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State of Minnesota  
**In Supreme Court**

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SYSDYNE CORPORATION,

*Appellant,*

v.

BRIAN ROUSSLANG, XIGENT SOLUTIONS, INC.,  
XIGENT SOLUTIONS, LLC, and  
NORTHLAND SYSTEMS, INC.,

*Respondents.*

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

In its response brief, Xigent offers a patchwork of arguments taken from authorities addressing a different tort than the one at issue here. Xigent claims that, regardless of whether its erroneous belief regarding the enforceability of Sysdyne's contract could justify its interference, a so-called competitor's privilege would still absolve Xigent of liability. But the law in this State (and elsewhere) is clear that competitors may interfere, in some circumstances, only with another's *prospective* economic advantage, not with an existing contract that is not terminable at will by the employee.

Xigent also claims that its "good-faith" belief (informed by counsel) that Sysdyne's Employment Agreement was unenforceable is relevant to whether it intentionally interfered with that contract. Xigent even suggests that, by arguing otherwise, Sysdyne is trying to "convert tortious interference with contract into an unintentional tort." (Resp. Br at 19.) But Xigent ignores that the district court already found that Xigent intentionally interfered with the contract. (Add.21, ¶ 40 ("Sysdyne has established that Xigent intentionally procured Rousslang's breach of the Noncompete Agreement.")) Xigent has not appealed that finding and cannot challenge it now.

The justification element of a tortious interference claim is (and should be) an objective inquiry focused on whether the defendant was acting in furtherance of a superior—or at least an equal—right. The element is not dependent on what the defendant subjectively thought of the contract it interfered with, even if that belief is informed by counsel. This Court should reverse.

**I. There is no “competitor’s privilege” for interfering with a valid restrictive covenant.**

Putting aside the principal issue on appeal, Xigent repeatedly argues that, irrespective of whether it could rely on the infirm advice of its counsel, it had a competitor’s privilege to interfere with Sysdyne’s contract. (*See, e.g.*, Resp. Br. at 24 (“The district court properly recognized that Xigent had a right to compete in the marketplace, and that Minnesota law favors free competition.”).) This argument is unsupported.

First, it is directly at odds with this Court’s decision in *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927). In *Sorenson*, this Court declared: “[T]he right of competition is not the right to destroy contractual rights . . . and [an interference] cannot be justified on the theory that it enhances and advances the business interests of the wrongdoer.” 171 Minn. at 266; 214 N.W. at 756. Yet this is precisely what the trial court did here. It found that Xigent’s interference was justified, in part, by the fact that Xigent “was establishing its own ‘staffing augmentation’ business” and “wanted to hire Rousslang to help establish that business.” (Add.23, ¶42.)

Xigent does not even mention *Sorenson*, and instead argues the opposite of what that decision teaches. Xigent claims that it “acted in furtherance of legally protected interests of its own,” which included “starting a staffing division and wanting to hire Rousslang due to his experience and capabilities.” (Resp. Br. at 18.) This position—adopted wholesale by the district court and intermediate appellate court—cannot be reconciled with *Sorenson*.

Second, Xigent's argument is directly at odds with the Restatement. The Restatement provides a qualified competitor's privilege where the defendant has interfered with a contract terminable at will. Restatement (Second) of Torts § 768(1) (1979). If the contract is not terminable at will, however, "[t]he fact that one is a competitor of another . . . does not prevent his causing a breach of an existing contract with the other from being an improper interference." *Id.* at § 768(2).

The Restatement provides substantially less protection for at-will contracts because any interference with those contracts will only interfere with the plaintiff's *expectation* of future performance under the contract, "and the plaintiff has no legal assurance" of that. (*Id.* at Cmt. (i).) Restrictive covenants, on the other hand, are not terminable at will. For exactly that reason, there is no "privilege" afforded to the competitor for interfering with them. The Restatement speaks clearly on this important point:

An employment contract . . . may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. Under these circumstances a defendant engaged in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete.

*Id.*; see also *Magic Valley Truck Brokers, Inc. v. Meyer*, 983 P.2d 945 (Idaho Ct. App. 1999) (discussing Comment (i) and holding that there is no competitor's privilege for interference with a noncompete agreement).

Third, the notion that a "competitor's privilege" applies where a defendant procures the breach of a valid restrictive covenant is illogical and is plainly wrong for

many public-policy reasons. Perhaps most obviously, it is precisely *competitors* that non-competition covenants are intended to protect against. If competitors could interfere with such contracts “in the name of competition,” as Xigent claims it did here, the innocent employer holding the contract would almost never be able to enforce it against a tortfeasor. By way of example, if Pepsi Co. ever induced a Coca-Cola employee to breach her confidentiality covenant and disclose the secret recipe to Coke, Pepsi Co. would not be able to claim a broad competitor’s privilege and avoid all legal consequences.

In this way, Xigent’s argument that restrictive covenants are valid and enforceable—except as against a competitor who has interfered in the name of business—is entirely circular and illogical. This Court should not support a broad privilege that would seemingly allow companies to interfere with their competitors’ contracts with virtual impunity, all in the name of competition. Such a holding would severely undermine the longstanding recognition of the freedom of contract and this Court’s repeated pronouncements that employers may utilize restrictive covenants so long as they are reasonable in content and duration. *See, e.g., Granger v. Craven*, 159 Minn. 296, 299-300, 199 N.W. 10, 12 (1924) (discussing many benefits of restrictive covenants); *Kallok*, 573 N.W.2d at 361 (stating that “noncompete agreements are enforceable if they serve a legitimate employer interest and are not broader than necessary to protect this interest”); *Walker v. Employment Serv., Inc. v. Parkhurst*, 300 Minn. 264, 272, 219 N.W.2d 437, 442 (1974) (upholding restrictive covenant that “was

not unreasonable either in terms of area or time, and which was utilized for the obvious reason for protective the employer’s confidential relationships with its customers.”).

In sum, there is no competitor’s privilege for interfering with a restrictive covenant. Xigent’s status as Sysdyne’s competitor cannot independently justify an intentional interference with contract. Consistent with *Sorenson* and with the Restatement, this Court should reject Xigent’s argument, reaffirm its precedent, and reverse the trial court’s conclusion that Xigent was somehow justified in intentionally interfering with Sysdyne’s Employment Agreement because it “was establishing its own ‘staffing-augmentation’ business” and “wanted to hire Rousslang to help establish that business.” (Add.23, ¶42.)

**II. A defendant’s erroneous belief that a contract is unenforceable does not justify an intentional interference with that contract.**

Turning to the main issue, Xigent cannot overcome one very simple fact: this Court has *never* absolved a defendant of liability for intentionally interfering with an existing contract simply because the defendant erroneously thought the contract was unenforceable. In fact, Xigent does not refer this Court to *any* decision from *any* jurisdiction reaching that result.<sup>1</sup> This is for good reason: that is not—and has never been—the law.

Instead, as pointed out in Sysdyne’s principal brief, courts and legal treatises widely and consistently reject the idea that a tortfeasor can throw up its hands, say

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<sup>1</sup> Xigent itself recognizes that “this is the first noncompete case in which the defense was successfully raised in the district court and sustained by the court of appeals.” (Resp. Br. at 30.)

“oops,” and expect to be fully excused from the consequences of its actions after intentionally inducing a breach of contract:<sup>2</sup>

- **Maryland**: “Appellants, however, claim Holladay-Tyler’s conduct was justified because the company believed that the nonsolicitation clause was unenforceable. This is no defense.” *Fowler v. Printers II, Inc.*, 598 A.2d 794, 803 n.6 (Md. App. 1991).<sup>3</sup>
- **Minnesota**: “The court is not to look at the state of mind of the tortfeasor, but is to look to the actual, legal interest of the contract interfered with.” *State of Minn. by Burlington N. Ry. Co. v. Big Stone-Grant Indus. Dev. & Transp., LLC*, 990 F. Supp. 731, 737 (D. Minn. 1997).
- **Missouri**: “A competitor is rarely if ever justified in interfering with another employer’s covenant not to compete. Interference with an existing contract is justified only where the interferer has a superior right or interest created either by a prior existing contract or by a supervening financial interest or public policy.” H. Luepke, *Tortious Interference with Covenants Not to Compete*, 66 J. Mo. B. 88, 90 (Mar./Apr. 2010) (citing cases).
- **New York**: “It is [an] actual, legal interest and not the state of mind of the interfering tort-feasor that determines the propriety of interference.” *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 776 (S.D.N.Y. 1990) (internal quotations omitted).
- **North Carolina**: “Defendant Share contends . . . it was justified in interfering with the contract because it had a good faith belief that the covenants in question were unenforceable. However, if a defendant has knowledge of the facts concerning plaintiff’s contractual rights, he is

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<sup>2</sup> Xigent claims Sysdyne did not preserve this issue below. It’s wrong. Sysdyne argued repeatedly to the district court that a defendant is not “justified” in interfering with a contract simply because it subjectively believed that the contract is unenforceable. (*See, e.g.*, T.42 (“Mr. Sokolowski is misplaced when he argues that it’s all about the state of mind. If every client could say ‘I believed my attorney so I should be able to get out of a tortious interference claim,’ we wouldn’t even have the claim, right?”)).

<sup>3</sup> *See also Ancora & Capital Mgmt. Group, LLC v. Corporate Mailing Servs., Inc.*, 214 F. Supp. 2d 493, 499 (D. Md. 2002) (“A defendant’s wrongful belief that a contract is . . . unenforceable is not a defense to a tortious interference claim.”).

subject to liability even though he is mistaken as to their legal significance and believes that there is no contract.” *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 388 (N.C. 1988).

- **Wisconsin:** “Curby knew when he negotiated with the Churches and dealt with them that plaintiff held the contract in question, and knew all the circumstances requisite to charge him with knowledge that such contract had not lapsed. The fact that he did not know the legal effect of such circumstances, and ignorantly supposed that a mere default of appellant terminated his contract rights, and in that state of mind dealt with the Churches, may relieve him from any taint of moral turpitude, but not of remediable responsibility.” *McLennan v. Church*, 163 Wis. 411, 414, 158 N.W.73, 76 (1916).
- **Restatement:** “[I]t is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what is judicially held to have.” Restatement (Second) of Torts § 766, Cmt. (i).<sup>4</sup>

This authority is consistent with this Court’s holdings. For more than a century, this Court has consistently held that the right “to have the benefit of one’s lawful contract,” which is “incident to the freedom of the individual,” can “be interfered with *only* by one who is acting in the exercise of an equal or superior right which comes in conflict with the other.” *Carnes v. St. Paul Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631 (1925). Xigent doesn’t even mention *Carnes*, much less explain how its erroneous belief about the enforceability or validity of Rousslang’s Employment

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<sup>4</sup> Xigent claims this provision of the Restatement applies only to a defendant’s claim that it did not know the plaintiff actually had a contract. But that limitation appears nowhere in the Restatement. And it would make no sense to have a rule that would say a defendant’s mistaken belief as the existence of a contract will not absolve a defendant liability, but a defendant’s mistaken belief as to the enforceability of a contract will.

Agreement somehow vested it with an equal or superior right that would essentially trump Sysdyne's recognized right to freely contract with employees and protect its relationships.<sup>5</sup>

Instead of addressing or trying to distinguish this Court's applicable and dispositive precedent, Xigent apports the bulk of its brief to arguing that it lacked actual intent to harm Sysdyne's business. *See, e.g.*, Resp. Br. at 22 (asserting that court can consider the defendant's motive to determine if an interference with contract was justified). But that is not the law.

This Court has long rejected the proposition that tortious interference is remediable only if the defendant had an improper motive to actually injure the plaintiff. *See Carnes*, 164 Minn. at 462, 205 N.W. at 631 ("An intentional interference with such a [contract] right, without lawful justification, is malicious in law, even if it is from good motives and without express malice."); *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965) (citing *Carnes*). *Accord Mathis v. Liu*, 276 F.3d 1027, 1030 (8th Cir. 2002) ("Inducing a breach of contract absent compelling justification is, in and of itself, improper.").

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<sup>5</sup> Xigent argues that "the law does not make . . . a distinction" between "(1) defendants who interfere with a contract in order to advance a legally protected interest of their own; and (2) defendants who interfere because they believe the contract is unenforceable." (Resp. Br. at 23-24.) But that is precisely the distinction the law makes, and Xigent cannot cite a single case or treatise equating the two concepts. The bottom line is this: if a third party holds a legal interest in the subject matter of another's contract, the law encourages that party to assert that right by shielding it from liability for tortious interference. That immunity, however, has never been extended to a third party who has no legal interest in the subject matter of the contract but simply wants the fruits of that contract for itself.

And while Xigent ignores *Carnes* and *Bennett*, it relies on a completely distinguishable case—*Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991)—for the proposition that the absence of “malice” justifies an intentional interference with contract. In *Nordling*, the Court was confronted with a legal issue entirely unrelated to the facts of this case: whether the law recognizes a tortious-interference claim by a plaintiff against one of her co-employees. Discussing *Carnes*, the Court in *Nordling* reiterated that a tortious-interference claim typically does not require the plaintiff to prove the defendant acted with malice. 478 N.W.2d at 507. The Court distinguished that case, however, because “in *Carnes* the defendant interferer was not employed by the same company as the plaintiff.” *Id.* Thus, unlike *Carnes*, the Court had to “balance a discharged employee’s need for a remedy against the concern not to chill company personnel in the performance of their duties.” *Id.* To achieve that balance, the Court carved out a narrow exception for intra-company disputes, and held that, in those limited situations, the plaintiff must prove actual malice. *Id.* But *Nordling* has no application—and has never been applied—where (as here) the plaintiff and the alleged tortfeasor are not employed by the same company.

Xigent also relies quite heavily on this Court’s decision in *Gieseke v. IDCA, Inc.*, 844 N.W.2d 210 (Minn. 2014), where the Court examined seven factors related to the defendant’s conduct, including its motive, to determine liability.<sup>6</sup> But importantly,

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<sup>6</sup> The Court examined the seven factors identified in the Restatement (Second) of Torts § 767. But as the Restatement provides, those factors generally apply where there is an alleged interference with a *prospective* contractual relation or with a contract terminable

*Gieseke* involved an alleged interference with a *prospective* contractual relation, not an existing one. Accordingly, as discussed in Section I above, the plaintiff in *Gieseke* had only an expectation—not a right—in future performance. In that circumstance, it is completely rational to require some “plus-factor”—such as actual malice—before liability is imposed. The Court in *Gieseke* noted that “[g]reater protection is given the interest in an existing contract than to the interest in acquiring prospective contractual relations.” *Id.* at 218. By asking the Court to also require a showing of malice for interference with existing contracts, Xigent is effectively seeking to erode this important distinction and subject existing contracts to unremediable interference so long as the defendant acts in good faith.<sup>7</sup> *Gieseke* does not stand for that proposition and, like *Nordling*, has no application here.

Finally, Xigent contends that this Court recognized in *Kallok v. Medtronic, Inc.*, 573 N.W.2d 585 (Minn. 1994), that a defendant’s subjective belief—informed by counsel—that a contract is unenforceable justifies intentional interference with that contract. But no such endorsement is found in the *Kallok* decision. Instead, the Court simply concluded that the defendant had not established (even factually) that it could have received an informed opinion from the attorney. Accordingly, there was no reason

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at will. *See* Restatement (Second) of Torts § 768(2). As set forth above, a one-year restrictive covenant is not a prospective contractual relation or one terminable at will.

<sup>7</sup> Most of Xigent’s brief is built on Minnesota case law dealing with interference with prospective contractual relations, a tort very different than interference with an existing contract. In addition to *Gieseke*, for example, Xigent cites *United Wild Rice v. Nelson*, 313 N.W.2d 628 (Minn. 1982), where this Court held that a competitor’s tortious interference with a *prospective* contractual relation was not improper because the defendant did not employ wrongful means.

for this Court to separately consider the legal propriety of the asserted defense. And *Kallok* cannot be read to depart from a century's worth of precedent establishing that justification exists *only* where the defendant was acting in furtherance of a superior or equal right to that of the plaintiff—something Xigent did not have here.

If *Kallok* can be read in such a manner, this Court should revisit the issue and clarify that its decision is not so expansive for one important reason: *Kallok* does not explain why the consequences of erroneous legal advice should be borne by the party whose contract was interfered with, rather than the party who assumed the risk by intentionally interfering with the contract. That is plainly not the law.

To claim that it should be, Xigent argues that any other rule would chill competitive hiring. That purported risk, though, is overstated. Employers routinely evaluate and comply with non-compete agreements by giving restricted personnel responsibilities that do not infringe on their contractual obligations to former employers. And because restrictive covenants are typically only enforced for a limited duration of one year, any claim to a drastic chilling effect seems grossly exaggerated.

The real problem the court of appeals' (and the trial court's) decision creates is that it is now far too easy for a company—through counsel or otherwise—to find a potential issue in its competitor's contract and then claim the entire contract might be unenforceable. It took only about fifteen minutes in this case. This problem will be significant in the employment context where, as Xigent concedes, the district court has discretion to “blue pencil” restrictive covenants. There seemingly is nothing to stop a creative tortfeasor from claiming (with or without the advice of counsel) that it

“reasonably believed” the court would not “blue pencil” the contract but would instead strike the entire contract down. The justification element of a tortious-interference claim has never turned on completely subjective and easily manipulated inquiries like that.<sup>8</sup>

This Court shouldn’t take Minnesota into such a thicket now.

**III. There is nothing in the record that confirms the legal advice Sokolowski actually gave.**

Because a defendant’s mistaken belief regarding contract enforceability cannot justify an intentional interference, this Court need not decide whether the evidence supports the district court’s finding that Xigent reasonably relied on the advice of its counsel. That said, it would be dangerous precedent, indeed, for the Court to conclude that a defendant’s recitation of the oral advice received from counsel is enough to establish the defense. Nothing in Sokolowski’s file indicates what legal advice he actually gave. There is not a single email, letter, or memorandum that informs this inquiry.

This absence is critical because, as Xigent itself points out, there can be no reasonable reliance where the client departs from the advice that was actually given. In *Kallok*, for example, the attorney denied giving the advice upon which the client

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<sup>8</sup> Xigent claims the risk of manipulation can be averted by looking at various factors, such as whether the tortfeasor sought out advice from an attorney, whether the attorney is experienced in noncompete matters, and whether the tortfeasor has a history of honoring noncompete agreements. (Resp. Br. at 31.) But Xigent made its list to suit only those facts favorable to it in this case—and none of those factors were examined by the trial court. Further, notably absent from Xigent’s list of factors is whether the attorney confirmed his or her advice in writing such that it could be verified, whether the attorney actually gave the advice claimed by the tortfeasor, and the length of time the attorney spent reviewing and learning about the contract and consulting with the client.

purported to rely. 573 N.W.2d at 360. Where, as in this case, counsel did not make a record of the advice and the court prohibits the plaintiff from calling counsel as a fact witness at trial, it is virtually impossible to establish that the client departed from the alleged advice.<sup>9</sup> Yet the lower courts gave Sysdyne the burden of establishing the impossible.

As it stands with the lower courts' decisions, any defendant can avoid liability by claiming its attorney gave certain, unverified advice, and that it relied on that oral advice in interfering with a third party's contract. It seemingly makes no difference whether the attorney has actually confirmed giving the supposed advice, or whether the attorney only spent a few minutes analyzing the issue. Intuitively, this is bad law and should not stand as binding precedent in this State.

Xigent chalks all of this up to a credibility determination. But that argument misses the point. A defendant should not be permitted to avail itself of an advice-of-counsel defense where the record contains nothing to verify that the claimed advice was actually given. Without that evidence, the factfinder cannot realistically compare the defendant's conduct to what the *actual* (not the claimed) advice was.

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<sup>9</sup> Xigent claims Sysdyne somehow tricked its attorney, Joe Sokolowski, into thinking he wouldn't be called as a witness at trial because it agreed to withdraw its *deposition* subpoena. But a decision not to depose an individual (particularly when threatened with a motion to quash) cannot legitimately act as a waiver of the right to call that person at trial. Moreover, Sysdyne included Sokolowski on its witness list according to the pre-trial protocol the district court established. After raising an advice-of-counsel defense at the end of discovery (not in its Answer), Xigent cannot claim to have been "blindsided" by Sysdyne's inclusion of Sokolowski on its witness list.

Quite unbelievably, Xigent maintains that Sokolowski (the attorney who purportedly gave the advice—was “not the only person—or the best person—to testify regarding the legal advice.” (Resp. Br. at 40.) But who better? Because he did not confirm his advice in writing, the only person who could verify the actual legal advice given to Xigent would be Sokolowski. Without his testimony, there is no confirmation in the record regarding the advice given. The advice-of-counsel defense should have failed on these facts, even independent of its legal irrelevance.

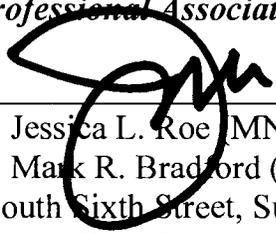
### CONCLUSION

Competitors are not privileged to interfere with restrictive covenants, either by virtue of their status as competitors or because they feel the covenants might be unenforceable. Where companies intentionally interfere with such agreements, they should properly bear the risk that their legal assessment might be wrong. It makes no sense to shift that risk to the innocent party, as the lower courts did here. This Court should reverse.

Respectfully submitted,

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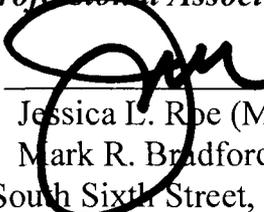
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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 3, in that it was prepared in 13-point, proportionately spaced typeface, using Microsoft Word 2010 software, and contains 4,095 words, excluding the Table of Contents and Table of Authorities, based on a word processing count obtained from the Microsoft Word 2010 software.

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County of Hennepin )

# Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **August 1, 2014**, he prepared the **Appellant's Reply Brief**, case number **A13-0898**, and served 2 copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid**.

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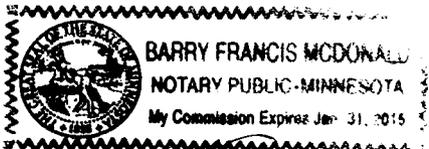
Subscribed and sworn to before me on  
**August 1, 2014**

OFFICE OF  
APPELLATE COURTS  
AUG 04 2014  
FILED

Signed \_\_\_\_\_



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Notary Public *Barry McDonald*