsible for all aspects of Liberty's response to NECP's default termination. Mr. Pisarcik offered detailed testimony concerning his efforts to prod NECP for information as to why a Project that was supposed to be done as of the date of default was, in fact, only half complete. (SOMF, ¶8). Yet, in response to this inquiry, NECP pointed only to an issue concerning a missing crane ramp that explained at most an eight-day delay. (*Id.*). Of course, if Mr. Pisarcik was wrong concerning NECP's failure to provide meaningful information in response to the default, the Court can rest assured that NECP would have contested this testimony through its own affidavits. Instead, NECP said nothing. There is no need to depose Mr. Pisarcik to confirm what NECP has already confirmed through its silence to be true.

Further, although NECP speculates that Liberty's "gun to the head" decision was actually undertaken to cement Liberty's business relationship with Mortenson, Mr. Pisarcik has already testified that he had no idea that such a relationship even existed when he made the decision to honor the terms of Liberty's Bond. (SOMF, ¶¶11-14). Deposing Mr. Pisarcik about Liberty's rationale in agreeing to honor its bond is not going to result in a different answer.

Taking depositions concerning NECP's "bad faith settlement" claim is equally futile. *First*, the District Court determined as a matter of law that "the Liberty/Mortenson Settlement Agreement is clear – Liberty did not waive NECP's claims against Mortenson." (A.231). Inasmuch as the four corners of the document establishes that there was no waiver of NECP's claims against Mortenson, deposition testimony

concerning the parties' intentions is pointless. *Second*, even if NECP had noticed depositions concerning the parties' understanding of the settlement agreement's plain terms, there is no good faith reason to believe that Messrs. Funk and Pisarcik would recant their sworn testimony that there was no waiver.

*Third*, any attempt to depose the parties on their *mediated* settlement negotiations would run head long into Rule 114.08(b) of the Minnesota Rules of General Practice which provides that mediated settlement negotiations (and documents prepared as part of the mediation process) are not discoverable.<sup>11</sup> See MINN.R.GEN.PRACT. 114.08(b) ("no statements made nor documents produced in a non-binding ADR process which are not otherwise discoverable shall be subject to discovery or other disclosure"); see also *Kennedy v. City of St. Paul*, 2000 WL 290425, at \*5 (Minn. Ct. App. 2000). *Finally*, as to NECP's claim that a negotiable settlement offer constitutes blackmail, the material *facts* are not disputed, but rather only NECP's "unique" interpretation of those facts.

The reason that NECP did not take depositions for the first six months of this case is certainly not because it lacked the opportunity to do so. Rather, it is because they would not have mattered. A court should be quite strict in refusing continuances where the party merely expresses a hope or a desire to engage in a fishing expedition as to what

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<sup>11</sup> NECP attempts to confuse the issue by creating the illusion that Liberty is actually claiming privilege under Rule 408, as opposed to Rule 114.08. (Appellants' Br. at 30-31). Having first asserted a Rule 408 claim of privilege for Liberty *that Liberty never asserted for itself*, NECP then proceeds to explain why Rule 408 is inapplicable. *Id.* Again, Liberty did not assert a claim of privilege under Rule 408, but relies instead on Rule 114.08 which imposes an absolute ban on the discoverability of Liberty's *mediated* settlement discussions with Mortenson.

it might find by the time it gets to trial. *Rice*, 320 N.W.2d at 412. Here, no amount of discovery would confirm NECP's fanciful interpretation of the unambiguous agreements and undisputed facts.

In order to avoid summary judgment, NECP must "extract *specific*, admissible facts from the [] record" that shows that a genuine issue of material fact exists. *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn.Ct.App.1988), *review denied* (Minn. Mar. 30, 1988). Here, "[t]here is not a scintilla of evidence, as distinct from conclusory allegations, that [the surety] acted inappropriately." *Banque Nationale de Paris S.A. v. Ins. Co. of North America*, 896 F. Supp. 163, 165 (S.D.N.Y. 1995). Instead, of offering actual "material facts," NECP provides only "plaster on the wall."

After entertaining numerous motions and conducting countless hearings (wherein NECP repeated the exact same arguments as advanced here), the District Court ruled that Liberty acted in good faith as a matter of law and that summary judgment was therefore appropriate on Liberty's First Claim for Relief (Exoneration) and Fourth Claim for Relief (Indemnity). With all due deference to this Court, there is no basis for overturning the District Court's summary judgment ruling as to these claims.

**G. LIBERTY IS ENTITLED TO SUMMARY JUDGMENT ON ITS SECOND AND SEVENTH CLAIMS FOR RELIEF**

Notwithstanding NECP's "irrevocable" assignment to Liberty of all monies arising out of the Subcontract (R.11; FOF at ¶10 (R.112)), NECP agreed to accept a \$400,000 payment from Mortenson in return for releasing Mortenson from all claims arising out of the Subcontract and the Project. (*Id.*) NECP admits that it undertook this

course of action despite *repeatedly* having been told that the \$400,000 in question constituted subcontract funds that belonged to Liberty. (SMOF, ¶39). Warned but undeterred, NECP proceeded to take Liberty's money. *Id.*

Liberty's Second Claim for Relief sought assignment of the \$400,000 in question as collateral for NECP's contractual indemnity and exoneration obligation. Likewise, Liberty's Seventh Claim for Relief sought a ruling that NECP wrongfully converted Liberty's property when it accepted a \$400,000 payment which plainly "grew out of" the bonded Subcontract.

An award of summary judgment on these claims flows inexorably from the District Court's Findings and Conclusions. *First*, it has been judicially determined that "NECP assigned to Liberty, as collateral for its indemnity and exoneration obligations, all of NECP's 'right, title and interest. . . in and growing in any manner' out of the Subcontract." (FOF at ¶5 (R.111); Indemnity Agreement, Paragraph Third "Assignment" (emphasis added) (R.1.2). *Second*, the District Court noted that, by "effecting this irrevocable assignment, NECP reinforced the fact that Liberty has an equitable lien in any funds which "grow out of" the Subcontract." *Id.*, ¶ 22 (R.116). *Third*, the Court rejected NECP's novel claim that Mortenson's payment did not "grow out of" the Subcontract, noting that "*without the Subcontract, Mortenson would have no reason to pay NECP anything.*" *Id.* at ¶ 24 (R.116). *See also* FOF, ¶ 18 ("NECP agreed to accept

a \$400,000 payment from Mortenson in return for releasing Mortenson from all claims arising out of the Subcontract and the Project.”) (emphasis added) (R.115).<sup>12</sup>

NECP’s protestations notwithstanding, the fact that these assigned proceeds belong to Liberty is not a matter of conjecture or speculation. NECP undisputedly transferred and assigned to Liberty all proceeds “growing in any manner out of the [Subcontract]” and, as noted by the District Court, this assignment gave Liberty an equitable interest in any such funds. Finally, Mortenson’s payment necessarily “grew out of the Subcontract” because “*without the Subcontract, Mortenson would have no reason to pay NECP anything.*” Without question, the \$400,000 payment made by Mortenson to rid itself of liability under the Subcontract was “assigned to Liberty, as collateral for [NECP’s] indemnity and exoneration obligations.” (FOF at ¶5 (R.111); Indemnity Agreement, Paragraph Third: “Assignment” (R.1.2)). The District Court did not err in awarding Liberty these assigned funds.

Finally, NECP’s contention that Liberty failed to set forth any actual or threatened losses that would justify the release of \$400,000 is woefully mistaken. At the time of the settlement on August 23, 2006, Liberty’s damages were approximately \$185,000. (R.19). Subsequent to the initiation of this lawsuit, Liberty has incurred (and continues to incur) substantial legal fees in enforcing its rights under the General Agreement of Indemnity.

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<sup>12</sup> NECP’s argument that all claims which arise or “grow out of the Subcontract” must necessarily be claims for “unpaid Subcontract balances” is so contorted that it requires its own road map. Suffice to say, the lower court did not fall for this argument the first three times it was made and Liberty strongly doubts that NECP will obtain a different result now.

In its initial summary judgment motion, Liberty submitted the affidavit of Dennis Pisarcik to substantiate its claimed damages as of January 9, 2007 (both in terms of indemnified loss and required exoneration loss reserves). Summary Judgment Brief at pp. 12-14 (A.245-47); Pisarcik Aff. ¶¶ 12-16 (R.57-60).

In keeping with that fact, *and in view of NECP's failure to even mention Liberty's claimed losses in its Opposition to Liberty's Motion for Summary Judgment*, the District Court ultimately "awarded Liberty \$400,000 to cover its indemnity claim and corresponding legal expenses." (A.376) note 1. Clearly, the Court below was aware that Liberty had incurred (and would continue to incur) significant losses enforcing NECP's obligations under the General Agreement of Indemnity. For NECP to question these damages now – *without even broaching the subject of Liberty's damages proof in its Opposition to Liberty's Motion for Summary Judgment* – is disingenuous at best. In any event, the \$400,000 distribution to Liberty is *not* sufficient to cover Liberty's indemnified loss (inclusive of legal fees), let alone the costs of responding to this appeal. Accordingly, Liberty will be bringing a motion pursuant to MINN.R.CIV.APP.P. 127 and 139.06 seeking an award of its attorneys' fees and costs incurred in responding to this appeal.

**H. LIBERTY IS ENTITLED TO SUMMARY JUDGMENT ON NECP'S AFFIRMATIVE BAD FAITH CLAIM.**

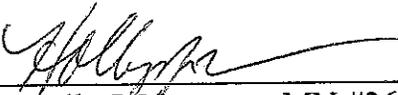
All parties agree that NECP's affirmative bad faith claims are simply the mirror image to its frivolous "bad faith" defense to liability. Having concluded that Liberty acted in good faith as a matter of law, the District Court granted Liberty's Motion for

Summary Judgment on NECP's affirmative claims. For the reasons set forth above, the District Court did not err in granting summary judgment as a matter of law on NECP's bad faith claims.

**IV. CONCLUSION**

It is time for NECP's legal maneuvering to end. The Indemnitors promised to make Liberty whole. Liberty respectfully requests that the Court hold the Indemnitors to their promise.

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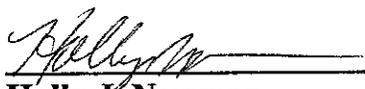
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### **Certificate of Compliance**

Pursuant to Rule 132.01, subd. 3, of the Minnesota Rules of Civil Appellate Procedure, I hereby certify that Respondent's Brief complies with typeface requirements and volume limitation as contained in the Rule, as it was typed using Microsoft Word 2002 in 13-point Times New Roman font and contains 13,465 total words.

  
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**Holly J. Newman**

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