

STATE OF MINNESOTA
IN COURT OF APPEALS

A06-396
A06-397

Susan Dunn, et al.

Respondents (A06-396)
Appellants (A06-397)

vs.

National Beverage Corp., a Delaware corporation, et al.,

Appellants (A06-396)
Respondents (A06-397)

DTM Distributing, Inc.,

Defendant (A06-396)
Respondent (A06-397)

APPELLANTS' BRIEF
(A06-396)

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ISSUES PRESENTED

1. Whether the district court erred by failing to conclude as a matter of law that National Beverage did not become a party to a 1972 contract by virtue of its 1999 transaction with American Citrus Products Corporation.

The district court denied multiple motions by National Beverage seeking this conclusion as a matter of law and submitted this legal question to the jury as Special Verdict Form Question No. 1.

Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989)

Dominion Sports Servs., Inc. v. Bredehoft, No. A04-2343, 2005 WL 3468137 (Minn. Ct. App. Dec. 20, 2005)

Phase III Mktg, Inc. v. EZ Painter Co., No. 1:99-CV-557, 2000 WL 33252113 (W.D. Mich. Dec. 4, 2000)

2. Whether the evidence at trial was sufficient to support each of the jury's answers to Special Verdict Form Questions No. 1-4, relating to breach of contract, where:

(a) the contract-based claims against National Beverage were premised entirely on an assumption of the 1972 contract by National Beverage in 1999;

Niccum v. Hydra Tool Corp., 438 N.W.2d 96, (Minn. 1989)

Dominion Sports Servs., Inc. v. Bredehoft, No. A04-2343, 2005 WL 3468137 (Minn. Ct. App. Dec. 20, 2005)

Phase III Mktg, Inc. v. EZ Painter Co., No. 1:99-CV-557, 2000 WL 33252113 (W.D. Mich. Dec. 4, 2000)

(b) Dunn and Twin City explicitly transferred away all of their purported contract rights months before the alleged breach occurred;

Pine Valley Meats, Inc. v. Canal Capital Corp., 566 N.W.2d 357 (Minn. Ct. App. 1997)

(c) Dunn and Twin City's transferee, Service Distributing, reached a new at-will agreement with National Beverage in April 2002, abandoned its business relationship with National Beverage several weeks later, and had no objection in August 2002 to the actions allegedly constituting breach; and

(d) there was no causal link between the alleged breach by National Beverage in August 2002 and the \$288,000 in damages awarded by the jury.

D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, N.J., 535 N.W.2d 671, 675 (Minn. Ct. App. 1995)

The district court denied National Beverage's motions pursuant to Minn. R. Civ. P. 50.01 and 50.02 and ordered judgment entered in accordance with the jury's answers to these four questions.

3. Whether the evidence at trial was sufficient to support each of the jury's answers to Special Verdict Form Questions No. 15-21, relating to defamation, where:

(a) there was no evidence that the alleged statement was made by National Beverage;

(b) there was no evidence that the alleged statement was defamatory, or indeed even false;

(c) National Beverage enjoyed qualified immunity from suit and no actual malice was or could have been shown.

The district court denied National Beverage's motions pursuant to Minn. R. Civ. P. 50.01 and 50.02 and ordered judgment entered in accordance with the jury's answers to these seven questions.

Diesen v. Hessburg, 455 N.W.2d 446, 448 (Minn. 1990)

STATEMENT OF THE CASE

This is a case about a beverage distributor that quit distributing, sold her business, and then sued one of her former product suppliers on a purported 30-year-old contract that the supplier never assumed, and in fact had never even seen, prior to the lawsuit.

This appeal (A06-396) arises following a jury trial in the District Court for the County of Dakota before the Honorable Rex D. Stacey.

Throughout litigation and trial, the plaintiffs below – Susan Dunn and her husband Richard Newstrom (“Dunn”) and the company Susan Dunn controlled, Home Juice Citrus Products Midwest (“Twin City”) – premised their contract-related claims on establishing that: (1) a 1972 agreement governed the relationship between Twin City and National Beverage; and (2) this contract was breached in August 2002 when National Beverage sold its products directly to the defendant DTM.

Dunn and Twin City also tried to the jury their claims against National Beverage for violation of the Minnesota Franchise Act, Minn. Stat. §§ 80C.01-80C.22, violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44, defamation, and tortious interference, as well as their claims against DTM for tortious interference and defamation. The jury awarded them \$0 in damages on each of those claims. National Beverage’s counterclaim for unpaid product invoices (in the amount of \$67,265.38) was voluntarily dismissed prior to trial.

On September 26, 2005, the jury returned a 43-question special verdict form, which included twelve questions on damages. (Appellant’s Appendix (hereinafter “App.”) at A-100-09.) In response to ten of these twelve questions (Question Nos. 10, 14, 20b, 22a, 22b, 22c, 26, 31, 36, and 43), the jury found that Dunn and Twin City were entitled to recover \$0 in damages – including \$0 on the claims under the Minnesota Franchise Act, Minnesota Deceptive Trade Practices Act, and for tortious interference with contract. (*Id.* at A-105-08.) In response to the other damages questions, the jury assessed \$288,000.00 in damages against National Beverage for breach of contract (*Id.* at A-101) and \$64,369.45 in damages against National Beverage for defamation (Question

Nos. 20a, 20c). (*Id.* at A-104.) The jury awarded no damages against DTM. (*Id.* at App. 104.)

On November 18, 2005, the Court issued an Order for Judgment attaching the jury's Special Verdict Form. (*Id.* at A 98-109.) The parties filed post-trial cross-motions, and the district court denied all motions for judgment notwithstanding the verdict or new trial, and also denied Dunn and Twin City's motion for pre-judgment interest and attorneys' fees. (*Id.* at A. 98-99; 110-48.) On December 29, 2005, judgment in favor of Dunn and Twin City, and against National Beverage, was entered. (*Id.* at A. 99.) Following a subsequent insertion of costs and disbursements, the final amount of the judgment is \$360,235.34. (*Id.* at A. 99.)

Case number A06-396 is National Beverage's appeal from the judgment entered December 29, 2005, as well as from multiple erroneous rulings by the Dakota County District Court – *i.e.*, the district court's partial denial of National Beverage's motion under Minn. R. Civ. P. 56, and the district court's complete denial of National Beverage's motions, during and after trial, under Minn. R. Civ. P. 50. (*See* App. at A-45,46; A-, A-57-76; A-98-99; A-110-48.)

Dunn and Twin City's legal theory, and all of their contract-based claims, fail as a matter of law and the district court should have so ruled. The contract-based claims further fail, for several additional reasons, on the evidence presented to the jury at trial. The portion of the judgment awarding damages for breach of contract must be reversed.

The portion of the judgment awarding damages against National Beverage for a purportedly defamatory October 2002 statement (that "DTM is the only authorized

distributor of Mr. Pure products”) also must be reversed for several reasons, among them that Dunn and Twin City failed to prove that any statement at all, never mind an actionably false statement, was made by National Beverage. Further, the statements could not have been found to be false, National Beverage enjoyed qualified immunity from suit, and no actual malice was or could have been shown.

STATEMENT OF FACTS

National Beverage¹ sold Mr. Pure® brand products to the company that Susan Dunn controlled, Twin City, beginning in May 1999, after National Beverage acquired certain assets from American Citrus Products, Inc., including the right to make and market Mr. Pure.

The 1999 transaction documents were produced by National Beverage in discovery. The relevant documents from the transaction were shown to the jury at trial. (Ex. 229, App. at A-326-46; Ex. 230, App. at A-347-50.) Schedule 1 of the asset purchase agreement identifies all categories of “Purchased Assets,” including personal intellectual and real property, inventory, receivables, licenses, business records, and contracts. (Ex. 229 at NBEV002047, App. at A-334.) The only contracts identified as

¹ National Beverage Corp. and a wholly-owned subsidiary corporation (HJMP Corp.) were named as defendants in this action. While those two entities have separate and distinct business roles, at the time of trial National Beverage did not press the distinction between National Beverage and any of its entities, including the acquisition entity formed for purposes of the 1999 transaction (HJ Acquisition Corp.) or the entity that employed the National Beverage witness seated at counsel table, Mike Perez (Shasta Midwest, Inc.). Accordingly, in this brief as at trial, all National Beverage corporate entities are referred to, individually or collectively, as “National Beverage.”

being assumed by the buyer in the transaction are those “listed on Schedule 1(g),” which in turn consists of a blank page (*Id.* at NBEV002058, App. at A-345) followed by a separate sheet identifying nothing other than two “Manufacturing Agreements” unrelated to Twin City or product distribution. (*Id.* at NBEV00259, App. at A-346.) The “Bill of Sale, Assignment, and Assumption Agreement” (Ex. 230, App. at A-347-49) dated the same day (May 14, 1999) similarly identifies only the “contracts listed on Schedule 1(g),” and no others, as being assigned by the seller and assumed by the buyer as part of the transaction. (*Id.* at A-348.)

National Beverage and American Citrus were clear with each other and with the world – including wholesale purchasers of Mr. Pure (such as Dunn and Twin City) – that no distribution contract obligations had been assumed as part of the transaction. This was restated on multiple occasions in 1999, including in a May 12, 1999 letter from National Beverage that offered to “begin anew” with these wholesale purchasers under new terms and on an at-will basis (Ex. 228, App. at A-324 (“[A]ny and all distributor agreements . . . are not being assigned to us as part of the acquisition.”).)² After a July 15, 1999 meeting in Chicago attended by Susan Dunn and her father Art Dunn, one or attendees reported of the meeting that “National Beverage made it clear that they do not use

² Plaintiff Susan Dunn claimed to have never received the letter, noting that it was addressed to Twin City’s former address (3810 Highway 13, Savage, MN) rather than its new address next door (3830 Highway 13, Savage, MN) within the same structure. (*See* Ex. 330, App. at A-442.) At trial, however, Susan Dunn acknowledged awareness, in the summer of 1999, of National Beverage’s position as expressed in the May 1999 letter. (Tr. 598-99, 970, App. at A-186a-87, A-232.)

distributor agreements in their organization, so our agreements with the Home Juice Division of American Citrus remain an obligation of American Citrus and Henry Lang.” (Ex. 231; App. at 350-51.) The evidence at trial established that wholesale customers received this message and understood it (Tr. 598-99, 970, App. at A-186a-87, A-232; *see also* Tr. 358-60, 374-75, Ex. 236; App. at A-166-70, 352) even while – in the specific case of Twin City – expressing unhappiness about it. (Exs. 237, 265, App. at A-354-55, A-365.)

Moreover, the evidence at trial was that, prior to being sued in October 2002, National Beverage had never seen the purported “Home Juice” distribution contract held by Twin City. During the lengthy pre-trial discovery period, Dunn and Twin City took no depositions of any National Beverage or American Citrus employees. At trial, they put forth no evidence that, at any time prior to the commencement of this lawsuit, they or anyone else ever produced or specifically identified to National Beverage any document constituting a written contractual obligation of American Citrus that National Beverage had assumed. (Tr. 926-28, App. at A-229-31.) There is no evidence in the record that National Beverage ever saw, or was aware of, the 1972 Agreement or the 1995 letter at any time prior to the filing of this action. (*See* Tr. 119, App. at A-150.)³

³ Even one of the *plaintiffs*, Richard Newstrom (the husband of Susan Dunn and a Twin City employee since 1988) testified that he saw the 1972 agreement for the very first time at his deposition in this action in 2004. (Tr. 1000, 1024; App. at A-235-36.)

Susan Dunn's intent to quit the beverage distribution business was formed in 2001 (Tr. 235, 1053, App. at A-154, A-241), after she and Twin City came into a \$646,320 payment from South Beach Beverage Company (newly owned by PepsiCo) as Pepsi took over the distribution of the SoBe line of beverages (Twin City's largest product line.) (Tr. 601-03, App. at A-188-89; Ex. 324, App. at A-434-41.) Shortly thereafter, without informing her other suppliers (including National Beverage), Susan Dunn began dismantling the rest of her beverage distribution business, selling all but one of the trucks (Tr. 238-239, App. at A-155-56) that are essential for any distribution business (Tr. 343, App. at A-165), selling newly-created "sub-distribution" rights (Ex. 254, App. at A-356-64), losing her employees (Tr. 814; App. at A-210), and making contractual promises to stay out of the business. (Ex. 254, p. 3., App. at A-358; Ex. 281, App. at A-387-91.) Ms. Dunn pursued her real-estate license, and became a licensed real-estate broker with Edina Realty in June 2002. (Tr. 674, App. at A-192.)

While some other suppliers terminated their dealings with Twin City in 2001 or 2002 (Exs. 266, 269-70, 271, App. at A-366-73; Tr. 816-21, App. at A-211-16), National Beverage continued to sell to Twin City, which began undisclosed discussions with the owners of Service Distributing, Inc. ("Service") in late 2001 and early 2002 about a transfer of Twin City's stock or assets. (Tr. 822-23, 1051; App. at A-217-18, 240.) In April 2002, with no advance notice to National Beverage (Tr. 635, 844; App. at A-191a; A-219a), Susan Dunn announced that Twin City had been "purchased" by the owners of Service. (Ex. 287; App. at A-392.) Although the memo "to all manufacturers" does not clearly state so, this transaction was in fact not a stock purchase but an asset sale, in

which certain contracts were specifically referenced in the transaction documents were assigned by Twin City and assumed by Service. (Ex. 280, App. at A-376-86; Tr. 641, App. at A-191.)⁴

While Service had originally proposed paying \$100,000 in up-front money (Ex. 274, App. at A-374-75), after investigation and negotiation Service offered no up-front money for these purported assets, and Dunn accepted that reduced offer. (Tr. 913, 1058, App. at A-228, A-1058; Ex. 280, App. at A-376-86.) The final version of the negotiated agreement called for Service to put no money down at closing (except for product inventory) and to make 48 monthly payments of \$6,000 each – totaling \$288,000 – to Twin City beginning in late September 2002. (Ex. 280 at ¶ 3, App. at A-377 ¶ 3.)

In the course of its investigation, Service, which was advised by an attorney in the transaction, reviewed the 1972 Agreement and 1995 letter (Exs. 201, 209, App. at A-316-20, A-322-23), neither of which had ever been shown to National Beverage. These were documents that Twin City claimed to Service created a contractual entitlement to purchase Mr. Pure products through September 2005. (Tr. 824, App. at A-219.) Service's counsel's analysis was done on the face of the agreements alone, and could not take into account other documents – including those in which Twin City itself

⁴ Among the contracts specifically identified as assigned to Service were “the Home Juice Co., Cool Mountain Beverage, Inc., Hansen Beverage Co., Tri-County Beverage & Supply, Inc. and Fuze Beverages, Inc. contracts, commitments and agreements” (Ex. 280, App. at A-385; Tr. 641, App. at A-191.) “Home Juice Co.” is the predecessor of American Citrus Products Corporation. (Cf. Compl. ¶ 1, App. at A-1.)

complained that its “franchise” had been “lost” in 1999 (*see* Exs. 202, 228, 265; App. at A-321, A-324-25, A-365) – because those documents were not disclosed by Twin City prior to the transaction. (Tr. 996-97, 1055-56, App. at A-233-34, A-242-43.)

Nevertheless, Service’s counsel advised against the deal and opined that the “franchise agreement,” even if valid, was problematic because, among other reasons, it imposed on Service an obligation (to sell no competitive product) that Service could not fulfill. (Tr. 1056-57, App. at A-243-44; *see* Ex. 201, ¶ 7; App. at A-319 ¶ 7.)

Twin City’s last order to National Beverage was invoiced on April 3, 2002. (Ex. 347; App. at A-454.) Within weeks after the Service transaction was finalized, neither Dunn or Twin City was actively engaged in beverage distribution in any form. (Tr. 1094, App. at A-259a.) Dunn acknowledged that, after April 5, 2002, Service and Service alone possessed any valid contract rights, and had the complete power, to do whatever it wanted with National Beverage regarding Mr. Pure (Tr. 845-46, App. at A- 220-21), and that Dunn and Twin City were precluded contractually from selling Mr. Pure. (Tr. 872, App. at A-223; *see* Ex. 281, App. at A- 387-88 ¶ 2.1.) Following the March 29, 2002 acquisition, one of Service’s first acts was to terminate the subdistribution relationship that Twin City had initiated (unbeknownst to National Beverage) with Tri-County Beverage and Supply in July 2001. Service’s principal testified at trial that this happened, in early April 2002, because Tri-County tendered NSF checks and ran a sloppy operation. (Tr. 1064-67, App. at A-246-49.)

On April 17, 2002, following the closing of the transaction (against Service’s counsel’s recommendation due to the dubiousness of, and problems with, the purported

“franchise” agreements), Service met with National Beverage. At that meeting, Mike Perez of National Beverage explained that National Beverage did not have a written agreement with Twin City, and Perez and Mark Leikam of Service explicitly agreed to begin an at-will business relationship involving sale of National Beverage’s products. (Tr. 526, 1073-77, 1387, App. at A-250-54, A-281.) Despite confusion created by Susan Dunn’s refusal to pay over \$67,000 of an outstanding product invoice or to respond to inquiries on the issue (Tr. 1388, A-282; Ex. 291, App. at A-393-95), National Beverage began selling Mr. Pure products to Service thereafter, with the first order dated May 14, 2002. (Ex. 347, App. at A- 454; Tr. 1088-89, App. at A-256-57.)

Sales of Mr. Pure in Minnesota had been declining since Dunn’s intent to quit was formed in 2001, and the trend continued into 2002. (Ex. 334, App. at A-444.) In May 2002, Service introduced National Beverage to a new “sub-distributor,” DTM Distributing, Inc. (“DTM”), who Service said would be supplying the trucks, and doing the actual distribution, of Mr. Pure product to be bought by Service. (Tr. 1089-91, 1389-93; App. at A- 257-59, A-283-87.)

Subsequently in the summer of 2002, Service stopped ordering products altogether, and told all concerned that it did not want to be in the business of selling Mr. Pure products at all. (Tr. 186; App. at A-151.) Service’s principal, Leikam, said that the business he had taken on was too much strain on Service’s employees, and did not make money as he anticipated it would. (Tr. 876, 1096-97; App. at A-224, A-261-62.) Dunn acknowledged at trial that she was aware of Service’s change of heart by no later than

June 2002, but nevertheless elected not to step in, despite being asked to do so by Service. (Tr. 892, 1095-97; App. at A-225, A-260-62.)

By mid-July 2002, Service had stopped ordering products and was intent on running its inventory down to zero. (Tr. 1100, App. at A-263a; *see* Ex. 347; App. at A-454.) National Beverage was faced with a deteriorating sales situation in a peak season and only one entity (DTM) that had been presented to it, or that it knew of, as both capable and interested in its product distribution in the Twin Cities. (Tr. 1395-99, App. at A-288-92; Ex. 335, App. at A-445.) After Perez of National Beverage spoke to Leikam of Service in mid-August 2002 and confirmed that Service's intent had not changed (Tr. 1398-99, App. at A-291-92), on August 19, 2002, National Beverage informed Twin City and Service that "our market share has continued to plummet and our brand equity has been severely damaged . . . [and] . . . we plan to take all steps necessary to protect our Mr. Pure brand in the Minnesota market." (Exs. 103, 297 at PL 0306, App. at A-313, A-401.)

On August 26, 2002, DTM submitted a written request to buy products directly from National Beverage (Ex. 350, App. at A-455), and National Beverage and DTM agreed to begin an at-will business relationship involving DTM's purchase and resale of National Beverage's products. (Tr. 1402-03, App. at A-293; Ex. 343, App. at A-452.) Beginning with an order placed by DTM on August 27, 2002 (Ex. 347; App. at A-454), National Beverage sold products directly to DTM, on a nonexclusive basis (Exs. 114, 302, App. at A-315, A-429; Tr. 1176, App. at A-268), for resale in the flagging Minnesota market.

Asked on cross-examination whether he thought that the August 2002 actions of National Beverage and DTM were appropriate, Leikam – as the principal of Service and the undisputed holder of any purported contract rights at that time – testified to having no objection to those actions: “If I’m a manufacturer’s rep, if I’m a regional district manager, I have got to protect my business – bottom line, I’ve got to protect my business.” (Tr. 1143; App. at A-267.)

Thereafter, Susan Dunn undertook a series of transactions creating a purported basis for this lawsuit. A document called “Termination Agreement and Mutual Release” between Twin City and Service, which was executed by Service no earlier than September 3, 2002, purported to undo the March 29, 2002 transaction. (Ex. 300, App. at A-425-26; Tr. 1004, App. at A-235a.)

At the same time (or, actually a few days *earlier*, even though Service – and not Twin City – still held any existing distribution contracts at the time) Susan Dunn purported to document the sale of the stock and assets of Twin City to Ron Kocina and Tri County Beverage & Supply, Inc. (“Tri County”) an unrepresented and unadvised third party (Tr. 456-57, App. at A-172-73) who had bought “subdistribution” rights from Dunn in July 2001 (Ex. 254, App. at A- 356-64.) Neither Dunn nor her counsel informed Kocina about National Beverage’s August 19 letter (Tr. 471-75, 905, App. at A-174-78, A-226), even though Twin City’s transaction counsel acknowledged on the witness stand that this information was material to the Twin City/Tri County transaction of August 26. (Tr. 737, App. at A-207.) The purported stock deal, which was signed but never closed, called for Kocina to pay Dunn \$375,000 for the stock of Twin City (Ex. 298, App. at A-

402-24), with an additional \$450,000 forthcoming to Dunn and Newstrom under consulting agreements (Ex. 301, App. at A-427-28) that Dunn, in contemporaneous oral conversation, assured Kocina would not be enforced. (Tr. 223-24, App. at A-152-53.) Distribution rights relating to Mr. Pure (or “Home Juice Co.”) were not a condition of, and were mentioned nowhere in, the purported deal with Tri County. (See Ex. 298, App. at A-402-24.)

A letter dated September 13, 2002 purported to inform National Beverage that Susan Dunn had terminated the relationship with Service and also made some form of new agreement with Tri-County involving the sale of her company, Twin City. (Ex. 112, App. at A-314.)

On September 24, 2002 (Ex. 303, App. at A-430), and again on October 10, 2002 (Ex. 305, App. at A-433), National Beverage asked for additional information about Tri-County from Susan Dunn’s counsel, but received none. Twin City never informed Tri-County about either of these inquiries from National Beverage. (Tr. 482-85, 907, App. at A-179-82, A-227.) The only response was a September 26, 2002 letter from Twin City’s litigation counsel asserting that “our client has directed us to commence litigation . . . and we will do so forthwith.” (Ex. 304, App. at A-431-32.)

Dunn and Twin City served and filed a 17-count complaint, dated October 29, 2002, against National Beverage, HJMP, DTM, and National Beverage’s chief executive officer, Nicholas Caporella. (App. at A-1-16.) The complaint made no reference to Twin City’s transactions with Service, nor to Service’s holding all purported contract rights from March 29, 2002 through at least September 3, 2002, nor to Service’s abandonment

of any purchasing or reselling activity as of at least July 2002. Indeed, neither the complaint, nor Dunn and Twin City's amended complaint filed one year later (*Cf.* App. at A-17-44), saw fit to mention Service at all.

In the complaint, Dunn and Twin City identified to National Beverage for the very first time the purportedly governing written "franchise" contract, dated August 1, 1972, made among three entities – Home Juice Co., Associated Citrus Enterprises, and Twin City Home Juice Co. (Ex. 201, App. at A-316-20.) The complaint claimed that National Beverage's direct sales to DTM beginning in August 2002 breached a provision in this 1972 contract.⁵

National Beverage's motions pursuant to Minn. R. Civ. P. 12 and Minn. R. Civ. P. 56 were heard in July 2003 and September 2004, respectively. Each motion was granted in part and denied in part by the district court. The case was a tried to a jury from September 12-26, 2005. The jury awarded no damages on any claim against DTM, and awarded no damages on the claims against National Beverage, save two: breach of contract and defamation.

The only breach-of-contract theory against National Beverage submitted to the jury was that National Beverage "breached a 1972 Distribution Agreement when National Beverage sold its products directly to DTM in the summer of 2002." (Jury

⁵ See Ex. 201 at ¶ 6, App. at A-319 at ¶ 6: "Home agrees that it will not sell the products which it manufactures to any customer within Twin City's marketing area as described in Exhibit A, without first obtaining written approval from Twin City."

Instructions, Tr. 1454, App. at A-83.) The jury answered questions 1-3 of the Special Verdict Form in the affirmative,⁶ and awarded Dunn and Twin City \$288,000 as the damages directly caused by the breach of the 1972 agreement. (App. at A-100-01.)

The defamation claim submitted to the jury was asserted against National Beverage and DTM without distinction, based on an allegation that National Beverage and DTM had stated, in October 2002, “that defendant DTM was the only authorized distributor of Mr. Pure products.” (App. at A-103.) The jury found that Twin City was entitled to a total of \$64,369.45 in damages for defamation: all of it against National Beverage and none of it against DTM. (*Id.*)

National Beverage appeals from the judgment against it, and from erroneous rulings of the district court before, during, and after trial.

⁶ The Special Verdict form asked:

1. Did Plaintiff Twin City Home Juice and Defendant National Beverage become parties to the 1972 contract by virtue of Defendant National Beverage purchasing the assets of American Citrus Products (Chicago Home Juice)?
2. Did defendant National Beverage breach this contract?
3. Was defendant National Beverage’s breach the direct cause of any of Plaintiff Twin City Home Juice’s damages?

(App. at A-100-01.)

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT NATIONAL BEVERAGE DID NOT ASSUME, AND WAS NOT LIABLE FOR, ANY CONTRACTUAL OBLIGATIONS OF AMERICAN CITRUS UNDER THE 1972 AGREEMENT

Throughout the litigation in the district court, Dunn and Twin City claimed that, by purchasing certain assets of American Citrus Products, National Beverage assumed American Citrus's obligations under the 1972 Agreement. Dunn and Twin City further claimed that National Beverage breached that contract when it made direct sales to DTM in the summer of 2002. This alleged breach of the 1972 Agreement by this August 2002 conduct was the only breach-of-contract claim against National Beverage submitted to the jury. (*See* App. A-83, A-100.)⁷

As a matter of law, National Beverage *did not* assume any obligations under the 1972 Agreement by virtue of its 1999 transaction with American Citrus. The district court erred in refusing to rule as a matter of law that Dunn and Twin City could not bring a breach-of-contract claim against National Beverage for breach of the 1972 agreement. It erred in denying National Beverage's motion under Minn. R. Civ. P. 56 prior to trial, and it erred in denying National Beverage's motions under Minn. R. Civ. P. 50 at the

⁷ The judge instructed the jury that "there are two breach of contract claims in this case. The first, plaintiffs claim that National Beverage and HJMP breached a 1972 Distribution Agreement when National Beverage sold its products directly to DTM in the summer of 2002. Second, plaintiffs claim that DTM breached a 2002 confidentiality agreement." (Tr. 1454, App. at A-83.)

close of Dunn and Twin City's evidence, at the close of all of the evidence, and following trial. The jury's verdict should be overturned, and the judgment reversed.

The *district court* should have answered the question posed by Question No. 1. of the Special Verdict Form because the question of National Beverage's assumption of obligations under the 1972 agreement was ripe for determination as a matter of law. It should have answered the question in the negative, and ordered the contract-based claim of Dunn and Twin City dismissed.

A. DUNN AND TWIN CITY STAKED THEIR CONTRACT CASE ON THEIR ABILITY TO PROVE AN ASSUMPTION OF THE 1972 AGREEMENT

It is elementary that in order to show a breach of contract, a claimant must show the existence of a valid agreement between the parties. *Comm. Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. Ct. App. 2006). As a matter of law, a breach-of-contract claim cannot be maintained against a defendant who was never a party to the agreement at issue. *See Watson's Properties, LLC v. Menard, Inc.*, No. C0-01-2085, 2002 WL 1364064, at *3 (Minn. Ct. App. June 19, 2002) (Addendum at Add. 3) ("Because Commonwealth is not a party to the purchase agreement, and because the only breach alleged is a breach of that agreement, the district court did not err by dismissing Watson's claim of breach of contract against Commonwealth."). Here, the only contract that Dunn and Twin City contended existed between the parties was the 1972 Agreement, modified by the 1995 letter, which they claimed was assumed by National Beverage by

virtue of the 1999 transaction.⁸ As a matter of law, National Beverage was not a party to this agreement, and, thus, cannot be held liable for its breach.

Dunn and Twin City failed to establish that National Beverage was a party to the 1972 Agreement they alleged was breached. Indeed, the factual record presented, both on summary judgment and at trial, precludes such a finding.⁹ As a matter of law, National Beverage assumed no contractual obligations under the 1972 Agreement other than the obligations specifically identified in the asset purchase documents. (*See* Ex. 229 at NBEV002039, NBEV002047-48, NBEV002058-59, App. at A-326, A-334-35, A-345-46; Ex. 230 at NBEV002060-61, App. at A-347-48.) Accordingly, National Beverage

⁸ While the May 12, 1999 letter from National Beverage (Ex. 228, App. at A-324-25) is on its face an offer to enter into a new agreement with each of American Citrus's wholesale customers, "begin[ning] anew" under new terms, Dunn and Twin City never alleged that they accepted this offer or that any contract was formed by this letter. Indeed, Dunn maintained throughout trial that she never saw this letter. (Tr. 574-76, 771, App. at A-184-86, A-209.) Dunn and Twin City therefore never claimed that there was a meeting of the minds as to the terms of the (allegedly unseen) 1999 letter, much less that there was a breach by National Beverage of any contract formed by or around the 1999 letter. (Nor could Dunn and Twin City have proved a breach of these terms, had that allegation been made.) The contract-related claims against National Beverage depended entirely on the validity of the 1972 agreement as a contract between Twin City and National Beverage.

⁹ Dunn and Twin City elected – for whatever reason – to take no depositions of anyone currently or formerly employed by National Beverage or HJMP. Accordingly, the discovery process, and the 12-day trial in this matter, added virtually nothing to the body of evidence (*i.e.*, Exs. 228, 229, 230, 231, 237, 265, App. at A-324-351, A-354-55, A-365) that was before the Court at least as early as the defendants' October 2004 summary-judgment motion. The documents possessed by National Beverage related to the 1999 transaction were produced in discovery. Neither during the discovery process nor at trial did the Dunn and Twin City obtain testimony from anyone with personal knowledge of the 1999 transaction.

cannot be held liable for breach of the 1972 agreement, and the breach-of-contract claim against it fails as a matter of law. The district court erred in submitting this claim to the jury and denying National Beverage's repeated motions, under Rules 56 and 50, seeking dispositive relief on this issue.

B. THE CONTRACT DOCUMENTS FAIL TO SHOW NATIONAL BEVERAGE'S ASSUMPTION OF THE 1972 AGREEMENT

In the spring of 1999, National Beverage acquired some assets of American Citrus through an asset-purchase agreement. (Exs. 229, 230, App. at A-326-49.) By the terms of the agreement, National Beverage agreed to buy only "certain assets" and assume "certain liabilities" of American Citrus. (Ex. 229 at NBEV002039, ¶ 3, App. at A-326 ¶ 3.) National Beverage expressly did not assume any of American Citrus's distribution contracts (including the unseen 1972 Agreement) as part of this transaction. Schedule 1 to the agreement delineated "the assets to be acquired" by National Beverage. Among the acquired assets were "all contracts listed on Schedule 1(g)." (Ex. 229 at NBEV002047, App. at A-334.) This Schedule did not list *any* distribution agreements or include *any reference* to the 1972 Agreement. (Ex. 229 at NBEV002058-59, App. at A-345-46.)¹⁰ Further, the asset-purchase agreement expressly limited the scope of National

¹⁰ Indeed, National Beverage acquired only two agreements to which American Citrus was a party: (1) a manufacturing agreement between Home Juice Co. and Bug Juice Brands, Inc. dated December 1, 1998 and (2) a manufacturing agreement between Home Juice Co. and Harmony Sports Group, dated December 11, 1998. (Ex. 229 at NBEV002059, NBEV002039, App. at A-326, A-346.)

Beverage's assumption of any outstanding obligations and provided that "HJA is assuming *only* those liabilities attached to this Schedule 2 and *no others of any kind or nature.*" (Ex. 229 at NBEV002048, App. at A-335 (emphasis added).)

As a matter of law, National Beverage did not assume any rights or obligations under the 1972 Agreement through the asset-purchase agreement. There was no evidence at trial that National Beverage so much as knew about the existence of the 1972 agreement until it was sued in October 2002. (See Tr. 119, 926-28; App. at A-150, A-229-31; *see also* Ex. 231, App. at A-350 (distributor statement that "[i]t became quite obvious that these [distribution] agreements [of American Citrus] were not properly disclosed during negotiations with National Beverage").)

The well-settled law of asset-purchase transactions is that, unless the parties to the transaction make a clear agreement to the contrary, an asset purchaser does not assume, and is not liable for, the predecessor's contractual obligations. *Wine Imports of Am., Ltd. v. Gerolmo's Liquors, Ltd.*, 563 F. Supp. 163, 166 (E.D. Wis. 1983) ("[T]he general rule against successor liability applies to both contractual and statutory obligations, the kind of obligations involved in fair dealership cases.") Minnesota follows this traditional rule against successor liability:

[W]here one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989) (quoting *J.F. Anderson Lumber Co. v. Myers*, 206 N.W.2d 365 (Minn. 1973)).

Dunn and Twin City provided *no* evidence to show that any of these exceptions applied to National Beverage. Accordingly, National Beverage, a party who purchased specific assets and assumed identified liabilities under the 1999 asset-purchase agreement cannot, as a matter of law, be held liable for any alleged breach of the 1972 agreement, which National Beverage did not assume.

As any basic summary of the advantages of asset-purchase agreements makes clear, the asset purchaser has the option, but not the obligation, to re-engage with vendors and customers, as well as to pick and choose exactly which contracts it wants to assume. *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 786 n.12 (Wis. 2003) (“[A] buyer generally prefers an Asset Purchase. The buyer knows exactly which assets are being acquired and which liabilities are being assumed.”) (citation omitted).

In Florida,¹¹ as in Minnesota, the law is clear: “A corporation that acquires the assets of another business entity does not as a matter of law assume the liabilities of the prior business.” *Corporate Express Office Prods., Inc. v. Phillips*, 847 So.2d 406, 412-13 (Fla. 2003) The general rule is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the

¹¹ The 1999 asset-purchase agreement chose to be governed by Florida law. (Ex. 229 at NBEV002045, App. at A-332.) Here, any controversy over choice of law is not outcome-determinative, as the result is the same under every state law that National Beverage has reviewed or is aware of.

transferor. This rule has frequently been applied to actions for damages for breach of contract, and where the transfer is made in good faith and for fair consideration, and the mere fact that the transfer is void by statute does not render the transferee liable. *See Niccum*, 438 N.W.2d at 98 (“Minnesota follows the traditional approach to corporate successor liability.”).

Indeed, in an opinion issued a month after the district court denied National Beverage’s post-trial motion, a panel of this Court made clear once again that, *as a matter of law*, contracts not specifically enumerated within an asset purchase agreement are not assumed by the purchasing party. *Dominion Sports Servs., Inc. v. Bredehoft*, No. A04-2343, 2005 WL 3468137 (Minn. Ct. App. Dec. 20, 2005) (Addendum at Add. 5).¹²

In *Dominion Sports*, a panel of this Court affirmed the district court’s summary judgment disposing of a breach-of-contract claim against an asset purchaser, determining that the claim failed as a matter of law because there was never any contract between appellant, on the one hand, and the buyer under an asset-purchase agreement, on the other hand. *Id.* at *4. The asset-purchase agreement in *Dominion Sports* provided that the liabilities assumed by the purchasing party consisted solely of those specifically enumerated within the agreement. *Id.* The contract that appellant claimed was breached was *not* specifically enumerated within the asset-purchase agreement. Accordingly, the

¹² That this Court chose not to publish the panel opinion in *Dominion Sports* merely highlights the obviousness and well-settled nature of this basic law concerning asset purchase agreements.

panel held that the terms of the asset-purchase agreement “permit[ted] but one interpretation: there [was] no contract between appellant and [the purchasing party].” *Id.* The panel noted that “[u]nder the terms of the [asset purchase] [a]greement, appellant did not assume the . . . contract obligation.” *Id.* The language of the contract “unequivocally relieved appellant from any obligation to employ or contract with any existing employees or independent contractors of [the selling entity under the asset-purchase agreement].” *Id.*

For the same reasons, the contract-related claims against National Beverage fail as a matter of law in this action. As National Beverage repeatedly showed to the district court, both before and during trial, it never assumed any obligations under the 1972 Agreement. The 1999 asset-purchase agreement specifically enumerated the assets that National Beverage was purchasing. (Ex. 229 at NBEV002047, App. at A-334.) It further sets forth the “liabilities assumed.” (Ex. 229 at NBEV002048, App. at A-335.) These lists made clear that the *only* contracts that National Beverage was assuming under the 1999 asset-purchase agreement were those specifically enumerated in a separate schedule; *i.e.*, two manufacturing agreements and *no* distribution agreements. (Ex. 229 at NBEV002059, App. at A-332.) The 1999 asset-purchase agreement was also express in the liabilities that National Beverage was assuming: “[e]xcept as set forth in the Amendment and Schedules, neither National Beverage nor HJA shall assume any obligation, duty or liability of [American Citrus]” (Ex. 229 at NBEV002048, App. at A-335.) The 1999 asset-purchase agreement is unambiguous: National Beverage only assumed those contracts specifically delineated therein. Accordingly, and as a matter of

law, National Beverage did not purchase or otherwise assume any obligations under the 1972 agreement. The 1972 agreement never governed the relationship among Dunn, Twin City and National Beverage. *Dominion Sports Servs., Inc.*, 2005 WL 34868137, at *4; *Mitchell Mach., Inc. v. Ford New Holland, Inc.*, 918 F.2d 1366, 1369 (8th Cir. 1990) (holding that, as a matter of law, under South Dakota’s identical rule of successor liability an asset purchaser did not become liable under distribution contracts where there was no language in the applicable asset-purchase agreement suggesting that the asset purchaser assumed any liability under the contracts); *Ernst v. Ford Motor Co.*, 813 S.W.2d 910, 916-17 (Mo. Ct. App. 1991) (holding that, as a matter of law, asset purchaser did not assume any obligation under dealership contracts when asset purchase documents did not list the contracts as being assumed by the deal).

In particular, *see also Phase III Mktg, Inc. v. EZ Painter Co.*, No. 1:99-CV-557, 2000 WL 33252113, at *8 (W.D. Mich. Dec. 4, 2000) (Addendum at Add. 18) (“The Asset Purchase Agreement limits [the purchaser’s] liability on [the seller’s] contracts only to those specified [in the] Asset Purchase Agreement. This express disclaimer of liability effectively negates any implied assumption claim . . .”).¹³

¹³ As National Beverage explained to the district court in extensive detail in support of its post-trial motion, *Phase III Marketing* addressed the same legal question, a very similar kind of business relationship, and many virtually identical facts. (See Memorandum in Supp. of Defs.’ Motion for Judgment Notwithstanding the Verdict (10/20/05) at 7-9.) While it will not repeat its extended discussion in this appeal brief, National Beverage respectfully commends the *Phase III Marketing* decision to this Court for particular consideration of its cogent discussion and application of these basic legal principles to an eerily similar scenario.

C. THE OTHER EVIDENCE FAILS TO ESTABLISH NATIONAL BEVERAGE'S ASSUMPTION OF OBLIGATIONS UNDER THE 1972 AGREEMENT

Moreover, not only the contract documents, but also the other evidence of statements of the transaction parties at the time, make crystal clear the parties' intent with respect to any distribution contracts of American Citrus. National Beverage clearly indicated that under the 1999 asset-purchase agreement it was not assuming any of American Citrus's contractual obligations to distributors.¹⁴ American Citrus did exactly the same thing,¹⁵ and the message was received – not necessarily happily – by the American Citrus wholesale customers, including Twin City. (Tr. 358-60, 374-75, 598-99, 970, App. at A-166-70, A-186a-87; Exs. 231, 236, 237, 265, App. at A-350-55, A-365.)

All of the evidence before the district court and jury compels but one conclusion: National Beverage did not acquire or assume the 1972 agreement with Dunn and Twin

¹⁴ Ex. 228, App. at A-324. (“[F]ollowing the closing of the sale of the assets, this letter is intended to supersede any and all distributor agreements maintained by you with American Citrus Products Corporation relating to the Mr. Pure, Home Juice and related brands, as those agreements are not being assigned to us as part of the acquisition.”); Ex. 231, App. at A-350: (“National Beverage made it clear that they do not use distributor agreements in their organization, so our agreements with the Home Juice Division of American Citrus remain an obligation of American Citrus and Henry Lang.”)

¹⁵ See Tr. 358-360 (testimony of James Folsom); Ex. 236 (September 1999 letter from Folsom to Henry Lang of American Citrus) (“When [American Citrus] was sold to National Beverage, we simply lost the difference between an exclusive, transferable franchise and an oral year to year distribution agreement.”).

City. Accordingly, as a matter of law, National Beverage cannot be held liable for any alleged breach of the 1972 Agreement. *State ex rel Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 569 (Minn. Ct. App. 2005) (“Under long-standing contract-law principles, a nonparty to a contract generally will not be bound by that contract.”); *Rausch v. Julius B. Nelson & Sons, Inc.*, 149 N.W.2d 1, 6 (Minn. 1967) (“It is the general rule that contract provisions do not create duties to strangers to the contract.”); *see also Southwest Distrib. Co. v. Olympia Brewing Co.*, 565 P.2d 1019, 1023 (N.M. 1977) (“A third party . . . cannot be held liable for the termination of a contract to which it is not a party, particularly after it has timely disclaimed any assumption.”).

As a matter of law, National Beverage did not assume or acquire this agreement under the 1999 asset-purchase agreement and was simply a stranger to the agreement, who could not be held liable for any alleged breach. *See Myers v. Hearth Techs., Inc.*, 621 N.W.2d 789, 791 (Minn. 1975) (standard of review); *Hoggarth v. Minneapolis & St. L.R. Co.*, 164 N.W. 658, 658 (Minn. 1917) (same). Accordingly, it was reversible error for the district court to submit plaintiffs’ breach-of-contract claim to the jury. *See B & H. Inv. Co. v. Union Stockyards Co. of Fargo*, 513 N.W.2d 264, 269 (Minn. Ct. App. 1994) (holding that it was reversible error for the district court to submit a breach-of-contract claim to the jury when the claim “had no basis in fact”).

Dunn and Twin City staked their breach-of-contract claim on their ability to carry the burden of showing that National Beverage acquired or assumed contractual obligations set forth in the 1972 Agreement. But Dunn and Twin City did not, and could not, provide evidence of such an assumption. Accordingly, the claim should not have

been submitted to the jury, and the district court erred in failing to conclude that the claim failed as a matter of law.

II. THE JURY'S ANSWERS TO QUESTIONS 1-4 OF THE SPECIAL VERDICT FORM ARE NOT SUPPORTED BY THE EVIDENCE

A district court's denial of motions for a directed verdict or for judgment notwithstanding the verdict should be reversed if a contrary result would be manifestly against the evidence or contrary to the applicable law. *LaBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975)

For all the reasons discussed above, the district court erred by failing to conclude as a matter of law that National Beverage never became a party to the 1972 agreement. From this, it follows necessarily that it was error to submit plaintiffs' breach-of-contract claim to the jury.¹⁶ However, once the jury (improperly) had the breach-of-contract claim as formulated by plaintiffs, it is also true that each of the jury's answers to Special Verdict Questions Nos. 1-4 was unsupported by the evidence. (App. at A-100-01)

A. THE JURY'S ANSWER TO SPECIAL VERDICT FORM QUESTION NO. 1 CANNOT STAND.

In light of the plain language of the 1999 documents (Exs. 229-30, App. at A-326-49), the law relating to asset-purchase-agreements in Florida, Minnesota and anywhere

¹⁶ Dunn and Twin City did not contend or ask the jury to find at trial that some other contract had been formed at any point in time. By their own choice, Dunn and Twin City made any possible breach-of-contract action dependent upon their ability to prove, first, an assumption of the 1972 agreement "by virtue of" the 1999 asset purchase, and, second, a breach by National Beverage of the assumed contract.

else, and the absence of evidence that the parties to the 1999 asset purchase agreed to depart from that baseline rule with respect to the assumption of contract obligations, the only supportable answer to Special Verdict Question No. 1 as propounded to the jury is “no.” (*See App. at A-100.*) Putting aside for the moment the impropriety of submitting Question No. 1. to the jury, the above also makes clear that the jury’s answer to this question (“yes”), is manifestly contrary to the weight of the evidence and cannot stand.

B. THE JURY’S ANSWER TO SPECIAL VERDICT FORM QUESTION NO. 2 CANNOT STAND.

Obviously, the evidence and the law discussed above relating to Special Verdict Question No. 1 also render the jury’s answer (again, “yes”) to Special Verdict Question No. 2 (“Did Defendant National Beverage breach this contract?”) manifestly contrary to the weight of the evidence, as a defendant cannot breach a contract to which it is not a party. *See Watson’s Properties, LLC*, 2002 WL 1364064, at *3 (Addendum at Add. 3) (affirming district court’s dismissal of breach-of-contract claim against non-party to an agreement because such a non-party cannot be held liable for its alleged breach).

But the answer to Question No. 2 is *also* against the manifest weight of the evidence for multiple additional reasons beyond those relating to the unsupportable answer to Question No. 1. Briefly, National Beverage explains those additional reasons here:

- 1. At the time of the alleged breach, plaintiffs had explicitly transferred all purported contract rights, and ceded all control over the alleged agreement.**

The breach-of-contract claim against National Beverage identifies the actionable breach of the 1972 agreement as National Beverage's act of selling products directly to DTM (Tr. 1454, App. at A- 83) – an event that took place, as the jury was instructed, in August 2002. (*Id.*; Exs. 344, 347; App. at A-453-54.) Yet, the evidence presented to the jury showed that *Service*, and not plaintiffs, held any existing contracts relating to Mr. Pure product distribution during a period that began on March 29, 2002 (Ex. 280, App. at A-376-86) and extended at least until September 3, 2002. (Ex. 300, App. at A-425-26; Tr. 1004, App. at A-235a.) Simply put, from the time that the Twin City/Service transaction was complete on March 29, 2002 (Ex. 280; App. at A-376), “the Home Juice Co., Cool Mountain Beverage, Inc., Hansen Beverage Co., Tri-County Beverage & Supply, Inc. and Fuze Beverages, Inc. contracts, commitments and agreements,” (Ex. 280, App. at A-385) if any, were held by Service and not Dunn or Twin City.

It was undisputed at trial that Dunn and Twin City had no control over what was done with those transferred agreements, or what was done in those business relationships, following their transfer to Service, and as of the date of the alleged breach – August 27,

2002.¹⁷ In fact, not only was it undisputed, but it was in fact *emphasized* by plaintiffs' counsel at trial, that Service, and not plaintiffs, was in complete control of the alleged contract rights as of August 27, 2005.¹⁸ In short, at the time of the alleged breach in August 2002, the Dunn and Twin City were, as a matter of undisputed fact, vested with

¹⁷ See Tr. 845, 867, App. at A-220, A-222 (testimony of Susan Dunn):

Q: [W]hen you sold this distribution business to Mr. Leikam, you are not suggesting that you could have, in some way, had control over what decisions he made about that business, right?

A: No.

....

Q: [When Leikam terminated Tri-County as a subdistributor in April 2002], you didn't, like, make a big point of it because Mr. Leikam at the point owned the company and he could do what he wanted to with the company, right?

A: Yeah, he could.

¹⁸ Q: [by Mr. Krass]: So . . . on August 27th, on that same day DTM is putting in a direct order, is that correct?

A [by Mr. Leikam]: According to that.

Q: According to exhibits that have been given us by National Beverage?

A: Yes.

....

Q: I mean, you still had these assets, right?

A: Correct.

Q: You were in the process of unwinding, but it hadn't been done yet, correct?

A: Correct.

Q: So whatever rights existed were still with you until you gave them back to Sue, correct?

A: Correct.

(Tr. 1131, App. at A-264a.)

no distribution rights whatsoever, having bargained any such rights away to Service in an arms-length deal that they themselves sought in furtherance of the plan to get out of the distribution business altogether.

In order to establish a claim for breach of contract, a plaintiff must show: (1) the formation of a contract; (2) the performance of any conditions precedent; and (3) that defendant breached the contract. *Comm. Assocs., Inc.*, 712 N.W.2d at 782 (citing *Indus. Rubber Applicators, Inc. v. Eaton Metal Prods. Co.*, 171 N.W.2d 728, 731 (Minn. 1969)). A necessary predicate to any action for breach-of-contract is that the claimant must be a party to the agreement at issue. *Comm. Assocs., Inc.*, 712 N.W.2d at 783 (“Because appellant was not a party to the insurance contract and respondent received the exact policy for which it bargained, no breach of contract occurred.”) Here, the evidence at trial showed that at the time of the alleged breach Dunn and Twin City did not hold any rights in any contract to distribute Mr. Pure juice products. Accordingly, Dunn and Twin City have no complaint against National Beverage for the alleged breach of such a contract. *See Pine Valley Meats, Inc. v. Canal Capital Corp.*, 566 N.W.2d 357, 365 (Minn. Ct. App. 1997) (affirming district court’s dismissal of breach-of-contract counterclaim where counterclaimant had assigned all assets including all “rights in and under all . . . outstanding contracts . . .” because assignor had assigned all interest in the sued-upon contract, and, thus, lacked standing to bring a claim for its breach), *abrogated on other grounds by Myers*, 621 N.W.2d at 794.

2. **The transferee, Service Distributing, reached a new at-will relationship with National Beverage in April 2002, abandoned that relationship several weeks later, and had no objection in August 2002 to the actions allegedly constituting breach.**

The evidence at trial concerning the actions of Service during the five-month period (from March 29 until at least September 3, 2002) that Service was, undisputedly, the sole party in control of any alleged contract-distribution rights further render the jury's answer to Special Verdict Question No. 2 manifestly against the weight of the evidence and insupportable as a matter of law.

- (a) **Service rejected the alleged agreement and made a new one.**

Representatives of Service and National Beverage each testified at trial that they reached a new meeting of the minds as to the terms of their business relationship in April 2002. (Tr. 526, 1073-77, 1387, App. at A-183, A-250-54, A-281.) Mike Perez of National Beverage – which had never even seen the 1972 agreement to this point in time (Tr. 119, 926-28, App. at A-150, A-229-31) – met with Mark Leikam of Service in Minnesota and explained the “handshake” terms under which National Beverage proposed to do business. (Tr. 526, 1387, App. at A-183, A-281.) Leikam – who had been advised by his counsel that the purported 1972 agreement was not only of dubious legitimacy, but affirmatively created problems for Service based on the product exclusivity requirement (Tr. 824, A-219) – was agreeable to National Beverage's standard at-will agreement with its wholesale customers, which was no different from the agreement that Service had with any one of its other 150-plus product suppliers (Tr. 1048, 1073-77, App. at A-239, A-250-54.) This new agreement superseded the 1972

agreement, and, accordingly, extinguished any rights arising thereunder. *See Krogness v. Best Buy Co., Inc.*, 524 N.W.2d 282, 286 (Minn. Ct. App. 1994) (recognizing that “[p]arties who have an express contract may leave that agreement behind and so conduct themselves that a new contract must be implied from their behavior.”)

(b) Service abandoned performance of the buyer’s obligations under the alleged agreement.

Second – and perhaps not surprisingly, since Service had rejected the 1972 agreement – Service performed inconsistently with its terms. The 1972 agreement required of the party in Service’s position product exclusivity, prompt payment, use of the product name in the territory, and best efforts to promote sales. (*See* Ex. 201, App. at A-317-21.) Service sold competitive product in the form of Very Fine juices. (Tr. 1056, App. at A-243; *cf.* Ex. 201 ¶ 7, App. at A-319.)¹⁹ Its most significant failure to perform was its complete abandonment of the product purchasing obligations of a wholesale customer, beginning in mid-July 2002, when it admittedly stopped ordering product and attempted to run its inventory down as low as possible. (Tr. 1100, App. at A-263a; *see* Ex. 347, App. at A-454.)

The predominant purpose of the alleged contract was the sale of goods, and so Minnesota’s version of the Uniform Commercial Code applies. *AKA Dist. Co. v. Whirlpool Corp.*, 948 F. Supp. 903, 905-06 (D. Minn. 1996), *aff’d* 137 F.3d 1083 (8th

¹⁹ Twin City engaged in similar breaching conduct by selling Welch’s juice products from March 1999 through late 2001. (*See* Ex. 271 , App. at A-271.)

Cir. 1998). Under the UCC, when an “exclusive” buyer quits performing, that buyer forfeits whatever rights it had to demand that the seller sell to no one else. *See* Minn. Stat. § 336.2-306(2) (an agreement for “exclusive dealing . . . imposes unless otherwise agreed an obligation . . . by the buyer to use best efforts to promote [the goods’] sale”) Here, the record evidence shows that Service breached the 1972 agreement by selling competing products in the distribution area and by failing to use its best efforts to promote sales of Mr. Pure. The record evidence further shows that these breaches occurred well before August 27, 2002 – the date of the alleged breach by National Beverage. Accordingly, the jury’s finding of breach is not supported by the record evidence and is contrary to law. *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 379-80 (Minn. Ct. App. 1996) (“Under general contract law, a party who first breaches a contract is usually precluded from successfully claiming against the other party.”).

(c) Service assented to the act alleged to constitute breach.

Third, Leikam – again the undisputed holder of any contract rights at the time of the alleged breach by National Beverage – testified at trial that he had no problem with National Beverage’s direct sale to DTM and would have done the same thing himself. (Tr. 1143, App. at A-267.) Leikam and Service waived any alleged breach by National Beverage. *Appollo v. Reynolds*, 364 N.W.2d 422, 424 (Minn. Ct. App. 1985) (“Ignoring a provision in a contract will constitute waiver”) (citing *Edelstein v. Duluth, M. & I. R. Ry. Co.*, 31 N.W.2d 465 (Minn. 1948)).

In sum, this undisputed evidence at trial wholly undermines the jury’s answer to Special Verdict Question No. 2 for separate reasons entirely supplemental to the legal rules on contract formation (see Sections I and II(a) *supra*).

C. THE JURY’S ANSWERS TO SPECIAL VERDICT FORM QUESTION NOS. 3 AND 4 CANNOT STAND.

Once again wholly apart from the fact that the jury’s verdict on the contract claim cannot stand because National Beverage was not a party to the contract at issue as a matter of law, it is also true that the jury’s answers to Special Verdict Question Nos. 3 and 4 (on causation and damages) are manifestly contrary to the weight of the evidence for additional reasons.

The evidence at trial established that the March 29, 2002 asset-purchase agreement called upon Service to make 48 monthly payments to Twin City of \$6,000 each, or \$288,000, beginning in late September 2002. (Ex. 280, App. at A-376.) The jury answered Question Nos. 3 and 4 by determining that the conduct alleged to constitute a

breach (direct sale to DTM beginning August 27, 2002) caused damages of \$288,000. (App. at A-101.) These answers are manifestly against the weight of the evidence, as there was no evidence whatsoever before the jury that could have supported the conclusion that the alleged breach (first occurring August 27, 2002) caused Service's failure to make *any* of these 48 monthly payments. Indeed, the undisputed evidence at trial makes such a conclusion manifestly unreasonable.

First, it was undisputed at trial that Service had determined to back out of the March 2002 deal, and thus not to make the payments, by no later than June 2002 – two full months before any alleged breach. Leikam testified that Service's experience between April and June 2002 convinced it not to perform under the agreement, and to back out of it, because the Mr. Pure business was too much strain on Service's employees and did not make money as he anticipated it would. (Tr. 876, 1096-97; App. at A-224, A-261-62.)²⁰ It was undisputed at trial that this decision was reached no later than June 27, 2002. (Tr. 1097-98, 1128, 1391, App. at A-262-63, A-264, A-285; Ex. 294, App. at A-396-97; *see also* Ex. 95; App. at A-311.) In fact, counsel for Dunn and Twin City took great pains at trial to attempt to establish that Dunn had determined to forego the benefits of the March 2002 deal – including the monthly payments – beginning in July 2002. (Tr.

²⁰ In fact, National Beverage's actions did not and could not have motivated Service to do anything at all. Leikam testified that he had no problem with the direct sale to DTM, and in fact would have done the same thing himself. (Tr. 1143, App. at A-267.)

1135-36, App. at A-265-66.)²¹ Accordingly, under any reasonable view of the evidence, nothing that happened in August 2002 could have had any bearing whatsoever on the likelihood that Service Distributing would pay \$288,000 to Twin City.

Second, Dunn and Twin City sought no relief related to the Service deal and indeed did not even *mention* the Service deal in their Complaint or Amended Complaint. (App. at A-1-44.) They never claimed that the alleged breach caused Service not to make monthly payments; rather, they claimed that the alleged breach caused them to be deprived of the benefit of the purported deal with Kocina and Tri-County. Dunn contended that the damages caused by this breach exceeded \$1 million, because an otherwise valid and legitimate deal with Kocina and Tri-County did not result in payment to Dunn and Twin City. (Tr. 690-703, App. at A-193-206.) National Beverage presented expert testimony and an expert opinion that the deal with Kocina and Tri-County was not legitimate and failed to meet established business valuation standards for a bona fide offer (Tr. 1246-51, App. at A-270-75) and that the damages caused by the alleged contract breach, and the allegedly resulting loss of the Kocina deal to plaintiffs, were \$0.

²¹ Q [by Mr. Krass]: Did you and Sue [Dunn] have direct talks about how this unwinding was going to happen?

A [by Mr. Leikam]: Yes.

Q: Was that during the summer in July and August?

A: Yes.

(Tr. 1135, App. at A-264.)

(Tr. 1261-65; App. at A-276-80.) The jury rejected Dunn and Twin City's theory concerning a loss of benefits from the Kocina deal. (See Answer to Special Verdict Form Question No. 32, App. at A-106 (refusing to find an agreement between Twin City and Tri-County).)

A plaintiff may not recover under a breach-of-contract theory absent a showing of injury from the claimed breach. *Lipka v. Minn. School Employees Ass'n*, 537 N.W.2d 624, 631 (Minn. Ct. App. 1995) (emphasis added) (citing *Lovell v. One Bancorp*, 818 F. Supp. 412, 425 (D. Me. 1993)). Here, Dunn and Twin City failed to meet their burden to present the necessary showing of causation and damages sufficient to support their breach-of-contract claim. Absent evidence that the contract breach proximately caused the complained-of damages, the jury's answers to Special Verdict Form Question Nos. 3 and 4 are unsupported by the evidence and contrary to law. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 535 N.W.2d 671, 675 (Minn. Ct. App. 1995) (reversing jury verdict on breach-of-contract claim for failure to provide sufficient evidence of proximate causation to sustain the verdict).

Here, the jury determined causation and awarded \$288,000 in damages on a theory that Dunn and Twin City could not and did not ever advance because it was flatly inconsistent with both the evidence at trial and with their stated claims regarding causation and damages – claims that involved the Kocina/Tri-County deal, which the jury rejected. For these additional reasons, the jury's answers to Special Verdict Question Nos. 3 and 4 (on causation and damages) are manifestly contrary to the weight of the evidence and cannot stand.

III. THE DISTRICT COURT SHOULD HAVE CONCLUDED THAT NATIONAL BEVERAGE FACED NO LIABILITY FOR DEFAMATION AS A MATTER OF LAW

The district court erred in denying National Beverage's motion for judgment notwithstanding the verdict on the defamation claim because the jury's answers on this portion of the Special Verdict Form (Question Nos. 15-21) had no reasonable support in fact and were contrary to law.

By its answers the jury determined that, in October 2002 (*see, e.g.*, Tr. 259-60, App. at A-159-60), National Beverage stated to one or more past purchasers of Mr. Pure products that "defendant DTM was the only authorized distributor of Mr. Pure products" (Question No. 15), and that this statement was intentionally or negligently published (Question No. 18), referred to Twin City (Question No. 17), was false (Question No. 19), and affected Twin City in its business (Question No. 16). (*See* App. at A-103-05.) The jury assessed \$64,369.45 in damages against National Beverage, and \$0 against DTM, in connection with the identical defamation allegations against each of them. (Question No. 21, App. at A-104.)

The jury's answers in Question Nos. 15-21 are unsupported by the weight of the evidence – indeed are flatly inconsistent with the evidence – and are nonsensical under the law.

"To succeed in a claim of defamation, a plaintiff must prove that the defendant made a false and defamatory statement about the plaintiff in an unprivileged communication to a third party and that the statement harmed the plaintiff's reputation in the community." *Marchant Inv. & Mgmt Co. v. St. Anthony West Neighborhood Org.*,

694 N.W.2d 92, 95 (Minn. Ct. App. 2005) (citing *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003)).

The evidence at trial does not support the jury verdict on any of these elements. Specifically: (1) there was no evidence that National Beverage, as opposed to DTM, made any complained-of statement; (2) under Dunn and Twin City's own theory of the case the statement was not false when made; (3) the statement was not defamatory as a matter of law in that it did not tend to harm plaintiffs' reputation in the community; and (4) Dunn and Twin City wrongly contended that they need not show evidence of malice necessary to overcome National Beverage's qualified privilege, and conceded that they could not make this showing in any event.

A. THERE WAS NO EVIDENCE THAT NATIONAL BEVERAGE MADE THE ALLEGED DEFAMATORY STATEMENT.

In completing the special verdict form, the jury indicated that "Defendants" made statements that DTM was the only authorized distributor of Mr. Pure products. (Special Verdict Form Question 15, App. at A-103.) Here, the jury heard no evidence, was not asked to find, and did not find that the purportedly defamatory statement was made by a representative of National Beverage as opposed to a representative of DTM.

Nor did the evidence support such a distinction. While the only Mr. Pure customer to testify at trial as to the statements, Bradley Mateer, had previously submitted an affidavit (Ex. 340, App. at A-446) averring that statements were made by Dan McNaughton of DTM *and* an unnamed representative of National Beverage without distinction (*id.*), Mr. Mateer's live testimony (Tr. 258-64, App. at A-158-64) quickly

established, to the satisfaction of all including Dunn and Twin City’s counsel, that Mr. McNaughton was the alleged speaker.²² As for Tim Stoffel, the nontestifying customer whose hearsay affidavit was not disclosed before trial (Ex. 342, App. at A-448), counsel for Dunn and Twin City freely characterized Stoffel as alleging that DTM employee Bill Biggerstaff was the speaker. (Tr. 1206, App. at A-269.)²³

The jury simply found that “Defendants” made such statements. Yet, the jury did not attribute *any* damages of any alleged defamation to DTM, indicating an implicit finding that National Beverage was the speaker of the alleged defamatory statement. (Special Verdict Form Question 21, App. at A-103.) This finding is contrary to the evidence, as nowhere in the record is there identification of allegedly defamatory statements made by a representative of National Beverage, as opposed to a representative of DTM.

In order to establish a claim for defamation against National Beverage, Dunn and Twin City had to provide evidence sufficient to show that *National Beverage* made false and defamatory statements. This they failed to do. Accordingly, National Beverage was entitled to judgment on the defamation count as a matter of law. *Swanson v. Am.*

²² Q: Mr. Mateer, you just stated that Mr. McNaughton told you he was the only authorized distributor (Tr. 263-64, App. at A-163-64.)

²³ Counsel for Dunn and Twin City also characterized the testimony of the sole non-customer “defamation” witness, Tri-County employee Jay Emerson, as attributing the statement at issue to Dan McNaughton and Tony Baker – both of DTM. (Tr. 1575-76, App. at A-297-98.)

Hardware Mut. Ins. Co., 359 N.W.2d 705, 707 (Minn. Ct. App. 1984) (recognizing that a defamation claim cannot lie against a non-speaker.) The jury’s verdict on the defamation count was manifestly contrary to the evidence.

B. UNDER DUNN AND TWIN CITY’S OWN THEORY OF THE CASE, AT THE TIME THE STATEMENT WAS MADE, IT WAS NOT FALSE.

The evidence is insufficient to support the jury verdict of defamation against National Beverage for the additional reason that the complained-of statement – that DTM was the only authorized distributor of Mr. Pure products (Special Verdict Form Question 15.) – was *not false* when made in October 2002. As a matter of law, a true statement cannot be defamatory. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Dunn and Twin City failed to provide the necessary evidence of falsity sufficient to sustain the jury’s verdict on the defamation claim.

Whether a statement can be proven false is a question of law. *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-20 (1990).

The evidence presented at trial provided no reasonable support for the jury’s finding that the statement set out in Question No. 15 of the Special Verdict Form (App. at A-105) was false in October 2002. Indeed, Dunn and Twin City’s *own theory of the case* was that National Beverage improperly terminated their authorization to sell Mr. Pure products in August 2002. (Tr. 1571, App. at A-296 (“Did defendant NBC terminate [the contract]? Certainly they did. And that happened when Mr. Perez said *You are out and DTM is in.*”) Counsel for Dunn and Twin City aggressively questioned several

witnesses, including his own, to obtain testimony amounting to confirmation that the alleged defamatory statement was in fact true. (*See* Tr. 674, App. at A-192.)²⁴

Under its own theory, Twin City was *not* an authorized distributor of Mr. Pure after August 2002, and the only conclusion consistent with Dunn and Twin City's arguments to the jury, and with the jury's own conclusion elsewhere on the special verdict form, is that allegedly defamatory statements were *truthful* at the time they were made. (*See* Question No. 24, App. at A-105 (finding that defendants did *not* "disparage the services of Plaintiff Twin City Home Juice by making false or misleading facts or statements".)) Accordingly, and as a matter of law, the jury's verdict on defamation claim cannot be maintained. *See Diesen v. Hessburg*, 455 N.W.2d 446, 449 (Minn. 1990) ("[g]enerally a plaintiff must prove publication of a false and defamatory statement to prevail in a libel action, with truth being an affirmative defense . . .").

Further, and at an absolute minimum, the allegedly defamatory statement was a subjective interpretation of the parties' legal relationship or status. As a matter of law, such a statement cannot be false. In order to be actionable as defamation, a statement

²⁴ Q [by Mr. Krass]: So sometime by late September you knew that DTM was an authorized representative of [National Beverage]?

A [by Ms. Dunn]: Yes, I knew that they were shipping him product direct. I disagree that he was the authorized distributor, but I don't know.

Q: If not authorized by you, authorized by National Beverage?

A: I guess, yes. By someone, yes.

must be reasonably interpreted as asserting *facts* that can be proven false. *Milkovich*, 497 U.S. at 18-20; *Metge v. Cen. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 496 (Minn. Ct. App. 2002). Statements of subjective opinions, interpretations, conjecture, and theories cannot be false for purposes of a defamation claim. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 308 (Minn. Ct. App. 2001). Indeed, “[a] commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist.” *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996). Accordingly, “remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of ‘falsity’ is possible in such circumstances.” *Id.* Here, the alleged defamatory statement cannot form the basis of an actionable claim for defamation. The jury’s finding of falsity is manifestly contrary to the evidence presented at trial.

C. THERE WAS NO EVIDENCE THAT THE ALLEGED STATEMENT HARMED DUNN OR TWIN CITY’S REPUTATION IN THE COMMUNITY.

The defamation claim fails for yet another reason: as a matter of law, the complained-of statement is not defamatory. A statement is only defamatory if it disgraces and degrades the plaintiff; holds him or her up to public hatred, contempt, or ridicule or harms the plaintiff’s reputation and lowers the plaintiff in the estimation of the community. *See Adv. Training Sys., Inc. v. Kaswell Equip. Co., Inc.*, 352 N.W.2d 1, 9 (Minn. 1984). The statement at issue merely set forth an understanding of the distribution rights for Mr. Pure products. At the time it was made, Dunn and Twin City

were out of the beverage distribution business and they suffered no demonstrable loss of any kind based on this statement – or any action – in October 2002. (*See* Section II.C, *supra*.) The statement also does nothing to disgrace and degrade Dunn or Twin City or hold them up to public ridicule or hatred. *See Brill v. Minnesota Mines*, 274 N.W.2d 631, 633 (Minn. 1937). The jury’s finding that the alleged statement was defamatory is manifestly contrary to the evidence.

D. THE STATEMENT AT ISSUE WAS PROTECTED BY A QUALIFIED PRIVILEGE.

Further still, the complained-of speech is protected under Minnesota law by a qualified privilege for statements “made upon a proper occasion, from a proper motive, and . . . based upon reasonable or probable cause.” *Stuempges*, 297 N.W.2d at 256-57. The statement regarding the status of the distribution relationship between National Beverage and other entities, like statements relating to the termination of an employment relationship, enjoys a qualified privilege. *See Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 890 (Minn. 1986); *Fahrmann v. Fredd*, No. C5-01-2034, 2002 WL 1467451 (Minn. Ct. App. July 1, 2002) (Addendum at 21) (employer had a qualified privilege from liability for defamatory statements made in connection with the termination of an employee, and there was insufficient evidence of common-law malice, or ill will, to overcome the privilege). In order to defeat the privilege, plaintiffs had the burden to show that the defendant did not have “reasonable and proper grounds” for making the allegedly defamatory statement. *Lewis*, 389 N.W.2d at 890.

Here, National Beverage was protected by this qualified privilege and cannot be subject to liability for defamation. As repeatedly recognized by the courts, when a statement is protected by the qualified privilege malice cannot be implied from the statement itself or from the fact that the statement was false. *Stuempges*, 297 N.W.2d at 256. Malice must be proved by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege.

Buchanan v. Minn. State Dep't of Health, 573 N.W.2d 733, 738 (Minn. Ct. App. 1998) review denied (Minn. Apr. 30, 1998). Here, plaintiffs provided no such extrinsic evidence to support a finding of malice. The jury was not asked to find – nor could it have found – that the statement was made to injure plaintiffs, that it was made with ill will and improper purposes or that it was made without cause and without regard for the consequences. (See Minn. Civ. JIG 50.35.) As a matter of law, no finding of actual malice would be supported on the evidence presented. Indeed, counsel for Dunn and Twin City acknowledged as much as it argued (erroneously) that the qualified privilege did not apply. (See Tr. at 1037-38, App. at A-68-69 (argument on directed verdict).

The jury's verdict on the defamation claims in this case has no reasonable support in fact and is contrary to law. The district court erred in failing to grant National Beverage's motion for judgment notwithstanding the verdict.²⁵

²⁵ The remedy for the district court's error with respect to qualified privilege is reversal with direction to enter a judgment of dismissal in National Beverage's favor. There is no need for a new trial. This is so in light of: (a) all of the other infirmities of the defamation verdict on this record, as explained herein; and (b) the acknowledgement of counsel for Dunn and Twin City that there is no issue of malice to be presented to the jury in this case. (See Tr. at 1037-38, App. at A-68-69.)

CONCLUSION

For all of these reasons, the judgment of the district court should be reversed, and a judgment of dismissal of all claims with prejudice and on the merits should be entered in the district court.

Respectfully submitted,

Dated: June 5, 2006

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STATE OF MINNESOTA

IN COURT OF APPEALS

A06-396
A06-397

Susan Dunn, et al.

Respondents (A06-396)
Appellants (A06-397)

vs.

National Beverage Corp., a Delaware corporation, et al.,

Appellants (A06-396)
Respondents (A06-397)

DTM Distributing, Inc.,

Defendant (A06-396)
Respondent (A06-397)

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,626 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

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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) (with amendments effective July 1, 2007).