

STATE OF MINNESOTA  
*IN COURT OF APPEALS*

No. A111137

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**NHF Hog Marketing, Inc.,**

**Appellant,**

**vs.**

**Pork Martin, LLP,**

**Respondent.**

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**APPELLANT'S REPLY BRIEF**

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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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**A. REPLY ARGUMENTS**

**I. THE COURT SHOULD NOT IGNORE THE CONTRACT AND THE DAMAGES PROVIDED FOR UNDER MINN. STAT. § 336.2-713**

This is an contract issue between Pork Martin and NHF Marketing. Pork Martin and NHF Marketing entered into a risk based contract; a contract that allocated the price risk of hogs between the parties. The contract defines the rights and remedies of the parties. The Uniform Commercial Code defines the calculation of damages in Section 2-713 as the difference between the contract price and the market price. This difference was \$439,844.95 during the period Pork Martin elected not to deliver hogs. Based on the contract and the Uniform Commercial Code, NHF Marketing is entitled to \$439,844.95. Pork Martin did not dispute this at trial.<sup>1</sup> Instead, Pork Martin asks the Court to ignore the contract and the specific contractual damage provision of the Uniform Commercial Code in favor of a Court determined remedy; a remedy that provides a windfall to the breaching party. The Court should not attempt to reallocate the risks and damages between the parties; risks that were allocated when the commercial contract was signed and damages that are statutorily determined under Minn. Stat. § 336.2-713.

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<sup>1</sup> The Respondent now challenges the calculation of damages under the Pork Martin contract (Res. 1). Robert Taubert testified at trial that the damages were \$439,844.95; an amount calculated by JBS Swift and identified as Trial Exhibit 4. (Trial Transcript, p.19 ¶ 4 to p. 20 ¶ 12). The testimony and Trial Exhibit 4 were admitted into evidence without objection by Pork Martin. (Trial Transcript, p.19, line 4 to p. 20, line 12; p. 39, lines 13-19). Pork Martin is precluded from now arguing that these damages are not accurate.

## II. THE GENERAL EXPECTATION OF DAMAGES THEORY SHOULD NOT OVERRIDE MINN. STAT. § 336.2-713

The foundation of the Respondent's case theory is that Minn. Stat. § 336.1-305 overrides Minn. Stat. § 336.2-713; in that, the Court should look past the specific damage provisions of Minn. Stat. § 336.2-713 in favor of the broad language of Minn. Stat. § 336.1-305. Minn. Stat. § 336.1-305 states, in relevant part, that "the aggrieved party may be put in as good of position as if the other party had fully performed."<sup>2</sup> Respondent argues that the expectation of NHF Marketing was to only receive the commission on the Pork Martin Contract; and that, if the Court reverses the District Court, NHF Marketing will be put in a better position than if the Respondent Pork Martin had fully performed. (Res. 1).<sup>3</sup>

Respondent's case theory is flawed. Under Minnesota law when there is a conflict between a specific statute and a general statute, the specific statute controls. Minn. Stat. § 645.26, subd. 1, states:

**Particular controls general.** When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to

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<sup>2</sup> Article 1 of the Uniform Commercial Code contain the general provisions of the Code. Article 1 is codified as Minn. Stat. § 336.1-101 et seq.

<sup>3</sup> An argument that relies on the expectation of the parties is fundamentally flawed. Respondent asks "[w]hat did the Appellant, NHF Marketing, Inc, expect under the terms expressed in [the Pork Martin] Contract?" (Res. p. 5). The answer is simple. NHF Marketing expected Pork Martin to honor the contract and deliver the hogs. As discussed in Appellant's brief, Respondent's expectation argument ignores residual liability of NHF Marketing and the guarantor to Swift. NHF is not in a better position if the full damages are awarded, it only affords a potential recovery to fund liability to Swift.

both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.<sup>4</sup>

Case law interpreting Minn. Stat. § 645.26, subd. 1, in conjunction with the Uniform Commercial Code has consistently held that the specific provisions of the Uniform Commercial Code control. *See Glacial Plains Co-op v. Lindgren*, 759 N.W.2d 661, 666 (Minn. App. 2009) (holding that the specific statute of frauds provision that relate to the sale of goods under Minn. Stat. § 336.2-201 controls the general statute of frauds provision under Minn. Stat. § 531.01); *Bradley v. First Nat. Bank of Walker, N.A.*, 711 N.W.2d 121 (Minn. App. 2006) (holding that the specific three year statute of limitations provision under Minn. Stat. § 336.3-307 controls the general six year statute of limitations under Minn. Stat. § 541.05).

The Minnesota Legislature adopted Minn. Stat. § 336.2-713 for just this purpose; to provide a specific damage calculation for commercial contract disputes. To the extent even applicable, the Court does not need to look to the general statement of law under Minn. Stat.

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<sup>4</sup> Minn. Stat. § 336.1-305 was formerly Minn. Stat. § 336.1-106. The Official Comments to UCC § 1-305 states “[o]ther than changes in the form of reference to the Uniform Commercial Code, this section is identical to former Section 1-106.” Former Minn. Stat. § 336.1-106 was enacted by the Minnesota legislature in 1941.

§ 336.1-305 and the Respondent's expectations argument. To do so would invalidate Minn. Stat. § 336.2-713 and impose a new factual burden on commercial litigants to explore the expectations of each party at the time the commercial contract was executed to determine damages. The expectations of the parties damage theory should not override the specific damage provisions of Minn. Stat. § 336.2-713.

### **III. THE COURT DOES NOT NEED TO CREATE A JUDICIAL TEST TO DETERMINE DAMAGES**

Respondent relies on two decisions in support of its case theory, *H-W-H Cattle Company, Inc. v. Schroeder*, 767 F.2d 437 (8<sup>th</sup> Cir. 1985) and *Allied Canners & Packers, Inc. v. Victor Packing Co.*, 62 Cal. App. 3d 905 (1984). Both case were discussed in detail in the Appellant's brief (App. 11 through 17). *H-W-H Cattle Company* is distinguishable on its facts. Even if *H-W-H Cattle Company* were factually similar, this Court should not accept the argument that judicially created damages based on the general provision of the Uniform Commercial Code should control. As discussed in Section B above, the Minnesota Legislature enacted Minn. Stat. § 645.26 for this reason. *Allied Canners's* judicially created three prong test to determine damages has been questioned by its sister court in *KGM Harvesting Company v. Fresh Network*, 36 Cal. App.4<sup>th</sup> 376 (Ca. App. 1995) and should not be adopted by this Court. Even if it were adopted, Pork Martin would be unable to prove that it acted in good faith considering it elected not to deliver the hogs. Unlike *Allied Canners*,

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there was no crop failure or other uncontrollable events in this case that caused the seller not to be able to deliver the contracted goods. The opposite is true. Pork Martin continued to raise hogs. The hogs were just sold to a different buyer for the higher market price.

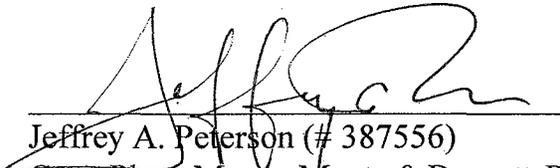
**IV. THERE IS NO FACTUAL SUPPORT TO THE ALLEGATION THAT NHF MARKETING COULD HAVE BREACHED PORK MARTIN CONTRACT WITHOUT INCURRING ANY DAMAGES TO PORK MARTIN**

The Respondent argues that this case is distinguishable from *Tongish* and *TexPar Energy* because NHF Hog Marketing was not contractually obligated to accept hogs from Pork Martin if Swift elected to breach its contract with NHF. Respondent argues that in *Tongish* and *TexPar Energy* the buyer was contractually obligated to accept the goods even if the enduser refused to accept the goods. Respondent fails to provide any factual evidence to support this theory. No citation is made to the Pork Martin Contract or the trial testimony. The opposite is true. Nothing in the Pork Martin Contract provides that NHF Marketing can walk away from the Pork Martin Contract if Swift elects not to accept deliveries. (Add. 160). Even the testimony of Robert Taubert was that if Swift elected not to accept hogs, NHF Hog Marketing was still contractually obligated to accept and pay for hogs delivered by the Respondent. (Trial Transcript, p.29, line 23 to p. 31, line 2). The legal reasoning in *Tongish* and *TexPar Energy* are applicable and should be adopted by this Court.

**B. CONCLUSION**

The Court of Appeals should enforce the contract as agreed to by the parties and provide NHF Marketing the damages it is entitled to under Minn. Stat. § 336.2-713. The decision of the Trial Court should be reversed.

Dated this 30<sup>th</sup> day of August, 2011.

  
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