

Nos. A10-2051 and A11-148

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State of Minnesota  
In Court of Appeals

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Marketline Construction Capital, LLC,  
*Defendant/Appellant,*

v.

City of Maple Grove,  
*Plaintiff/Respondent.*

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RESPONDENT CITY OF MAPLE GROVE'S  
BRIEF AND APPENDIX

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

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## STATEMENT OF THE ISSUES

I. When the letters of credit are identified as such and unambiguously state that Marketline will pay the City upon the City's presentation of certain documents, did Marketline issue the City letters of credit under Minn. Stat. §§ 336.5-101, et seq.?

The District Court held that Marketline issued letters of credit to the City.

Most Apposite Authorities:

Minn. Stat. § 336.5-102(a)(10)

Minn. Stat. § 336.5-103

Shaffer v. Brooklyn Park Garden Apartments, 250 N.W.2d 172 (Minn. 1977)

United Shippers Co-op v. Soukup, 459 N.W.2d 343 (Minn. Ct. App. 1990)

II. When the City's presentation of documents to Marketline complied with all of the terms of the letters of credit, did Marketline wrongfully dishonor the City's presentation?

The District Court held that Marketline wrongfully dishonored the letters of credit.

Most Apposite Authorities:

Minn. Stat. § 336.5-108(a)

Minn. Stat. § 336.5-111(a, d-e)

III. When Marketline failed to oppose the City's motion for summary judgment on its counterclaims and the undisputed material facts demonstrate that Marketline cannot establish the elements of its claims, did the District Court properly grant the City summary judgment dismissing Marketline's counterclaims?

The District Court held that Marketline failed to present specific facts precluding summary judgment and even so, the undisputed facts demonstrate that Marketline cannot satisfy the elements of its claims as a matter of law.

Most Apposite Authorities:

Minn. R. Civ. P. 56.06

Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359 (Minn. 2009)

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)

Airlines Reporting Corp. v. Norwest Bank, N.A., 529 N.W.2d 449 (Minn. Ct. App. 1995)

IV. When the documents are unambiguous and the City's deposition would not have lead to the discovery of material facts essential to Marketline's opposition of the City's motion for summary judgment, did the District Court abuse its discretion in denying Marketline's motion for a continuance?

The District Court held that because the letters of credit are unambiguous and independent from the development agreements, any additional information would have no bearing on the parties' clear agreement.

Most Apposite Authorities:

Minn. R. Civ. P. 56.06

Molde v. Citimortgage, Inc., 781 N.W.2d 36 (Minn. Ct. App. 2010)

QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n, 778 N.W.2d 393 (Minn. Ct. App. 2010)

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V. When the City is the prevailing party in this letter of credit action after defending against Marketline's myriad of counterclaims and defenses, did the District Court abuse its discretion in awarding the City \$45,459.00 in attorneys' fees pursuant to Minn. Stat. § 336.5-111?

The District Court found, based on the entire record of this action, that the City is entitled to recover its attorneys' fees in the amount of \$45,459.00 as the prevailing party.

Most Apposite Authorities:

Minn. Stat. § 336.5-111

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986)

Nelson v. Master Vaccine, Inc., 382 N.W.2d 261 (Minn. Ct. App. 1986)

## STATEMENT OF THE CASE

This is a letter of credit action governed by Article 5 of the Minnesota Uniform Commercial Code, Minn. Stat. §§ 336.5-101, et seq. On March 1, 2010, the City initiated this action against Marketline for wrongful dishonor of letter of credit numbers 06-0713-DD, 04-0713-DD, and 05-0713-DD (collectively referred to as the “Letters of Credit”).<sup>1</sup> The City seeks damages in the amount of \$228,930.00, which represents the total amount wrongfully dishonored, plus interest, costs, and reasonable attorneys’ fees. On March 16, 2010, Marketline served its Answer and Counterclaim, which included claims for fraud, negligent misrepresentation, estoppel, and unjust enrichment. Marketline seeks declaratory relief, reformation of the parties’ agreement, and damages.

On September 20, 2010, after the parties engaged in written discovery, the City moved for summary judgment on its claim for wrongful dishonor of the Letters of Credit and all of Marketline’s counterclaims. Marketline only partially opposed the City’s motion, as it did not offer any arguments or evidence to raise a fact issue on any of its counterclaims. Marketline requested a continuance so that it could take the City’s deposition, and the City moved for a protective order on the grounds that no additional evidence was necessary to resolve the issues in this case.

On September 22, 2010, the Honorable Charles A. Porter, Jr. issued an order granting the City’s motion for summary judgment, denying Marketline’s request for a

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<sup>1</sup> After initiating this action, the City accepted a replacement letter of credit for LOC No. 07-0713-DD from a third party. Marketline, however, did not consent to the City’s amendment of its Complaint to remove the portion of its wrongful dishonor claim attributed to the replaced credit.

continuance, and dismissing Marketline's counterclaims in their entirety. Judge Porter awarded the City judgment in the amount of \$228,930.00 plus interest accrued since January 2010 in the amount of 45,945.91. Judgment was entered on September 27, 2010.

On October 4, 2010, the City, as the prevailing party, filed a motion for attorneys' fees, costs, and disbursements. The City requested reasonable attorneys' fees in the amount of \$45,459.00 plus costs. The parties appeared at a hearing before Judge Porter on October 18, 2010. On November 12, 2010, Judge Porter issued an order granting the City's motion. Judgment was entered on December 1, 2010.

On November 22, 2010, Marketline filed its notice of appeal of the District Court's judgment entered September 27, 2010. Since the District Court's November 12, 2010 order had not been entered, this Court requested argument as to whether Marketline's appeal was premature. Both parties filed briefs, and this Court determined that Marketline's appeal could proceed. On January 25, 2011 Marketline filed its notice of appeal of the District Court's judgment entered December 1, 2010. This Court consolidated Marketline's appeals in an order dated January 28, 2011.

## **STATEMENT OF THE FACTS**

### Terms of the Letters of Credit

The Letters of Credit arise out of development agreements the City entered into with non-parties Dingman Development (MGII), LLC and Dingman Development (MG), LLC (collectively, "Dingman") for the development of Maple Creek Estates and The Preserve at Rush Creek, respectively. Both agreements required Dingman to provide the City with cash, letters of credit, or another form of surety to secure Dingman's

performance under the agreements. MCC 68-108. Dingman secured the letters of credit from Marketline in favor of the City to comply with the surety requirements in the development agreements. See id. Dingman granted Marketline mortgages on property in the Maple Creek Estates and the Preserve at Rush Creek developments. MCC 110, ¶ 1.

All three Letters of Credit contain essentially the same terms. MCC 50-55. First, each document is labeled a “Letter of Credit” and identifies Dingman as the “Account Party” and the City as the recipient of the credit. Id. Second, the credits were to be available to the City upon presentation of drafts drawn at sight on Marketline accompanied by a certification signed by the City Administrator. Id. Third, presentation was to be made either by mail or hand delivery at Marketline’s Edina office prior to February 1, 2010. Id. Fourth, the “special conditions” were as follows:

- 1.) Marketline Construction Capital, LLC has no obligation to request to (I) inquire into the correctness of any such herein described letter certification or (II) see to the proper application or use by said City of any payments by the bank to it under any such certification.
- 2.) Partial draws are permitted.  
Payment will be made at the offices of Marketline Construction Capital, LLC

Id. Fifth, Marketline expressly warranted to “drawers and/or bona fide holders that drafts drawn and negotiated in conformity with the terms of this credit will be duly honored upon presentation.” Id. Finally, each Letter of Credit is signed by Jay Schoo, President of Marketline. Id. The total amount of the Letters of Credit is \$228,930.00. Id.

### Marketline's Dishonor of the Letters of Credit

On or about January 20, 2010, the City sent written notice to Marketline that it was drawing on the full balance of the Letters of Credit. MCC 56-65. The City complied with the terms and conditions of the letters of credit by presenting Marketline with the required sight drafts and certificates signed by the City Administrator by certified mail at Marketline's Edina office. Id. The City requested, in the alternative, that Marketline renew and extend the full amount of each letter of credit until February 1, 2011. Id.

In a letter dated January 29, 2010, Marketline notified the City that it would not honor the City's drafts and demand for payment under the Letters of Credit or extend the Letters of Credit. MCC 66-67. Marketline did not identify any deficiencies in the City's presentation or claim that the City's draw on the Letters of Credit was fraudulent.<sup>2</sup> Id. Instead, Marketline claimed, among other things, that it is not obligated because it issued the credits as a conditional guarantor and its obligations were extinguished through foreclosure of the underlying property. Id.

### Discovery and Marketline's Request for a Continuance

Prior to the City's motion for summary judgment, the parties exchanged written discovery. In its interrogatories, the City asked Marketline to identify the City's alleged representations. MCC 114-23. Marketline claimed that the City made representations about its special assessment policy, the Letters of Credit, and the development agreements. Id. Many of these alleged representations occurred on March 8, 2010, well after Marketline issued the Letters of Credit. Id.

On August 3, 2010, Marketline noticed the City's Rule 30.02(f) corporate deposition, seeking to depose:

the person who has the most information regarding the above entitled litigation including but not limited to the purported letter of credit issued by Defendant, representative who had the most conversations with Marketline Construction Capital, LLC, representatives including but not limited to the representative Jay Schoo; and the party who has the most information regarding the Dingman Development MG LLC's failure to install and pay for petitioned items regarding the Reserve at Rush Creek, the City's call upon Dingman Construction MG's Letter of credit, and the application of the letter of credit.

MCC 210-11.

In his Rule 56.06 affidavit in support of Marketline's motion for a continuance, Marketline's counsel stated that he required more information about the following:

- The development agreements between the City and Dingman (paragraphs 10a, 10h-i, 10k, 10n, 12-15, 18);
- The letters of credit and the City's presentation (paragraphs 10b-c, 10l-m, 15, 17, 20);
- Dingman's sale or transfer of the real estate in the developments (paragraphs 10d, 10e, 10j, 14, 17-18);
- Payment of special assessments (paragraphs 10e, 10g, 12-14); and
- The City's cash flow from payment of the special assessments (paragraphs 10f, 11, 12-13, 17).<sup>3</sup>

MCC 204-08.

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<sup>2</sup> There is no dispute that the City's presentation conformed to the Letters of Credit.

<sup>3</sup> Notably, most of these subjects are not encompassed within Marketline's Rule 30.02(f) deposition notice, which only sought inquiry into the Letters of Credit, the City's conversations with Marketline and its representatives, the developer's failure to perform under the development agreement, the City's presentation, and application of the Letters of Credit. MCC 210-11.

## SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is proper when there are no genuine issues of material fact and a determination of the applicable law will resolve the matter. Gaspord v. Wash. County Planning Comm'n, 252 N.W.2d 590, 591 (Minn. 1977). When a moving party makes and supports a summary judgment motion, the nonmoving party has the burden to “present specific facts showing that there is a genuine issue for trial.” DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Minn. R. Civ. P. 56.05).

Upon a motion for summary judgment supported by affidavits setting out specific facts which, if true, would demonstrate the absence of a cause of action, the adverse party cannot preserve his right to a trial on the merits merely by referring to unverified and conclusionary allegations in his pleading or by postulating evidence which might be developed at trial in the course of cross-examination of adverse parties under the rules. He must instead present specific facts showing a genuine issue for trial.

Rosvall v. Provost, 155 N.W.2d 900, 904 (Minn. 1968). “Summary judgment may not be avoided simply because there is some metaphysical doubt as to a factual issue.” Bob Useldinger & Sons v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993).

On appeal, this Court determines whether the District Court, in entering summary judgment, erred (a) in concluding that no material facts are in dispute; or (b) in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

## SUMMARY OF THE ARGUMENT

This case arises out of Marketline’s failure to honor its obligations under the terms of the Letters of Credit. There is no dispute that the terms of the Letters of Credit unambiguously obligate Marketline to honor the City’s presentation of a draft and certification signed by the City Administrator. It is undisputed that the City fully

complied with the terms of the Letters of Credit; yet, Marketline failed to honor its clear obligations. Instead, Marketline asserted baseless legal arguments in an attempt to avoid its financial obligations to the City – to assure adequate funding of a public project. The trial court properly granted the City summary judgment in accordance with the clear, unequivocal obligations Marketline assumed when it issued the Letters of Credit.

## **ARGUMENT**

### **I. MARKETLINE WRONGFULLY DISHONORED THE LETTERS OF CREDIT**

#### **A. Whether the documents are letters of credit is a question of law.**

Marketline wrongly contends that interpretation of the Letters of Credit is a question of fact requiring extrinsic evidence. In Minnesota, courts construe letters of credit according to general contract principles. United Shippers Co-op. v. Soukup, 459 N.W.2d 343, 345 (Minn. Ct. App. 1990). Interpretation of an unambiguous contract is a question of law.<sup>4</sup> Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 856 (Minn. 1986).

The general rule is that the construction of a writing which is unambiguous is for the court, particularly when the intention of the parties is to be gained wholly from the writing. \* \* \* Where the issue to be determined is the nature and effect of a writing, the contents of which is not disputed, the general rule is particularly applicable.

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<sup>4</sup> Marketline's reliance on Barclays Bank D.C.O. v. Mercantile Nat'l Bank, 481 F.2d 1224 (5th Cir. 1973) is misplaced. A decision from a foreign federal jurisdiction on a question of Minnesota state law has no precedential value. Even so, that court held that summary judgment finding that the Bank issued letters of credit was appropriate.

Id. Further, when the language is plain and unambiguous the contract must, as a matter of law, be enforced as it is written. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66-67 (Minn. 1979); Telex Corp. v. Data Products Corp., 135 N.W.2d 681, 686-87 (Minn. 1965) (recognizing that “where the written language of an instrument applied to the subject is clear, whether it be a statute, constitution, or contract, it is neither necessary [n]or proper in construing it to go beyond the wording of the instrument itself”). See also Bolander & Sons, Inc. v. United Stockyards Corp., 215 N.W.2d 473, 476 (Minn. 1974) (stating that the court’s duty is to “declare the meaning of what is written in the instrument, not what was intended to be written”). Finally, when interpreting a contract, its language must be given its plain and ordinary meaning. Turner, 276 N.W.2d at 67.

Here, the Letters of Credit are unambiguous and must be enforced in accordance with their express terms. The contents of the Letters of Credit are undisputed and Marketline has not claimed, let alone shown that any of the terms in the documents are reasonably susceptible to more than one meaning. See Republic Nat’l Life Ins. Co. v. Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn. 1979) (stating that “ambiguity exists if it is susceptible to more than one construction”). Moreover, letters of credit are independent from any agreement out of which they arise. Minn. Stat. § 336.5-103. The Letters of Credit must therefore be construed without any reference to the underlying development agreements or the parties’ intent. Thus, this Court’s review of the parties’ agreement must focus solely on the terms of the Letters of Credit.

**B. Marketline issued letters of credit to the City.**

Pursuant to Article 5 of the UCC, a letter of credit is defined as:

a definite undertaking that satisfies the requirements of section 336.5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

Id. at § 336.5-102(a)(10).<sup>5</sup> The essential elements of a letter of credit are a direct promise to pay by the issuer upon a beneficiary's presentation of specified documents or items of value. Soukup, 459 N.W.2d at 345. See also Shaffer v. Brooklyn Park Garden Apartments, 250 N.W.2d 172, 175 n.1 (Minn. 1977) (finding that letters of credit requiring the beneficiary to present a documentary draft for payment was within the scope of Article 5); Crossroads Bank of Ga. v. State Bank of Springfield, 474 N.W.2d 14, 16 (Minn. Ct. App. 1991) (same). A letter of credit may be issued in any form that is a record and authenticated by a signature. Minn. Stat. § 336.5-104. Further, a letter of credit is issued and enforceable against the issuer when sent to the beneficiary and cannot be revoked unless provided in the credit. Id. at § 336.5-106(a).

In this case, the credits satisfy the definition of a letter of credit. Both essential elements are present in the express terms of the documents – Marketline promised to pay upon the City's presentation of the required documentary draft and certification signed by

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<sup>5</sup> An "applicant" is defined as the "person at whose request or for whose account a letter of credit is issued." Minn. Stat. § 336.5-102(a)(2). The "beneficiary" is the "person who under terms of a letter of credit is entitled to have its complying presentation honored." Id. at § 336.5-102(a)(3). An "issuer" is "a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family,

the City Administrator. Moreover, the documents are entitled “Letters of Credit” and were issued to the City on account of Dingman in a writing authenticated by Marketline’s president.<sup>6</sup> All of the essential elements are present in the credits; thus, the credits and Marketline’s obligations to the City are governed by Minn. Stat. §§ 336.5-101, et seq.

Marketline’s claim that it was a conditional guarantor, whose obligation ended upon transfer of the underlying property, is without merit. Marketline was not a guarantor. Courts distinguish guaranties from letters of credit on the grounds that in the former, the guarantor is secondarily liable and in the latter, the issuer is primarily liable. Prudential Ins. Co. of Am. v. Marquette Nat’l Bank of Minneapolis, 419 F. Supp. 734, 735 (D. Minn. 1976). Here, the Letters of Credit expressly state that Marketline will honor (ie. pay) any drafts drawn in conformity with the terms of the credit. There is no language in the Letters of Credit which even suggest, let alone state, that Marketline is only secondarily liable. Marketline, as the issuer of the Letters of Credit, is principally liable for payment to the City. Dingman, in turn, is liable to Marketline for the amount of the draw on the Letters of Credit because there is no dispute about the conformity of the City’s draw and presentation. Minn. Stat. § 336.5-108(i)(1).

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or household purposes.” Id. at § 336.5-102(a)(9). “Presentation” is defined as the “delivery of a document to an issuer . . . for honor . . . .” Id. at § 336.5-102(a)(12).

<sup>6</sup> Marketline contends that the District Court wrongly relied on United Shippers Co-op. v. Soukup, 459 N.W.2d 343 (Minn. Ct. App. 1990) in finding that the title of the documents was dispositive. However, both Soukup and Minn. Stat. § 336.5-102(a)(10) require the same essential exchange of a promise to pay upon presentation of required documents. Moreover, the District Court did not rely exclusively on the title of the documents, but also the undisputed fact that the letters of credit “require a documentary draft.”

Moreover, Marketline's obligations to the City are not conditioned on the terms of the agreements between the City and Dingman. Minn. Stat. § 336.5-103 provides:

Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

See also Shaffer, 250 N.W.2d at 178 (recognizing that an issuer's obligation to honor drafts presented for payment on a letter of credit depends solely on the terms and conditions of the letter of credit and not the underlying agreements); Menard, Inc. v. King De Son, Co., Ltd., 467 N.W.2d 34, 36 (Minn. Ct. App. 1991) (same); Crossroads Bank of Ga., 474 N.W.2d at 16-17 (same). By conditioning payment on the terms of a letter of credit, the issuer's justifications for not honoring the credit "are severely restricted, thereby assuring the reliability of letters of credit as a payment mechanism." Crossroads Bank of Ga., 474 N.W.2d at 17.

The only contractual relationship at issue in this case is between Marketline and the City, and that relationship is governed exclusively by the unambiguous terms in the Letters of Credit. As stated, the terms of the Letters of Credit plainly satisfy the statutory requirements under Minn. Stat. §§ 336.5-102(a)(10) and 336.5-104. Thus, summary judgment in favor of the City was proper.

**C. Marketline wrongfully dishonored the letters of credit.**

An issuer must honor a beneficiary's presentation if it appears on its face to strictly comply with the terms of the letter of credit. Minn. Stat. § 336.5-108(a). Except

with respect to a fraudulent presentation, which is not an issue in this case, an issuer is barred from “asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.” *Id.* at § 336.5-108(c). If an issuer wrongfully dishonors a presentation, the beneficiary is entitled to recover the amount dishonored plus interest accruing from the date of the wrongful dishonor, reasonable attorneys’ fees, and litigation expenses. *Id.* at § 336.5-111(a, d-e).

There is no dispute that the City’s presentation complied with the terms of the Letters of Credit, and Marketline’s subsequent dishonor was wrongful. The District Court’s judgment should be affirmed.

## **II. MARKETLINE’S COUNTERCLAIMS FAIL AS A MATTER OF LAW**

### **A. Marketline has not introduced any evidence precluding summary judgment dismissing its counterclaims.**

In opposing the City’s summary judgment motion, Marketline had the burden of “present[ing] specific facts showing that there is a genuine issue for trial.” *DHL, Inc.*, 566 N.W.2d at 69 (quoting Minn. R. Civ. P. 56.05). Marketline, however, did not file any response or objection to the City’s motion for summary judgment on its counterclaims, let alone provide any evidence in support of its counterclaims. The District Court therefore properly dismissed these claims.

Marketline claims for the first time on appeal that fact issues preclude summary judgment on its counterclaims. It is well-settled that issues not raised before, or decided by, the district court will not be considered for the first time on appeal. *Thiele v. Stich*,

425 N.W.2d 580, 582 (Minn. 1988). This Court should not consider the merits of Marketline's counterclaims and affirm the grant of summary judgment to the City.

Nevertheless, Marketline still has not provided any specific facts creating a triable issue on any of its counterclaims. Marketline's general reliance on the allegations in its Answer and Counterclaim is insufficient to create a fact issue. Minn. R. Civ. P. 56.05. Further, while Marketline states that the City made "representations," it does not identify these representations or claim that they were false, negligent, or misleading. Finally, instead of supporting its counterclaims with specific facts, Marketline claims it should have been given additional time for discovery. There is nothing in Marketline's Rule 56.06 affidavit that specifies or explains what evidence it sought from the City's deposition that was essential to support its counterclaims. No delay was warranted since Marketline presumably knows what representations the City made to it and the extent of its reliance and damages. There are no fact issues and the City is entitled to summary judgment dismissing Marketline's counterclaims.

**B. Even if considered, Marketline's counterclaims should be dismissed.**

Marketline brings several counterclaims in an attempt to avoid payment to the City. First, Marketline seeks an order reforming the parties' agreement and declaring that it has no outstanding obligations to the City because it was a conditional guarantor and its obligations were extinguished through foreclosure of the underlying property. As demonstrated above, however, the plain and unambiguous terms of the Letters of Credit establish that Marketline is liable to the City for wrongful dishonor. Marketline's

obligations to the City were definite and have not been extinguished; thus, Marketline's declaratory judgment and reformation claims should be dismissed.

Second, Marketline claims that the City fraudulently induced it to enter into the letters of credit. Marketline's fraud claims fail because the City did not make any false representations and, even if it did, Marketline cannot show reliance, causation, or damages. Marketline is also not entitled to damages against the City based on the City's immunities. Finally, Marketline claims that it is entitled to equitable relief. Equitable relief is inapplicable because the parties' written agreements fully set forth their obligations. Moreover, there is no injustice to be avoided because Marketline has an immediate statutory remedy against Dingman, the letter of credit applicant.

**1. Marketline cannot prove fraud as a matter of law.**

To succeed on a claim for fraud, Marketline must prove:

(1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986). Similarly, in

Minnesota, negligent misrepresentation requires:

One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Bonhiver v. Graff, 248 N.W.2d 291, 298 (Minn. 1976). “An essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information.” Smith v. Woodwind Homes, Inc., 605 N.W.2d 418, 424 (Minn. Ct. App. 2000). When parties in a business transaction negotiate at arm’s length, there is no duty imposed and a negligent misrepresentation claim fails as a matter of law. Id.; Safeco Ins. Co. of Am. v. Dain Bosworth Inc., 531 N.W.2d 867, 871 (Minn. Ct. App. 1995). Whether a duty of care exists is a question of law. Id. Marketline must prove its fraud claims by clear and convincing evidence, especially since it seeks to avoid the effects of the written Letters of Credit. Boyd v. DeGardner Realty & Constr., 390 N.W.2d 902, 904 (Minn. Ct. App. 1986).

Marketline’s fraud claims should be dismissed because there is no evidence that the City made any false representations. First, while Marketline alleges that the City’s staff made “representations,” it does not claim that any of these representations are false. App.’s Br. p. 18. Second, any representations taken from the terms of the Letters of Credit and development agreements are true statements. Third, Marketline cannot base its fraud claim on the terms of the development agreements because those representations were made to Dingman, not Marketline. Thus, even assuming that the City’s staff made representations to Marketline, they are not actionable as fraud because they are not false. No further analysis is warranted and Marketline’s fraud claims should be dismissed.

However, even if the court finds that the City made a false representation, Marketline cannot show that it reasonably relied on the City’s representations to its detriment. A party’s alleged reliance is only actionable if it is reasonable. Valspar

Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 368 (Minn. 2009). Reasonableness is a subjective determination based on that party's intelligence, experience, and opportunity to investigate. Id. at 369. Obviously, Marketline could not have detrimentally relied on any alleged representations made at the March 8, 2010 meeting because it had already issued the Letters of Credit to the City. Further, Marketline concedes that it is a "limited liability company which provides funding for builders to construct new homes." App.'s Br. p. 15. As an experienced lender in an arms length lending transaction with the City, Marketline could not have relied on the City's representations as a matter of law.<sup>7</sup>

Moreover, reliance is unjustified as a matter of law when the oral representations contradict the terms of the parties' written contract. Boyd, 390 N.W.2d at 904.

Marketline executed written Letters of Credit that contain all of the terms of the parties' agreement. The allegedly false representations made by the City's employees are not contained in and contradict the plain terms of the Letters of Credit. Thus, Marketline's reliance on any of the allegedly false representations was unjustified.

Finally, Marketline cannot show that it suffered any damages as a result of its reliance. It is undisputed that Dingman granted Marketline a mortgage to secure the Letters of Credit. Further, Minn. Stat. § 336.5-108(i)(1) provides Marketline with an immediate right to recover the amount paid under the Letters of Credit from Dingman,

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<sup>7</sup> Marketline's reliance on any statements in the development agreements is unreasonable as a matter of law because, under the independence principle, its obligations are derived solely from the terms of the letters of credit. Minn. Stat. § 336.5-103.

the account party. Marketline's attempt to shift the risk of loss onto the City in this transaction contradicts the plain terms of the parties' agreement.<sup>8</sup>

**2. Marketline is not entitled to damages against the City because it is protected by vicarious immunity.**

Marketline seeks a monetary judgment against the City as relief for its fraud counterclaims. Even if Marketline can establish a fact issue on fraud, which it cannot, summary judgment is appropriate because the City has immunity from damages.

A city has vicarious immunity protecting it from liability when the employee whose actions give rise to a claim for damages is entitled to official immunity. Fedke v. City of Chaska, 685 N.W.2d 725, 731 (Minn. Ct. App. 2004). Under the doctrine of official immunity, "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." Pletan v. Gaines, 494 N.W.2d 38, 40 (Minn. 1992). Official immunity applies when the official exercises discretion on an operational, rather than policymaking level, and requires something more than the performance of ministerial duties. Id.

In this case, Marketline claims that [REDACTED] and [REDACTED] on behalf of the City, made representations about the Letters of Credit. At the time any claimed actionable statements would have been made (there were none) these City employees were engaged in the development process which necessarily involves the exercise of

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<sup>8</sup> Marketline's negligent misrepresentation claim fails for all of the stated reasons and the additional reason that no duty existed between Marketline and the City. The City and

discretion. Further, there is no claim, let alone any evidence that these employees are guilty of malice. At most, the statements were given in explanation of the development process and agreements. Thus, even if the City employees' actions could give rise to a claim for damages, the employees would be protected from liability by official immunity; and the City would be entitled to vicarious immunity. Marketline's claim for damages fails as a matter of law.

**3. Marketline's equitable counterclaims should be dismissed.**

Marketline's counterclaims include Count Two – Reformation/Modification of Agreement, Count Four – Detrimental Reliance/Estoppel, and Count Five – Unjust Enrichment.<sup>9</sup> These counterclaims fail as a matter of law. The Letters of Credit are governed by Article 5 of the Minnesota Uniform Commercial Code, Minn. Stat. § 336.5-101, et seq. Minnesota courts hold that when the provisions in the UCC are determinative of the parties' obligations, equitable principles do not apply. Airlines Reporting Corp. v. Norwest Bank, N.A., 529 N.W.2d 449, 452 (Minn. Ct. App. 1995). Here, the Letters of Credit fully set forth the parties' agreement in this strictly commercial matter and application of equitable principles is inappropriate.

Even if the court looks to equitable principles, Marketline cannot establish that it is entitled to reformation of the parties' agreement. A party seeking to reform a contract bears a heavy burden of showing that reformation is required by clear and convincing

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Marketline engaged in an arm's length financing transaction. This was a commercial transaction involving sophisticated parties with equal access to all required information.

evidence. Gethsemane Lutheran Church v. Zacho, 104 N.W.2d 645, 648 (Minn. 1960).

Before the court can reform a contract, it must find that there was a valid agreement between the parties, that the agreement fails to express the parties' true intention, and the failure was due to mutual mistake or a mistake by one party coupled with fraud on the part of the other party. Glaser v. Alexander, 76 N.W.2d 682, 686 (Minn. 1956). Here, the Letters of Credit unambiguously express the parties' intent that Marketline provide letters of credit as opposed to conditional guaranties. There is no evidence of mutual mistake, and Marketline cannot prove fraud as a matter of law. Thus, Marketline is not entitled to reformation or modification of the letters of credit.

Marketline's unjust enrichment claim is also fatally flawed. To succeed on its unjust enrichment claim, Marketline must show that the City "received or obtained something of value for which the [City] in equity and good conscience should pay." Hamann v. Park Nicollet Clinic, 792 N.W.2d 468, 472 (Minn. Ct. App. 2010) (citation omitted). This claim "requires proof that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully, . . . or as a result of fraudulent inducement or unconscionable conduct." Id. at 473. While Marketline pled fraud in its Answer and Counterclaims, it has not offered any specific facts in support of this claim and the undisputed facts demonstrate that it cannot prove fraud as a matter of law.<sup>10</sup>

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<sup>9</sup> While Marketline titles its Counterclaims as "Estoppel," "Unjust Enrichment," and "Reformation/Modification," it does not plead the required elements of these claims. Instead, it repeats the same allegations it uses in support of its fraud-based claims.

<sup>10</sup> In a desperate attempt to revive its claim, Marketline quotes a portion of the summary judgment hearing where its attorney baldly accuses the City of a crime without any factual support. App.'s Br. p. 22. This statement is obviously not under oath and

Finally, there is no injustice to be avoided in this case which would support Marketline's equitable claims. The Letters of Credit, by their very nature, bind Marketline to its surety obligations without any regard to the development agreements or Dingman's transfer of the property. Minn. Stat. § 336.5-103. Marketline's wrongful dishonor of the Letters of Credit directly caused the City's loss of the security it requires for the underlying development projects and to which it was entitled to receive under the plain terms of the credits. Marketline, through its mortgage on the underlying property, is secured and has not been damaged as a result of the letter of credit transaction. Further, pursuant to Minn. Stat. § 336.5-108(i)(1), Marketline has a claim against Dingman for the full amount paid to the City. Marketline is in the best position to make both the City and itself whole. Thus, Marketline's equitable counterclaims should be dismissed and the City's motion for summary judgment granted.

### **III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MARKETLINE'S REQUEST FOR A CONTINUANCE**

This Court reviews the District Court's decision denying Marketline's motion for a continuance under an abuse of discretion standard. Molde v. Citimortgage, Inc., 781 N.W.2d 36, 45 (Minn. Ct. App. 2010). Minn. R. Civ. P. 56.06 provides that a party may seek an order delaying summary judgment by submitting an affidavit setting forth the facts essential to its opposition and reasons why it cannot obtain those facts prior to the

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irrelevant to a Minn. R. Civ. P. 56 analysis. Viewed in its entirety, this exchange is part of Marketline's argument that the City failed to act with good faith and fair dealing in drawing on the Letters of Credit. Marketline, however, has never alleged that the City fraudulently drew on the Letters of Credit and there is no dispute that the City's draw complied with the terms of the Letters of Credit.

motion. The affidavit “must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” Molde, 781 N.W.2d at 45 (citation omitted). In deciding the Rule 56.06 motion, courts consider the “moving party’s diligence in seeking discovery as well as the materiality of the facts that party is seeking.” QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass’n, 778 N.W.2d 393, 400 (Minn. Ct. App. 2010). The district court does not abuse its discretion by denying a motion for a continuance and granting summary judgment when the discovery would not aid the court or alter the result of the summary judgment motion. Id.

The District Court did not abuse its discretion in denying Marketline’s motion because deposing the City was unnecessary and would not have lead to the discovery of material facts essential to resolving the City’s motion for summary judgment. In his affidavit, Marketline’s attorney claimed that he needed to depose the City “to fully comprehend [the City’s] understanding of all the relevant evidence and documents in this matter,” which included the Letters of Credit, the development agreements between the City and Dingman, the sale or transfer of the underlying property, payment of the special assessments, and the City’s cash flow from payment of the assessments.

Marketline has not shown how any of this information is relevant to the City’s motion.<sup>11</sup> The issues in this case are whether Marketline issued letters of credit to the City, did the City’s presentation conform to the terms of the Letters of Credit, and did

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<sup>11</sup> See R 39-45 for a detailed analysis of why each item claimed in Marketline’s Rule 56.06 affidavit is irrelevant to this action.

Marketline wrongfully dishonor the City's presentation. As the District Court correctly found, the Letters of Credit are unambiguous and clearly set forth Marketline's obligations to the City regardless of the parties' understanding. Further, since the Letters of Credit are independent of the development agreements, the City's agreements and relationship with Dingman and the underlying property is irrelevant to Marketline's liability. Minn. Stat. § 336.5-103. No extrinsic evidence was necessary to the District Court's decision awarding the City summary judgment and Marketline's motion was properly denied. See QBE Ins. Corp., 778 N.W.2d at 400 (affirming district court's decision denying motion for continuance when resolution of the summary judgment motion was a question of law based on an interpretation of the parties' agreement).

Marketline's claim that the District Court erred because it was also requesting additional discovery related to its counterclaims lacks merit. Marketline, either in its Rule 56.06 affidavit or on this appeal, has not specified what facts it expected to gain from deposing the City that would be necessary to oppose the City's motion on its counterclaims. Marketline cites to MCC 186, a page from its brief in support of its motion for a continuance, to claim that it raised fact issues on its counterclaims, but it never even opposed the City's motion for summary judgment on its counterclaims, let alone raised any fact issues. Marketline's failure to comply with Rule 56.06 by

specifically describing the discovery sought is sufficient grounds for the District Court to deny its motion for a continuance. Molde, 781 N.W.2d at 45.<sup>12</sup>

Finally, Marketline had ample opportunity for discovery prior to the City's motion. This Court has held that denying a continuance when the moving party had just over five months to take depositions prior to summary judgment is not an abuse of discretion. Gradjelick v. Hance, 627 N.W.2d 708, 715 (Minn. Ct. App. 2001). Further, both parties engaged in written discovery and on summary judgment, the City accepted as true all of the alleged misrepresentations identified in Marketline's interrogatory answers. The District Court properly denied Marketline's motion for a continuance.

#### **IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE CITY ITS REASONABLE ATTORNEYS' FEES**

Minn. Stat. § 336.5-111 provides that "[r]easonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article." (Emphasis added). While the amount of fees generally lies in the court's discretion, denying a prevailing party an award of fees required by statute without a finding of unreasonableness is an abuse of discretion. See Nelson v. Master Vaccine, Inc., 382 N.W.2d 261, 266 (Minn. Ct. App. 1986) (recognizing that it would undermine the purpose of the statute to deny the prevailing party its fees without finding that the fees were unreasonable). In determining the amount of an attorneys' fee award, courts multiply the number of reasonable hours spent

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<sup>12</sup> Even so, deposing the City with respect to Marketline's counterclaims is unnecessary because presumably Marketline already knows the alleged misrepresentations and the extent of its alleged reliance and damages.

by a reasonable rate. Specialized Tours, Inc., 392 N.W.2d at 542. Courts also consider the results obtained in determining the total fee award. Id.

The City, as the prevailing party in this action, is entitled to recover all reasonable attorneys' fees it incurred in this matter. Marketline does not dispute the reasonableness of Hoff, Barry & Kozar, P.A.'s ("HBK") hourly rates; thus, the only issue is the reasonableness of the hours expended. All of the attorneys' fees incurred by the City in this matter were reasonable and necessary to successfully prosecute its claim for wrongful dishonor as well as defend itself against Marketline's counterclaims. The District Court's fee award should be affirmed.

**A. The time and labor expended by the City's attorneys was reasonable.**

Marketline wrongly claims that the City's fees are unreasonable based on the time and labor required for this action. First, Marketline fails to explain how the length of this lawsuit makes the amount of the City's attorneys' fees unreasonable. Marketline ignores that in the "relatively short" seven months of this lawsuit, in addition to attorney-client communications, the parties engaged in written discovery and document review, the City moved for a protective order and summary judgment, and Marketline moved for a continuance. All of this work was necessary for the City to prevail on summary judgment without incurring substantially more fees for unnecessary depositions or trial. The fact that the City was able to prevail on all of the claims in this action in only seven months demonstrates that it was efficient and only incurred enough attorneys' fees to ensure a favorable outcome as quickly as possible.

Second, Marketline's comparison between its attorneys' fees and the City's fees is an improper method of determining reasonableness. Marketline cites no Minnesota case adopting this methodology. Further, there is no factual basis in the record to determine the reasonableness of Marketline's fees to make an accurate comparison. Unlike the City, Marketline does not disclose whether its attorneys charged their normal hourly rates or other rates based on a special fee agreement. Marketline also redacted all of its billing records to remove any description of the work done by its attorneys, so it is impossible to tell what, if any, actual legal work may have been done in pursuit of its claims.

Even if compared, the record is clear that Marketline's fees are low because its attorneys spent minimal time and effort defending this action. In a separate action, the City of Oak Grove sued Marketline for wrongful dishonor of a letter of credit. R 3-31. Marketline served an answer and counterclaim in that case prior to the ones served in this action. Id. Marketline's answers in both cases contain many of the same allegations and claims. See Id. It appears that Marketline did nothing more than "cut and paste" its allegations and claims from the Oak Grove answer and counterclaim into its claims against Maple Grove. Clearly, there is little to no attorney time required to direct a staff member to "cut and paste" in the firm's computer system. As if the use of "cutting and pasting" in the initial pleadings is not enough evidence of little to no effort, in this matter, Marketline's interrogatory answers are very similar in both cases and are based on the same legal theories. MCC 112-23; R 20-31. Thus, whatever Marketline charged its client does not even resemble a fair approximation of reasonableness; it is evident that Marketline's attorney did little if any individual research and response to the claims and

unique facts in this case.<sup>13</sup> Based on the results, it is fair to say that the quality of work performed by Marketline's attorneys is not comparable to that of the City's attorneys.

**B. The nature and difficulty of this action justifies the amount of fees.**

Marketline claims that the City's attorneys' fees were unreasonable because "the determinative issue in this case involved the interpretation of surety documents, and whether the documents were letters of credit as asserted by the City, or conditional guaranties as asserted by Marketline." App.'s Br. p. 31. Marketline's after-the-fact, simplified characterization grossly misrepresents the importance of this case to the City and Marketline's extreme efforts to avoid its surety obligations to the City. The City brought this action to recover almost \$300,000.00 in surety funds wrongfully withheld by Marketline. The City's attorneys' fees represent only 15% of the total amount at stake.

Moreover, in addition to challenging the terms of the Letters of Credit, Marketline asserted six counterclaims including fraud, negligent misrepresentation, contract reformation, unjust enrichment, and promissory estoppel. Also, during oral argument, Marketline's attorney accused the City of criminal conduct. R 62. The City incurred attorneys' fees to defend against Marketline's counterclaims and baseless accusations.

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<sup>13</sup> This course of making casual claims with little to no research was also evidenced by Marketline's responses to the City's summary judgment motion. Marketline proffered several serious claims against the City (including accusing the City of active wrongdoing and potentially criminal conduct) in an effort to avoid its clear obligations. When it came time to demonstrate and support the bold assertions made, Marketline offered nothing of substance. It is not surprising that Marketline's fees were at the level claimed by counsel. Marketline got what it paid for – virtually nothing of substance. But the allegations Marketline chose to make and the surety obligation that it tried to avoid, called for sustained, diligent, and thorough effort on behalf of counsel for the City.

Had Marketline admitted that this was a straightforward contract action from the beginning, the City's attorneys' fees would have been dramatically less. Marketline cannot now complain that the City's fees are too high when it is directly responsible for turning what should have been a simple contract action into a convoluted legal quagmire, all with the hope of avoiding its clear financial responsibility to the City. All of the attorneys' fees incurred by the City in this matter were necessary to prevail on its claim for wrongful dishonor and successfully defend against Marketline's counterclaims.

**C. The amount of fees represents the actual amount of work done on the file by the City's attorneys.**

Marketline's claim that the City's claim for attorneys' fees is duplicative and excessive lacks merit. First, Marketline falsely accuses HBK of double-billing because it does not understand that HBK's fees were evenly apportioned between the City and its insurer, the League of Minnesota Cities Insurance Trust ("LMCIT"). The City and the LMCIT retained HBK to represent them in bringing the wrongful dishonor claim and in defending against Marketline's extensive counterclaims, respectively. Since most, if not all, of HBK's work benefited both representations, the City and the LMCIT agreed to evenly split HBK's fees as a fair approximation of the work HBK did in this matter. With the exception of its first bill, which predated Marketline's counterclaims and the LMCIT's involvement, HBK billed the City and the LMCIT separately for one-half of the fees actually incurred during each billing period. Thus, the same language appears in

the billing entries on the invoices to the City and the LMCIT for work on the same day.<sup>14</sup> HBK did not bill its clients twice for the same work, but employed a straight-forward and simple billing structure that was reasonable under the circumstances.

Second, Marketline wrongly claims that HBK's fees are excessive based on the number of persons working on this case. Attorneys George C. Hoff and Shelley M. Ryan and paralegal Wendy M. Price were the primary persons working on this case.<sup>15</sup> It is axiomatic that distributing work between attorneys and paralegals is the most efficient and cost-effective use of time and the client's resources. Mr. Hoff's time is the most expensive time billed to the file, given his experience.<sup>16</sup> As shown in the billing records, his role was not original drafting, but was that of review, revision, and overall final decision-making on strategy. Ms. Ryan, an associate, as is normal did the bulk of the work in researching legal and factual issues, drafting, and working with the client to gather information necessary to this action. The entries Marketline cites simply reflect in a shorthand manner the function carried out and do not reflect duplication of work.

Third, Marketline argues that HBK's fees are excessive because it spent too much time drafting an opinion letter and the City's summary judgment memorandum.

Marketline, however, does not explain how the amount of hours spent is unreasonable.

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<sup>14</sup> For example, on March 25, 2010, Shelley M. Ryan spent 2.50 total hours reviewing and analyzing Marketline's answer and counterclaims. As reflected on the billing statements, HBK split the total time in half and billed 1.25 hours to the City and 1.25 hours to the LMCIT. MCC 335, 352.

<sup>15</sup> Attorneys Kimberly B. Kozar and Scott B. Landsman billed less than 1.8 hours to the file and were consulted only when necessary and appropriate. MCC 329-30.

<sup>16</sup> Notably, Marketline's attorney, with only seven years of experience, charges \$225.00/hour.

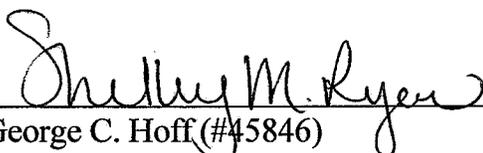
Nevertheless, these fees are reasonable because the City was not only prosecuting its claim for wrongful dishonor, but defending against Marketline's specious claim that it was merely a guarantor and its six counterclaims. The City had to analyze and defend against Marketline's arguments and counterclaims through the summary judgment motion. By then, the City had incurred the vast majority of its attorneys' fees.

Finally, Marketline complains that the time HBK spent on a settlement agreement is unnecessary. After Marketline dishonored the letters of credit and the City initiated this lawsuit, the Bank of Elk River ("Bank") contacted the City about providing a letter of credit to replace Marketline's letter of credit No. 07-0713-DD in the amount of \$70,730.00. R 1, ¶ 2. HBK drafted a settlement agreement and related documents to facilitate the City's acceptance of the Bank's replacement letter of credit. *Id.* Even though Marketline was not a party to those agreements, HBK's work was directly related to this lawsuit. *Id.* HBK's work in drafting, reviewing, analyzing, and advising the City with respect to the Bank's proposal resulted in the City's acceptance of a replacement letter of credit and a reduction of \$70,730.00 in damages against Marketline. *Id.* The City would not have incurred any of these attorneys' fees but for Marketline's failure to renew and its unjustified dishonor of the letters of credit. Thus, these fees were necessary and reasonable.<sup>17</sup>

**CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court's decisions.

Dated: 3/25

  
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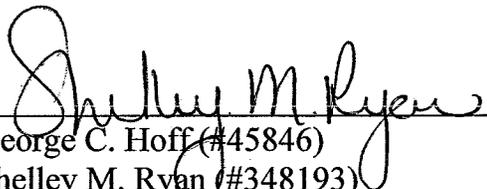
<sup>17</sup> HBK billed 5.1 hours for work to facilitate the replacement letter of credit. MCC 333.

**CERTIFICATE OF COMPLIANCE**

PURSUANT TO MINN. R. CIV. APP. P. 132.01, Subd. 3(a)

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 8,806 words, excluding the parts of the brief exempted by Minn. R. Civ. App. P. 132.01, Subd. 3. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in Times New Roman with a 13 point font.

Dated: 3/25

  
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