STATE OF MINNESOTA

IN COURT OF APPEALS

No. A111137

NHF Hog Marketing, Inc.,

Appellant,

vs.

Pork Martin, LLP,

Respondent.

APPELLANT'S BRIEF AND ADDENDUMS

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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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LEGAL ISSUE

Did the District Court err when it failed to apply the plain language of Minn. Stat. § 336.2-713 and held that the Appellant NHF Marketing is not entitled to the full contract damages under its contract with Pork Martin?

Minn. Stat. § 336.2-713 provides for the contractual damages for the sale of goods. The Appellant NHF Marketing argued that under Minn. Stat. § 336.2-713, NHF Marketing is entitled to damages for the difference between the contract price and the market price at the time the goods were to be delivered. The District Court disagreed and held that the Appellant was only entitled to its lost commission on the resale of the goods, and not its full contract damages under Minn. Stat. § 336.2-713.

The issue was raised by the Appellant NHF Marketing at trial on January 5, 2011. The Court entered its Order on May 11, 2011. (Appellant's Addendum ("**Add**.") 1-8). The Appellant filed its Notice of Appeal on June 8, 2011. (Appellant's Appendix ("**App.**") 1).

<u>Authority</u>:

Minn. Stat. § 336.2-713

STATEMENT OF THE CASE AND FACTS

This case arises from the decision of the Respondent Pork Martin not to deliver hogs under a contract with the Appellant NHF Marketing and the respective damages owed to the Appellant under Minn. Stat. § 336.2-713. The Respondent argued that its damages to the Appellant are limited to the Appellant's lost commission on the resale of the hogs. The

Appellant NHF Marketing argued that Minn. Stat. § 336.2-713 does not limit its damages to its lost commission on the resale of the hogs; but rather, the Appellant is entitled to its full contract damages for the difference between the contract price and the market price at the time the hogs were to be delivered. A trial was held on January 5, 2011. District Court Judge Timothy K. Connell disagreed with the Appellant and held that the Appellant was only entitled to its lost commission.

The Parties. The Appellant NHF Marketing, Inc. ("**NHF Marketing**") is a Minnesota corporation with its regular place of business in Pipestone, Minnesota. (Add. 3, ¶1). NHF Marketing markets hogs. (Add. 3, ¶1). The Respondent Pork Martin, L.L.P. ("**Pork Martin**") is a Minnesota limited liability partnership with its regular place of business in Fairmont, Minnesota. (Add. 3, ¶ 2). Pork Martin owns and finishes hogs. (Add. 3, ¶ 2).

The J.B.S. Swift Master Contract. On November 14, 2005, NHF Marketing and J.B.S. Swift entered into a Master Hog Procurement Contract wherein NHF Marketing agreed to deliver 750,000 hogs to J.B.S. Swift (the "**Market Hogs**") from January 1, 2006, to December 31, 2010, in consideration for payment ("**Master Contract**"). (Add. 3, ¶ 3; App. 160-193). The obligations under the Master Contract were guaranteed by New Horizon Farms (the "**Guaranty**"). (Add. 3-4, ¶ 3; App. 191-193). The Master Contract required that the Market Hogs be raised at certain **Designated Production Facilities** (as defined in the Master Contract) and meet certain quality requirements as further memorialized in the Master Contract. (Add. 4, ¶ 4; App. 160-161). J.B.S. Swift was entitled verify that the location and quality requirements of the Master Contract were being satisfied. Add. 4, ¶ 5; App. 166-167).

The Master Contract provided that NHF Marketing would be paid a market based price for the Market Hogs (referred to as the Base Price under the Master Contract), but that the contract price would be limited by a "price window" (the "**Price Window**"). (Add. 4, ¶ 5; App. 167-168). If the market price of hogs were between \$55.00 and \$64.00 per carcass cwt., NHF Marketing would receive the market based price for the Market Hogs. (Add. 4, ¶ 5; App. 167-168). However, if the market price was below the window floor (of \$55.00 per carcass cwt.), NHF Marketing would receive more than the market price. (Add. 4, ¶ 5; App. 167-168). Likewise, if the market price was greater than the window ceiling (of \$64.00 per carcass cwt.), NHF Marketing would receive less than the market price. (Add. 4, ¶ 5; App. 167-168). Section 7.02 of the Master Contract provides an example. (Add. 4, ¶ 5; App. 167-168). Section 7.02 states:

> If the Market Price is \$42.00, the Base Price [or the price paid to NHF Marketing] would be \$48.50 (\$42.00 + ½ (\$55.00 - \$42.00)), or if the Market Price is \$72.00, the Base Price would be \$68.00 (\$72.00 - ½ (\$72.00 - \$64.00)). (Add. 4, ¶ 5; App. 167-168).

<u>The Pork Martin Contract.</u> On January 2, 2006, NHF Marketing and Pork Martin entered into a Hog Procurement Contract wherein Pork Martin agreed to deliver 2,333 market weight hogs a month to NHF Marketing (the "**Pork Martin Hogs**") in consideration for payment ("**Pork Martin Contract**"). (Add. 4, ¶ 7; App. 194-221). The original Master

Contract identified Pork Martin as a Designated Production Facility.[1] (Add. 4, ¶ 7; App. 184). The critical location, quality and price terms of the Pork Martin Contract were the same as the Master Contract, with the exception that Pork Martin would be paid $.33 less per carcass cwt for the hogs it delivered under its contract with NHF Marketing (the "**NHF Marketing Commission**"). (Add. 5, ¶ 8; App. 199-200). The NHF Marketing Commission was the economic incentive for NHF Marketing to negotiate and coordinate the delivery of Pork Martin Hogs to J.B.S. Swift under the Master Contract. (Add. 5, ¶ 8). NHF Marketing coordinated the delivery of the Pork Martin Hogs to J.B.S. Swift. (Add. 5, ¶ 9). J.B.S. Swift would issue a check made payable to NHF Marketing for the Pork Martin Hogs delivered under the Master Contract at the Master Contract price. (Add. 5, ¶ 9). NHF Marketing would issue a check to Pork Martin for the Pork Martin contract price. (Add. 5, ¶ 9).

On or about May 1, 2008, the price of corn and other feed increased dramatically; causing the cost to finish hogs to increase. (Add. 5, ¶ 10). Although the market price for hogs increased, the contract price under the Master Contract and the Pork Martin Contract limited the price gain under the respective contracts. (Add. 5, ¶ 11 and 12). On or about May 1, 2008, Pork Martin elected to stop delivering hogs under the Pork Martin Contract. (Add. 5, ¶ 13). Pork Martin continued to raise hogs and sold its hogs to another buyer at a market price. (Add. 5, ¶ 13). The total damages under the Pork Martin Contract for the failure of Pork Martin to deliver under the Pork Martin Contract total $439,844.95. (App. 236-237;

[1] Pork Martin is identified as the Unke Pork Finisher on Exhibit B to the Master Contract. (Add. 4-5, ¶ 7; App. 184)

App. 222-235; Trial Transcript ("T") 19-21). The damages reflect the difference between the Pork Martin contract price and the market price at the time the hogs were to be delivered under the Pork Martin Contract. Because of the related J.B.S. Swift contract, the damages can also be summarized as:

a. $396,647.45; the damages incurred by the Appellant to J.B.S. Swift under the Master Contract for the failure of Pork Martin to deliver hogs. (App. 236-237; T. 19-21). The damage calculations were provided by J.B.S. Swift to the Appellant. (App. 236-237; T. 17).

b. $43,197.50; the lost commission of NHF Marketing under the Pork Martin Contract

for the failure of Pork Martin to deliver under the Pork Martin Contract. (Add. 5, ¶ 14; T. 19-21).

NHF Marketing did not buy any hogs to replace the hogs not delivered by Pork Martin under the Pork Martin Contract. (T. 21). Any replacement hogs would be required to meet the terms and conditions of the Master Contract. (Add. 4, ¶ 4; App. 160-193). No additional hogs were available at existing Designated Production Facilities to replace the hogs not delivered by Pork Martin. (T. 21-22).

The Master Contract expired on December 31, 2010. (App. 161; T. 14-15). J.B.S. Swift has not released NHF Marketing or the guarantor, New Horizon Farms for any liability under the Master Contract. (T. 19-20).

STANDARD OF REVIEW

This appeal is limited to whether the Trial Court correctly applied the law. A *de novo* standard of review by this Court is proper.

ARGUMENT

There is no dispute that Pork Martin decided to stop delivering hogs to NHF Marketing in May of 2008 and that the failure to deliver hogs was a breach of the Pork Martin Contract. The issue is the calculation of damages under Minn. Stat. § 336.2-713.

NHF Marketing is not seeking the total value of the hogs that should have been delivered by Pork Martin. NHF Marketing is only seeking the difference between the Pork Martin contract price and the market price at the time the hogs were suppose to be delivered; totaling $439,844.95. Because of the structure of the respective contracts, $439,844.95 also represents the total of: (a) the damages owed by NHF Marketing to J.B.S. Swift under the master contract, in the amount of $396,647.45, and (b) NHF Marketing's lost commission on the Pork Martin Contract, in the amount of $43,197.50. Pork Martin argued that NHF Marketing's damages under the Pork Martin Contract were only $43,197.50; or the lost commission on the Pork Martin Contract. The Trial Court agreed with Pork Martin. NHF Marketing disagrees that Minn. Stat. § 336.2-713 limits its damages to its lost commissions for three related reasons:

1. The plain language of Minnesota Statute section 336.2-713 sets the damage calculation as the difference between the contract price and the market price at the time of delivery.

2. As a general matter of contract enforcement, failure to apply the statute as written will allow the any seller the option to conform to the contract when it is to his benefit and breach the contract when changing market conditions provide an economic incentive to do so. The purpose of the Uniform Commercial Code is to provide uniformity and predictability in contract performance and enforcement is frustrated by this outcome.

3. In the specific context of this contract there is window price. When the market price is below the lower limit of the window, the seller is guaranteed a price better than the market price and, conversely, when the market is above the upper limit the seller receives less than the market price. If section 336.2-713 is limited to NHF Marketing's commission, then the seller, such as Pork Martin, can simply obtain the benefit of the contract when the market price is less than the lower limit of the window and breach the contract without any meaningful economic cost when the market price is greater than the upper limit of the window. The law of contract enforcement is a nullified if one party to a contract has the option to accept a bargained for and clearly defined benefit and then breach the contract with relative impunity when faced with a similarly bargained for and clearly defined burden.

I. THE PLAIN LANGUAGE OF MINN. STAT. §336.2-713 PRESCRIBES THE DAMAGES OWED BY THE RESPONDENT TO NHF MARKETING

Minn. Stat. § 336.2-713 is clear. Minn. Stat. § 336.2-713 provides that the amount of damages for a breach of contract for the sale of goods is the difference between the contract price and the market price at the time for delivery under the contract. Minn. Stat. § 2-713 states:

> (1) Subject to the provisions of this article with respect to proof of market price (section 336.2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (section 336.2-715), but less expenses saved in consequence of the seller's breach.
>
> (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

The total damages under the Pork Martin Contract for the failure of Pork Martin to deliver under the Pork Martin Contract total $439,844.95. $439,844.95 represents the difference between the Pork Martin contract price and the market price of hogs at the time Pork Martin was expected to deliver. NHF Marketing provided evidence at trial to support the calculation of the $439,844.95 in damages; calculations that were prepared and provided by J.B.S. Swift to NHF Marketing. Pork Martin did not dispute or provide any evidence contesting the calculation of this amount; rather, Pork Martin argued that Minn. Stat. § 336.2-713 should be read to limit the damages of the Appellant to its lost commission of $43,197.50. The plain language of Minn. Stat. § 336.2-713 does not limit the damages of the Appellant to its lost commission and the majority of decisions agree on this issue.

II. UCC SECTION 2-713 AND CONTRACT LAW SHOULD BE APPLIED IN A CONSISTENT MANNER.

Section 2-713 of the Uniform Commercial Code and contract law strive for consist enforcement of contractual obligations and a uniform standard for measuring damages.[2] *Tongish v. Thomas*, 251 Kan. 728 (1992) is directly on point. In *Tongish* a sunflower seed producer Tongish had a contract with a buyer Decatur Coop Association for the sale of sunflower seeds at a set price. *Id.,* 729. In reliance on the contract, the buyer Decatur Coop contracted to sell the same sunflower seeds for marginally more to the end user Bambino Bean & Seed. *Id.,* 729. The market price of sunflower seeds increased and the producer elected not to deliver on his contract. *Id.,* 729. The producer sold his sunflowers seed to a third party for the greater market price. *Id.,* 729.

The buyer intervened in a related lawsuit and asserted a claim for its full damages on the contract, or the full amount owed to the buyer as a result of the failure of the buyer to deliver the seeds on the producer contract. *Id.,* 729-30. The producer argued that under UCC § 1-106 the buyer Decatur Coop has a responsibility to cover its damages and that any damages are limited to its lost profits under the contract. The trial court agreed and ruled that the buyer was only entitled to its lost profit or the lost handling charges. *Id.,* 730. The Court of Appeals reversed; holding that the appropriate damages are the full damages under the contract under UCC § 2-713 and that UCC § 2-713 supersedes UCC § 1-106. *Id.,* 731.

The Kansas Appeals Court held that:

> UCC § 2-713 allows the buyer to collect the difference in market price and contract price for damages in a breached contract. For that reason, it seems impossible to reconcile the decision of the [trial court] that limits damages to lost profits with this statute. *Id.,* 731.

[2] Minnesota adopted Article 2 the Uniform Commercial Code. Minn. Stat. § 336.2-713 is identical to Section 2-713 of the Uniform Commercial Code.

> Therefore, because it appears impractical to make [UCC § 1-106] and [UCC § 2-713] harmonize in this factual situation, [UCC § 2-713] should prevail as the more specific statute according to the statutory rules of construction.

Other courts have agreed with *Tongish.* In *TexPar Energy v. Murphy Oil*, 45 F.3d 1111 (7th Cir. 1995), the seller Murphy Oil contracted to sell asphalt to the buyer TexPar Energy for a fixed amount. In reliance on this contract, the buyer TexPar contract with the end user Starry Construction to sell the asphalt for a slightly higher price. The seller Murphy Oil elected not to deliver to TexPar. TexPar commenced an action against Murphy Oil. In affirming the lower court, the 7th Circuit held that:

> Nevertheless, we do not believe that the district court erred in awarding damages based on a straightforward application of [UCC § 2-713]. That provision is found in the article on the sale of goods, and specifies a remedy for the circumstances presented here – the seller's nondelivered of goods for which there is a market price at the time of repudiation.
>
> We can see no sound reason for looking to an alternative measure of damages. Murphy argues that TexPar shouldn't be aware a "windfall" amount in excess of its out-of-pocket damages. Since it depends on the market price on a date after the making of the contract, the remedy under [UCC § 2-713] necessarily does not correspond to the buyer's actual losses, barring a coincidence. **Our problem with Murphy's suggested measure of damages is that limiting the buyer's damages in cases such as this one to the buyer's out-of-pocket losses could, depending on the market, create a windfall for the seller**. (bold added).

In citing *Tongish*, the 7th Circuit then stated:

> The UCC § 2-713 remedy serves the purpose of discouraging sellers from repudiating their contracts as the market rised, if the buyer should resell as did TexPar, or gambling that the buyer's damages will be

> small should the market drop. It also has the advantage of promoting uniformity and predictability in commercial transaction, by fixing damages on the date of the breach, rather than allowing the vicissitudes of the market in the future to determine damages. *Id., at 476.* ("Damages computed under [UCC § 2-713] encourage the honoring of contracts and market stability.").

The *Tongish* decision references and criticizes *Allied Canners & Packers, Inc. v. Victor Packing Co.,* 162 Cal. App. 3d 905 (1984), a California decision that represents the minority view. In *Allied* the producer contract to sell raisins to the buyer Allied. In turn, the buyer had contracts to resell the raisins to two end users. The economic incentive for the buyer was a four percent margin. The crops conditions for raisins deteriorated and the price of raisins increased. The producer was unable to deliver the contracted raisins due to the adverse weather. One end user released the buyer from its contractual obligations and the other buyer failed to bring a legal action against the buyer within the applicable statute of limitations; effectively releasing the buyer from the obligation. The California Court held that UCC § 2-713 was not applicable, and created and applied a three prong test. The test required: (1) that the producer knew that the buyer had a resale contract, (2) that the buyer would not be liable to the end user and that (3) there was no finding of bad faith by the producer.

Allied has been critically questioned. In another California decision, *KGM Harvesting Company v. Fresh Network,* 36 Cal. App.4th 376 (Ca. App. 1995), and although the issue before the Court did not directly involve UCC § 2-713, the Court took the opportunity to criticize *Allied.* In affirming the reasoning of the *Tongish* decision, the Court stated that the "focus on the good or bad faith of the breaching party is inappropriate in a commercial sales case." *Id.*, 293. The Court also recited the law review article *UCC Section 2-713: A Defense of Buyers' Expectancy Damages*, 22 Cal. Western L. Rev. 233, 264 (1986), which stated:

> "[b]y limited buyer to lost profits, the [*Allied Canners*] court ignored the clear language of section 2-713's compensation scheme to award expected damages in accordance with the parties' allocation of risk as measured by the difference between the contract price and the market price on the date set for performance.

The California Court then stated:

> In addition numerous New York courts have chosen not to limit a buyer's damages to actual losses. (*See, e.g. Fertico Belgium v. Phosphate Chem. Export,* 70 N.Y.2d 76, 510 N.E.2d 334 (1987); *Apex Oil Co. v. Vanguard Oil & Service Co., Inc.*, 760 F.2d 417 (2d Cir. 1985); *G.A. Thompson & Co. v. Wendell J. Miller, etc.* 547 F.Supp. 996 (S.D.N.Y. 1978). *Id.*, 293.
>
> As the foregoing discussion makes clear, **we have serious reservations about whether the result in *Allied Canners*, with its emphasis on the good faith of the breaching party, is appropriate in an action seeking damages under section 2713**. *Id.*, 293. (bold added).

Unlike *Allied*, the parties in this case do not dispute that § 2-713 is applicable. The parties only dispute whether § 2-713 limits the damages to the lost commission of the Appellant. Even if the three prong test judicially created and applied by *Allied* is applied to the case at hand, there would still need to be a showing that the buyer would not be liable to the end user and that there was no finding of bad faith by the producer. J.B.S. Swift has neither released the Appellant nor is any claim that may be asserted by J.B.S. Swift time barred; as was the case in *Allied*. Furthermore, Pork Martin acted in bad faith by not delivering on the contract. Unlike the producer in *Allied* that was unable to deliver the raisins due to adverse weather and a lost crop, Pork Martin continued to raise hogs. Pork Martin just decided not to deliver hogs on the contract with the Appellant and instead sold the same hogs at a higher market price to another buyer.

III. <u>PORK MARTIN SHOULD NOT BE ALLOWED TO ACCEPT THE BENEFIT OF THE CONTRACT AND DISREGARD THE BURDENS.</u>

If the decision of the District Court prevails, Pork Martin would have the benefit of the price floor below which the sale of its pigs would not fall regardless of the decline on the market price. Yet, Pork Martin now wants this Court to accept the proposition that it may unilaterally decide to accept that benefit in a falling market and, yet, in a rising market, reject the burden of a ceiling price for hogs from the same facilities. This conclusion is contrary to the language of the contract, contrary to the explicit allocation of mutual burdens and benefits for which the parties bargained and contrary to the principle of the uniform application to the laws of contract to both parties to an agreement.

The District Court relied on *H-W-H Cattle Company, Inc. v. Schroeder,* 767 F.2d 437 (8^{th} Cir. 1985) for its ruling that NHF Marketing is not entitled to its full contract damages. The Trial Court improperly interpreted and relied on *H-W-H Cattle.*

H-W-H Cattle is factually consistent with the arguments raised by NHF Marketing and affirmed by the majority view. *H-W-H Cattle* involved the sale of cattle from a producer Schroeder to the buyer H-W-H Cattle; cattle that we then contract for sale by H-W-H Cattle to Western Trio. In September 1978 the seller Schroeder and the buyer H-W-H Cattle agreed that the seller would deliver 2,000 head between March 1, 1979 and May 31, 1979 for $67.00

hwt. *Id.*, at 437. The buyer then turned around and contracted with Western Trio to sell the same cattle for $67.35 hwt. *Id.*, at 437. The price of cattle went up and the seller refused to deliver the cattle in the spring of 1979. *Id.*, at 437. The buyer H-W-H Cattle brought a legal action against Schroeder.

The legal issue in *H-W-H Cattle* was less about the calculation of damages; but rather, whether the contract was modified to allow for a later delivery. Schroeder argued that the contract had been modified by the parties and that the new agreement provided that the cattle were to be delivered in the summer of 1979. *Id.*, at 437. In the summer of 1979 the price of cattle had returned to the contract price of $67.00 hwt. *Id.*, at 440. By the fall of 1979 the price of cattle dropped below the contract price of $67.00 hwt. *Id.*, at 440. Therefore, since the market price was less than the contract price, there were no damages under the contract except for the lost commission owed to H-W-H Cattle.

The Court agreed and held that the parties agreed to modify the contract to allow the cattle to be delivered in the summer of 1979. *Id.*, at 439. As the Court stated and relied on:

> The district court also found that the parties modified the time for delivery, in that HWH indicated that it would have accepted delivery through the summer of 1979. During this time, the price of cattle fell back to around $67.000 per hundredweight. *Id.*, at 339.
>
> ....
>
> The evidence at trial indicated that [the enduser] Western Trio would have, at best, only broken even on the resale of cattle delivered under the contract due to the fallen cattle market in the autumn of 1979. *Id.*, at 440.

As a result of the modified contract delivery date (and the lower market price at the time of the later delivery date), the only damages caused by the seller were the lost commission not paid to the buyer H-W-H Cattle. The Court properly decided this issue.[3] Had the Pork Martin contract been for a certain fixed amount and the market price for hogs went below this contract price, NHF Marketing would have arguably received some windfall – in that the Appellant would have been able to buy cover hogs for less than the contract price and capture an unexpected profit from the resale under the J.B.S. Swift contract. However, these are not the facts in this case. The Appellant was not able to buy cover hogs for at or less than the contract price. The cases cited above can be reconciled by these two examples.

<u>A Market Price At or Below the Contract Price.</u> If the producer contract price is $67.00 per hundred weight, the enduser contract price is $67.35 hwt and the market price is $65.00 hwt, it is in the benefit of the seller to deliver on the contract and realize the $2.00

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[3] The Court in *H-W-H Cattle* was also skeptical of the interrelationship between the buyer and enduser in *H-W-H Cattle*. The Hitch family owned the buyer H-W-H Cattle Co. and managed the enduser Western Trio. *Id.,* 439. As the Court in *H-W-H Cattle* stated and relied on:

> McGlaun testified that [the enduser] Western Trio is managed by the Hitch family, which also owns [the buyer] HWH as an equitable consideration in support of the district court's judgment. *Id.*, at 440.

Because of the lower market prices at the time of delivery, the enduser Western Trio may not have been actually damaged by the failure of the seller Schroeder to deliver on the H-W-H Contract. For that reason the enduser Western Trio may have elected not to commence the lawsuit. Instead the buyer H-W-H commenced the action against the seller Schroeder for damages based on the earlier delivery date.

hwt price advantage. If the seller elects not to deliver and the buyer can buy replacement livestock, the buyer can buy $65.00 hwt livestock and sell the same livestock under the contract for $67.35; capturing the $2.35 difference. However, since the buyer could buy replacement livestock at or less than the contract price, the buyer is only entitled to the $.35 hwt lost commission against the seller. This is the basic fact pattern in *H-W-H Cattle*.

A Market Price Above the Contract Price. If the producer contract price is $67.00 per hundred weight, the enduser contract price is $67.35 hwt and the market price is $70.00 hwt, it is in the short term economic benefit of the seller not deliver on the contract and sell the same livestock to a third party for $70.00 hwt. However, the seller cannot choose to breach the contract, sell for the higher price and then limited the buyer to the contractual commission. Seller's contractual benefit was $67.00, yet by virtue of the breach, it increased that benefit by $3.00. If it only has to pay the contract benefit of $.35 to the buyer, the seller gets to keep $2.65 of the benefit flowing from its breach. This is windfall to the seller resulting from the breach of contract. This is the Pork Martin fact pattern and the fact pattern in *TexPar Energy v. Murphy Oil*, 45 F.3d 1111 (7th Cir. 1995); *Tongish v. Thomas*, 251 Kan. 728 (1992); *KGM Harvesting Company v. Fresh Network,* 36 Cal. App.4th 376 (Ca. App. 1995); all holding that the buyer is entitled to a judgment against the seller for the $3.00 hwt difference. The $2.65 hwt price difference in the above example amounts to $396,647.45 in our case, the $.35 hwt commission in the above example amounts to $43,197.50 in our case; and the collective $3.00 hwt in the above example amounts to the $439,844.95 sought by NHF Marketing.

Even if *H-W-H Cattle* stands for the proposition argued by Pork Martin and supported by the Trial Court, that there is some judicially created "intermediary exception" to UCC § 2-713, that exception should not be adopted by this Court. For the reasons given above and supported by *TexPar Energy v. Murphy Oil*, 45 F.3d 1111 (7th Cir. 1995), *Tongish v. Thomas*, 251 Kan. 728 (1992), and *KGM Harvesting Company v. Fresh Network*, 36 Cal. App.4th 376 (Ca. App. 1995) this Court should apply the plain reading of Minn. Stat. § 336.2-713.

The facts are involved but the issue is simple. Should the party that breaches the contract receive the economic windfall? This is exactly the concern raised by the 7th Circuit in *TexPar Energy* when it stated that its problem with the lost commission argument is that by "limiting [NHF Marketing's] damages in cases such as this one to [NHF Marketing's] out-of-pocket losses could, depending on the market, create a windfall for [Pork Martin]." By limiting the damages to the lost commission the windfall goes to Pork Martin; leaving NHF Marketing and the guarantor New Horizon Farms to deal with the residual liability to J.B.S. Swift.

CONCLUSION

The Court of Appeals should reverse the decision of the Trial Court. The Appellant is entitled to its full contract damages for the difference between the contract price and the market price at the time of delivery, in the amount of $439,844.95, plus interest at the statutory rate of ten percent from the date of judgment until paid in full.

Dated this 21st day of July, 2011.

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