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' REPLY BRIEF
(A06-396)
RESPONDENTS' BRIEF
(A06-397)

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INTRODUCTION

For reply in No. A06-396, National Beverage will address the responsive arguments made by Dunn and Twin City at pages 13-38 of their brief (*see* pages 1-18, *infra*). Next, National Beverage will respond in No. A06-397, the attorney's fees appeal, by addressing Dunn and Twin City's arguments at pages 38-49 of their brief (*see* pages 18-27, *infra*). If this Court agrees with National Beverage's position in appeal A06-396 on the contract-related claims, then Dunn and Twin City's appeal in A06-397 can be rejected without further analysis. That is the proper result.

[APPELLANT'S REPLY IN A06-396]

I. THE JUDGMENT ENTERED ON THE CONTRACT-RELATED CLAIMS SHOULD BE REVERSED

A. The Unseen 1972 Contract and Unseen 1995 Letter Were Not Assumed by National Beverage in the 1999 Asset Purchase Transaction.

As Dunn and Twin City's appellate brief only serves to confirm, their contract-based case is completely dependent upon a legal conclusion that National Beverage was a party to a particular written contract document (the 1972 contract and 1995 letter) of the type that National Beverage took pains expressly *not* to assume in 1999, and indeed never even saw before this lawsuit was filed in 2002.

In their latest defense of this unsupportable conclusion, Dunn and Twin City do nothing new. Not for the first time, they willfully miss the point and attempt, without meaningful case citation, to muddle a straightforward successor liability analysis and convert the core question into one of whether wholesale customers (that is, *distributors*) serve an essential need or purpose for product manufacturers. If this is true, say Dunn and Twin City, then a "distribution contract" is *always* transferred when manufacturing assets change hands because "it is axiomatic that [a manufacturer] is unable to do business without the ability to distribute its product." (Dunn Br. at 15.)

It was error for the district court, apparently entertaining this shallow rhetoric, to disregard the well-settled rules governing the transfer of liabilities and obligations in an asset purchase transaction. That law is amply set forth in National Beverage's opening brief and Dunn and Twin City fail to adequately address it in their response.

Instead, Dunn and Twin City try to rescue the district court's erroneous ruling on the legal effect of the asset purchase documents by focusing on (and distorting) the general over the specific. This directly contradicts settled interpretation principles. In the world according to Dunn and Twin City, parties that take the trouble – as American Citrus and National Beverage did in Schedule 1(g) – to specifically identify the contracts to be transferred and assumed by the asset purchaser are only wasting their time, because boilerplate general language as to the items on the "asset" side of a balance sheet ("tangible personal property, receivables, and inventory") will somehow force the purchaser to assume every contractual obligation and liability connected with anything that the asset seller might have "used" in the conduct of its business.

This makes no sense on any level. *First*, the asset purchase agreement here is to be construed in accordance with Florida law (*see* A-332) and, in Florida as elsewhere, "it is a general principle of contract interpretation that a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject." *Kel Homes, LLC. v. Burris*, --- So.2d ---, 2006 WL 2033904, at *4 (Fla.

Ct. App., July 21, 2006) (official publication pending) (Reply Add. 1-7) (citing *Island Manor Apartments of Marco Island, Inc. v. Div. of Fla. Land Sales, Condos. & Mobile Homes,* 515 So.2d 1327, 1330 (Fla. Ct. App. 1987); *Suncoast Bldg. of St. Petersburg v. Russell,* 105 So.2d 809, 810 (Fla. Ct. App. 1958)); *see also Minnesota Ins. Guaranty Assoc. v. Intergra Telecom, Inc.*, 697 N.W.2d 223, 229 (Minn. Ct. App. 2005); Minn. Stat. § 645.26, subd 1.

Here, that means that Schedule 1(g) – the specific effort of the parties to delineate which (and only which) contracts would be transferred in the transaction and assumed by National Beverage – must be given effect. Both Schedule 1 and the Bill of Sale delineated that the only contracts National Beverage was acquiring and assuming in the transaction were "all contracts listed on Schedule 1(g)." (A-334; A-348.) This Schedule listed no distribution agreements, and the deal documents nowhere contain any reference to the 1972 Agreement or 1995 letter. (A-345-46.) *See Phase III Mktg, Inc. v. EZ Painter Co.*, No. 1:99-CV-557, 2000 WL 33252113 (W.D. Mich. Dec. 4, 2000) (Addendum 12-20), at *8 ("Pursuant to section 1.1(g) of the Asset Purchase Agreement, EZ Painter assumed '[a]ll rights and interests of [Adams] in, to and under all contracts, agreements, arrangements or understandings (both written and oral) ("Contracts") which are listed on <u>Schedule 1.1(g)</u>.' The Agreement is not listed in Schedule 1.1(g).")

Second, as even the most rudimentary summary of asset purchase agreements makes clear, a primary advantage to that kind of transaction is that allows the buyer "to pick and choose which contracts to assume."[1] Even though National Beverage and American Citrus did exactly this on the face of the 1999 deal documents via Schedule 1(g), Dunn and Twin City would have the clear intent of American Citrus and National Beverage thwarted in this regard.

Third, Dunn and Twin City carefully choose the general contract language they discuss – focusing only on the "purchased assets" boilerplate and ignoring that they sought to impose on National Beverage a contractual *liability* entirely on the basis of the unseen 1972 document. (Special Verdict Form Question Nos. 1-4, App. at A-100.) Dunn and Twin City refuse to deal with the language (both general and specific) in the asset purchase documents describing what liabilities National Beverage has agreed to assume. (*See* A-335; "[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] . . . .")

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[1] As a rule of thumb, a buyer will usually prefer an asset purchase agreement. Some of the reasons why are:

- The buyer has the ability to acquire assets only, without assuming any liabilities of the seller. The buyer can also pick and choose which assets to acquire. Conversely, the seller can choose which assets to keep.
- The buyer gets a 'stepped-up' tax basis on the assets being acquired.
- The buyer usually has the option but not the obligation to hire employees of the seller's business.
- The buyer also has the ability to pick and choose which contracts to assume."

Lexis-Nexis Martindale Hubbell, lawyers.com, "Buying (Or Selling) A Business: The Basics, available at http://business-law.lawyers.com/buying-selling-businesses/Buying-Or-Selling-A-Business:-The-Basics.html. (Reply Add. 8-9.)

Meanwhile, the purported "damaging admissions" obtained at trial are illusory. They have nothing to do with the assumption of contract liability. What they show is the credibility and fair-mindedness of National Beverage's Mike Perez, who agreed with the proposition that a good distributor adds value for a manufacturer.[2] Of course National Beverage does not dispute that product distributors help its business, and can be important and valuable resources. But this is equally true of vendors (*see Dominion Sports Servs., Inc. v. Bredehoft*, No. A04-2343, 2005 WL 3468137 (Minn. Ct. App. Dec. 20, 2005) (Addendum 5-11) and independent sales representatives (*see Phase III Mktg, Inc.,* 2000 WL 33252113 (Addendum 12-20)), and it has nothing to do with the instant issue of contract law. The panel of this Court in *Dominion Sports Servs.*, the federal court in *Phase III Mktg.*, and every other court that National Beverage is aware of – other than the Dakota County District Court in this case – have shown little difficulty in applying the law of asset purchase transactions in determining whether the *contractual*

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[2] In their appeal brief, Dunn and Twin City take Mr. Perez's sincere factual acknowledgment that good distributors add value (Tr. 132-33, R. 028-29) and flatly misrepresent it as some kind of legal "admission" that "*franchise agreements* are assets and not liabilities." (Dunn Br. at 20; emphasis added). This "admission" gets them nowhere, but their distortion of the testimony is highly objectionable nevertheless. Perez was not asked about particular contract documents, and he was testifying about the value of the role that distributors can play. This distortion is symptomatic of Dunn and Twin City's willful conflating of the unseen 1972 contract with broader concepts and obtuse legal arguments.

Moreover, even pretending for a moment that the Dunn and Twin City's imaginary legal standard (effectively, "if it was 'necessary', National Beverage assumed it") actually applied, there was never any factual evidence that *the 1972 contract* was essential or necessary to the operation of the manufacturer's business.
Indeed, the evidence is that National Beverage operated through late 2002 without any knowledge whatever of the 1972 contract or 1995 letter.

obligations of an asset seller have been transferred and assumed by the asset buyer. That law, as explained in the opening brief, is that these contractual obligations are not transferred to and assumed by the asset buyer absent clear evidence of the buyer's agreement to do so.

When, as in this case, "the [Asset Purchase] Agreement provides that the assumed liabilities 'shall consist solely' of specifically enumerated liabilities," and when "nowhere in the Agreement is the relationship between the [plaintiff] and the [asset seller] mentioned," then "[t]he terms of the Agreement are unambiguous and permit but one interpretation: There is no contract [as a matter of law.]" *Dominion Sports Servs.*, 2005 WL 3468137 (Addendum 5-11) at *4.

Further, where, as in this case, "there is no evidence in the record showing that [the successor manufacturer] was even aware of the Agreement," the successor manufacturer "made no reference to the Agreement," and there was "no evidence that [the plaintiff] ever specifically discussed the Agreement with anyone from [the successor manufacturer]," then the plaintiff cannot "have reasonably believed that [the successor manufacturer] intended to assume the Agreement." *Phase III Mktg.*, 2000 WL 33252113 (Addendum 12-20) at *6. A legally valid assumption of the contract cannot be found where the plaintiff's own contemporaneous conduct and statements "show that [it] was never under the impression that [the successor manufacturer] assumed the Agreement." *Id.*

This is true *even if* statements were made at acquisition time that it would be "business as usual" post-acquisition, or if pre-asset-purchase performance and payment standards were continued after the acquisition. *Phase III Mktg.*, 2000 WL 33252113 (Addendum 12-20) at *6. Simply put, it is well-settled that, as a matter of law, a written distribution contract (or a vendor contract or a sales representative contract) has not been assumed in an asset purchase deal where neither the transaction documents nor the parties to the deal indicate that such an assumption has been made. *Dominion Sports Servs.*, 2005 WL 3468137 (Addendum 5-11) at *4; *Phase III Mktg.*, 2000 WL 33252113 (Addendum 12-20) at *4-8.

Here, the asset purchase agreement and the parties who made it not only failed to specifically indicate an assumption of the 1972 agreement, they quite specifically (and successfully) communicated to each other and the world that contracts of that kind *were not* assumed by National Beverage in the transaction. Dunn and Twin City continue to ignore these same key facts, chief among them:

- Both parties to the 1999 asset purchase transaction (National Beverage and American Citrus) made as clear as possible that National Beverage was not assuming written distribution contracts. (*See* Opening Br. at 6, 26-27, and record citations.)

- All wholesale customers, including Dunn and Twin City, received the message. They may not have liked it, but they received it. (*See id.*)

- The purported contract documents supporting the judgment in this case were never shown to National Beverage, not by Dunn nor by anyone else. (*See id.* at 7, and record citations.)

While Dunn and Twin City's brief (pp. 21-24) discusses the May 12, 1999 letter (A-324), it does so only in a context that is irrelevant to this appeal on the contract assumption issue. On the contract assumption issue, the letter matters because it is one of several pieces of evidence of the complete lack of any implied assumption of American

Citrus's distribution contract liabilities by National Beverage ("[t]hose agreements are not being assigned to us as part of the acquisition.") Along with the July 29, 1999 letter (A-350-51), the September 27, 1999 letter (A-352), the November 9, 2001 letter from Arthur Dunn (A-365), and much other evidence (*see* Opening Br. 26-27), the May 12, 1999 letter is part of an overwhelming array of proof that neither American Citrus not National Beverage intended to transfer any existing contracts relating to product sales, and that all distributors were well aware of this immediately.

Whether wrongheadedly or very much intentionally, Dunn and Twin City choose not to discuss this powerful evidence of the complete lack of any assumption of the 1972 agreement. Instead, they seem fixated on real and imagined issues of franchise law. But this appeal is not about their Franchise Act claim or franchise law.[3] Nothing in either the common or statutory law of either Minnesota or Florida creates an unintended assumption of a particular contract where the test for successor liability is not satisfied. Discussion of the May 12, 1999 letter in Dunn and Twin City's brief misses the point.[4]

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[3]No damages were awarded to Dunn and Twin City under the Franchise Act (*see* Special Verdict Question No. 10; App. at A-102), and the jury's answer to Question No. 10 was ultimately not challenged by Dunn and Twin City, either by a JNOV motion – *see* Transcript of Proceedings (Nov. 10., 2005) at Tr. 1613, App. at A-135 (withdrawing Dunn and Twin City's JNOV motion) or on this appeal. Accordingly, National Beverage has no reason to appeal the district court's denial of its own motions for summary judgment and then JNOV on the Franchise Act liability questions (*see* Special Verdict Question Nos. 6-9, App. at A-101-02). During every phase of the litigation below, however, including the post-trial phase, National Beverage did repeatedly challenge the Franchise Act claims against it on multiple grounds that are set forth it the record .

[4] Nevertheless, the position that Dunn and Twin City now state clearly in their appellate brief makes it worth noting that, even if Twin City could have brought a cause of action

In Florida, "[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) (citing and quoting William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations,* § 7122.[5]). This rule applies with equal force in Minnesota. *See J.F. Anderson Lumber Co. v. Myers*, 206 N.W.2d 365, 369 (Minn. 1973) (citing and quoting the Fletcher treatise); Minn. Stat. § 302A.661 ("The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state."); s*ee also Niccum v. Hydra Tool Corp.,* 438 N.W.2d 96, 98 (Minn.

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under the Minnesota Franchise Act at one point in time, it has now effectively conceded that such a cause of action was time barred when brought on October 29, 1999. A "franchise" is a "contract or agreement . . . ." Minn. Stat. § 80C.01, Subd. 4. Dunn and Twin City repeatedly allege that the only "contract or agreement" they had was the 1972 agreement modified by the 1995 letter. National Beverage's alleged position – which Dunn and Twin City describe as "the position . . . that Twin City's franchisee [sic] rights were terminated" (Dunn Br. at 3) – was undisputedly taken in May 1999 and was understood by all wholesale customers, including Dunn, no later than July 1999. (*See* Opening Br. at 6-7, and record citations.) That occurred more than three years before this action was filed on October 29, 2002. *See* Minn. Stat. § 80C.17, subd. 5 (three-year limitations period). In the spring and summer of 1999, National Beverage specifically and explicitly *was* doing exactly what Dunn's brief contends is the "violation of the franchise agreement and the Minnesota Franchise Act" – that is "distributing product in the states covered by Twin City's franchise agreement without assuming the franchise [that is, the 'contract or agreement']." (Dunn Br. at 16).

[5] "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 transferor. This rule has frequently been applied to actions for damages for breach of contract, at least where the claim is not a lien on the property at the time of the sale and transfer, 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."

1989); *Cooper v. Lakewood Eng'g & Mfg. Co.*, 45 F.3d 243, 245-46 (8th Cir. 1995) (interpreting Minnesota law).

The contract claim cannot be sustained as a matter of law because it requires the legally insupportable conclusion that National Beverage became a party "to the 1972 contract by virtue of NBC purchasing the assets of American Citrus Products." (Special Verdict Form Question No. 1, App. at A-100). The 1972 contract was never assumed by National Beverage as a matter of law.

B. The Jury's Answers to Questions No. 1-4 Are Against the Weight of the Evidence and Cannot Stand

The reasons why the jury's answers to Questions Nos. 1-4 cannot stand – even apart from the lack of contract assumption by National Beverage – are fully set forth in National Beverage's opening brief. The arguments raised by Dunn and Twin City in response (Dunn. Br. at 25-30) offer no basis for affirmance – and indeed only demonstrate the deep flaws in Dunn's position.

First, Dunn and Twin City contend that, despite what the contract documents say, *Twin City* (and not Service) truly held the contract rights at the time of National Beverage's purported breach in August 2002. Dunn and Twin City's position on when legal formalities are required in a business transfer of rights, in addition to being unsupported and wrong, is embarrassingly inconsistent,[6] and their misrepresentation of

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[6] *Compare* Dunn Br. at 26-27 (although termination agreement not signed until September 3, 2002 (A-434-35), "there was evidence that Twin City and not Leikam was the holder of the franchise relationship with NBC at the time of NBC's breach [August 2002]," *with* Dunn Br. at 22 ("The letter is dated May 12, 1999. The asset purchase

the testimony of Mike Perez and Mark Leikam is again highly objectionable.[7] Putting that to the side for the moment, however, even more significant is the inescapable reality that, if Twin City held the contract rights in the summer of 2002, it also held the contract obligations. Whether *Twin City or Service* was the party in control of performing of the alleged 1972 contract between June 27 and September 3 of 2002, that party completely abandoned its duties (contractual or otherwise) to attempt to sell Mr. Pure product during over several key summer weeks in 2002 (*see* A-454), thereby and justifying National Beverage's remedial action with DTM in August 2002. (A-398, 399.)

Next, Dunn and Twin City respond to National Beverage's discussion of Paragraph 7 of the 1972 Agreement (the restriction on dealing in competitive juice products that Twin City and Service failed to observe) by helpfully illustrating for the Court the difficulty and legal absurdity of trying to apply in 2002 this unseen 1972 contract relating to a three-tier relationship and made among three parties, one of which– who indeed was the *manufacturer* in the original agreement – went bankrupt. Dunn and Twin City claim with a straight face that the convoluted and compound history over thirty

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documents, however, clearly indicated that NBC did not acquire the Chicago Home Juice assets until May 14, 1999. Thus, at the time it drafted and allegedly sent the May 12, 1999 letter, neither NBC nor its unknown subsidiary possessed the assets . . . .") (citations omitted).

[7] Even a cursory examination of the claimed support for the assertions at page 26 of Dunn's brief – that "Dunn, Leikam, and NBC's Perez all testified that Leikam . . . returned the company to Dunn on June 27, 2002" and that "Perez's notes indisputably establish that NBC had actual knowledge that Dunn and not Leikam held the rights when NBC sold directly to DTM" – will reveal that Dunn and Twin City have, once again, represented the record highly inaccurately. (*See, e.g.*, R-050-51, R-085-86, A-311.)

years *only* serves to liberate *them* from the part of the contract that *they* indisputably violated (Paragraph 7), while the part of the contract under which they make their claim (Paragraph 6) remains intact.

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

As set forth in National Beverage's opening brief, the district court erred by submitting the defamation claim to the jury in the first instance, and it should have granted National Beverage's JNOV motion following trial because the jury's answers to the defamation questions had no reasonable support in fact and were contrary to law.

This is so because: (1) the evidence at trial did not establish that National Beverage was the speaker of the alleged defamatory statement; and (2) the alleged defamatory statement, *i.e.*, that "defendant DTM was the only authorized distributor of Mr. Pure products," was not actionably false at the time it was made. Furthermore, this statement was protected by a qualified privilege, was made based on reasonable grounds, and Dunn and Twin City did not present any evidence of malice. Accordingly, the jury's verdict on the defamation claim cannot stand.

A. The Testimony at Trial Established that DTM, and Not National Beverage, Was the Speaker of the Allegedly Defamatory Statement

A defamation claim may only be brought against a speaker of the alleged statement. Here, the evidence at trial was that Dan McNaughton, a representative of DTM rather than National Beverage, was the speaker of the alleged defamatory statement. (*See* Tr. at 260, App. at A-160 ("He [Dan McNaughton] came in and told me that he would be the distributor for Mr. Pure products."); ("He said that he would be the distributor in the area").) Contrary to Dunn and Twin City's suggestion, this testimony does not support the jury's finding that representatives of National Beverage made the complained-of statements. (Dunn Br. at 32) Mr. Mateer testified solely to statements made by a single individual – Mr. McNaughton. He provided no testimony, and there was no other evidence, of statements made by representatives of National Beverage, as opposed to DTM. (*See* Tr. 260, App. at A-160). In fact, counsel for Dunn and Twin City repeatedly characterized the evidence on the defamation claim as involving statements made by DTM, as opposed to National Beverage, representatives. (Tr. 1206, App. at A-269; Tr. 1575-76, App. at A-297-98.) Because the evidence presented at trial showed that DTM was the speaker, it was error for the jury to find that "defendants" made the alleged defamatory statement and that National Beverage (but not DTM) was liable for defamation. (App. at A-103-04.); *Swanson v. Am. 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.)

B. Because the Alleged Defamatory Statement Was Not False at the Time, It Cannot Form the Basis of an Actionable Claim for Defamation

The only allegedly defamatory statement was the one set out on the Special Verdict Form: the statement that, as of October 2, 2002, "DTM was the only authorized distributor of Mr. Pure products." (Special Verdict Form at 15, App. at A-103).[8] Dunn and Twin City themselves acknowledge that "the parties disputed who the authorized distributor of Mr. Pure products was in the summer of 2002." (Dunn Br. at 33; Tr. 674, App. at A-192 (recognizing that National Beverage authorized DTM to be a distributor); *see also* Tr. 1571, App. at A-296 (Twin City's right to distribute terminated when DTM became a distributor).) The evidence was clear, and no party disputes, that the allegedly defamatory statement was true at the time it was made, in that DTM *was* the only distributor that *National Beverage* authorized to distribute Mr. Pure as of October 2002.

Because this statement was true at the time it was made, it cannot form the basis of a claim for defamation. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980) ("Truth . . . is a complete defense [to defamation], and true statements, however disparaging, are not actionable.") Accordingly, the evidence does not support the jury's finding of falsity and should be reversed.

C. Even if National Beverage Made the Defamatory Statement, It Was Protected by the Qualified Privilege

Minnesota courts have long recognized that "statements that are legitimately expressed in a business, employment, or professional context, may be insulated from suit by virtue of a qualified privilege." *Kovatovich v. K-Mart Corp.*, 88 F. Supp.2d 975, 991 (D. Minn. 1999). Here, assuming *arguendo* that National Beverage made the complained-of statement and that it was false, this statement was protected by a qualified

[8] Indeed, the jury expressly found that National Beverage did *not* disparage Dunn and Twin City' services by making false or misleading statements. (Special Verdict Form at No. 24, App. at A-105.)

privilege because it was made upon a proper occasion, from a proper motive and based upon reasonable cause. *Stuempges*, 297 N.W.2d at 256-58. A statement regarding the status of the business relationship between National Beverage and other entities, like statements relating to the termination of an employment relationship, enjoys a qualified privilege. In order to defeat this conditional privilege, Dunn and Twin City had the burden to show that the defendant did not have "reasonable and proper grounds" for making the allegedly defamatory statement *and* acted with actual malice. *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 890 (Minn. 1986). Dunn and Twin City failed to meet this burden.

i. National Beverage Had Reasonable Grounds for Making the Statement.

Dunn and Twin City argue that National Beverage did not have reasonable grounds for such a statement in October 2002 and, in so doing, they implicitly change the meaning of the alleged statement about which they complain – from a statement that was fact-based and clearly not false when made (effectively, "DTM is the only distributor authorized *by National Beverage*") to a statement that was *law*-based, and involved a still-disputed legal question (effectively, "DTM is the only distributor authorized *by law*"). They then take National Beverage to task for failing to investigate "whether there was a franchise agreement between Twin City and American Citrus Products" and to "investigate Twin City's rights" as a franchisee under the Minnesota Franchise Act. (Dunn Br. at 37.)

Of course the actual alleged statement itself, per the Special Verdict Form, was merely "DTM was the only authorized distributor of Mr. Pure products," and the contention that the statement had this inferential law-based meaning (as a statement of the legal landscape) is highly suspect and not borne out by the testimony. Nevertheless, even treating the alleged statement as relating to the impact of law, National Beverage had reasonable grounds for making the statement. Dunn and Twin City do not, and cannot, cite a single case concluding that a party has committed defamation by making a statement (either in court or out of it) as to its good faith belief as to *what the law is*. *See Global Discount Travel Svcs., LLC, v. TWA, Inc.*, 960 F. Supp. 701, 706-07 (S.D.N.Y. 1997) ((dismissing under Rule 12(b)(6) the claim that TWA commercially disparaged plaintiff by alleging plaintiff "does not have the right under the Ticket Agreement to sell System Tickets" because "until the legal question . . . is resolved, TWA's statements are incapable of being proved false.") Even if this Court indulges in the unsupported supposition that the October 2, 2002 statement involved what was authorized by law (as opposed to authorized by National Beverage), the law of defamation "should not be used to transform a contractual dispute into a [disparagement case], particularly where a party expresses and opinion about a contractual right." *Id.* at 707.

Dunn and Twin City do not and cannot support their outlandish claim that, before opining on the law, National Beverage would have been required to first conduct an independent obligation to investigate "whether there was a franchise agreement between Twin City and American Citrus Products" and to "investigate Twin City's rights" as a franchisee under the Minnesota Franchise Act. The law does not impose such a burden upon National Beverage.

In sum, if the statement is given its natural, fact-based interpretation ("DTM is the only distributor [authorized by National Beverage]"), then it obviously had a reasonable basis in that it was true – National Beverage was authorizing no one else in October 2002. And if the statement is given a strained, law-based interpretation ("DTM is the only distributor [authorized by law]"), then it also may well be true, but at a minimum National Beverage would enjoy a qualified privilege, and would deserve the protection of that privilege on the first prong (the "reasonable grounds" prong) alone – without the necessity of an "actual malice" inquiry. And if the "actual malice" inquiry were necessary, it would be short and decisive on this record.

ii. Dunn and Twin City Provided No Evidence of Actual Malice to Defeat the Qualified Privilege

When a statement is protected by a qualified privilege, it cannot form the basis of a defamation claim absent evidence of actual malice. *Stuempges*, 297 N.W.2d at 256. Accordingly, to defeat a claim of qualified privilege, Dunn and Twin City "must prove that [National Beverage] 'made the statement from ill will and improper motives, or carelessly and wantonly for the purpose of injuring [them].'" *Id.* (quoting *McKenzie v. William J. Burns Int'l Detective Agency, Inc.*, 183 N.W. 516, 517 (Minn. 1921)). Dunn and Twin City failed to meet their burden and provided no evidence at trial that National Beverage made the allegedly defamatory statement for any improper motive. *Lewis*, 389 N.W.2d at 890 (Minn. 1986) ("The burden is on the plaintiff to show that the privilege has been abused."). The record is devoid of any such evidence. Indeed, Dunn and Twin City do not even address the issue of actual malice in their brief. Because the allegedly defamatory statements are covered by a qualified privilege, malice cannot simply be implied because the statements were ultimately found to be false. *Buchanan v. Minn. State Dep't. of Health*, 573 N.W.2d 733, 738 (Minn. Ct. App. 1998) (quoting *Bol v. Cole*, 561 N.W.2d 143, 150 (Minn. 1997)). Accordingly, Dunn and Twin City have failed to rebut National Beverage's defense of qualified privilege. The jury's verdict on the defamation claim should be overturned as a matter of law, and as against the substantial weight of the evidence.[9]

D. The Allegedly Defamatory Statement did Not Harm Twin City's Reputation

Dunn and Twin City claim that the allegedly defamatory statement harmed their reputation because it affected their business. (Dunn Br. at 36.) Yet, Dunn and Twin City themselves forcefully argued that National Beverage had terminated any agreement that they had to distribute Mr. Pure at the time Dan McNaughton made the alleged statements. (Tr. 1571, App. at A-296.) Accordingly, under its own theory of the case, the allegedly defamatory statements could not hurt Twin City's business through lost sales. At the time of the statement, Dunn and Twin City had no right or expectation of such sales.

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[9] "[W]here the totality of the evidence [does] not support a finding of malice, the matter should not [be] submitted to the jury." *Harvet v. Unity Med. Ctr., Inc.*, N.W.2d 574, 579 (Minn. Ct. App. 1988) (citing *Frankson v. Design Space Int'l*, 394 N.W.2d 140 (Minn. 1986)).

The jury verdict on the defamation claim cannot stand and the judgment entered on that verdict must be reversed.

[RESPONDENT'S BRIEF IN A06-397]

III. THE DISTRICT COURT DID NOT ERR BY DENYING THE MOTION FOR ATTORNEY'S FEES

Dunn and Twin City are not entitled to recover costs or attorney's fees under the Minnesota Franchise Act in this case, where they sought no relief other than damages under the Franchise Act and the jury specifically and unequivocally awarded them $0 in damages on that Franchise Act claim. (Special Verdict Form Question No. 10, App. at A-102.)

Dunn and Twin City effectively concede that they are not a "prevailing party" under the Act but contend that they need not be one in order to qualify for an award of attorney's fees under Minn. Stat. § 80C.17, subd. 3. Such an argument is contrary to the plain language of that statutory subdivision, which provides for a discretionary grant of attorney's fees to successful parties, to be awarded "*together with*" the "*damages sustained by plaintiff*" as a result of the violation of the Act. Minn. Stat. § 80C.17, subd. 3 (emphasis added).

A. The Trial Court's Refusal to Award Attorney's Fees is Reviewed for an Abuse of Discretion

Because the Minnesota Franchise Act provides for a permissive award of attorney's fees, the district court's refusal to award attorney's fees to Dunn and Twin City is reviewed for abuse of discretion. Indeed, this Court has held, in interpreting similar statutory provisions, that such denials of attorney's fees are subject to this deferential standard of review. *Pathmanathan v. St. Cloud State Univ.*, 461 N.W.2d 726, 728 (Minn. Ct. App. 1990) ("Generally, the trial court's discretionary award or denial of attorney's fees will not be reversed absent an abuse of that discretion.") (citing *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d at 655, 661 (Minn. 1987)). Dunn and Twin City have failed to meet this heavy burden.

B. The District Court Did Not Abuse Its Discretion in Declining to Award Attorney's Fees to Parties That Obtained No Relief Under the Minnesota Franchise Act

The district court did not err in refusing to grant attorney's fees to Dunn and Twin City, who did not receive *any* relief under the Franchise Act. Accordingly, the Order denying attorney's fees was well within the district court's discretion, and it should stand, and the appeal in A06-397 be denied, no matter what the outcome in A06-396.

Dunn and Twin City have cited no Minnesota case, and National Beverage has found none, decided at any point in the history of the Minnesota Franchise Act in which a plaintiff to whom a court or jury had specifically declined to award *any* relief under the Franchise Act has ever been awarded attorney's fees under Minn. Stat. § 80C.17. The district court decided that this should not be the first such case. The district court was not only well within its discretion in so deciding; indeed, it made the only legally supportable decision available to it, as nothing in the Franchise Act or the case law supports such a radical departure from case precedent and common sense. In fact the cases establish a directly contrary precedent.

In *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734 (Minn. Ct. App. 1985), this Court considered an appeal involving a strikingly similar special verdict form to the one returned by the jury here on September 26, 2005:

> In Part III, A of the special verdict, the jury found CKI and JLC committed fraud and violated the Minnesota Franchise Act. They awarded $173,860.00 for the fraud claim and $.00 for the Franchise Act claim.

374 N.W.2d at 740.

In *Noble*, the parties asserting the Franchise Act claim (Huber and Mann), like Dunn and Twin City sought damages against CKI for a violation of the Franchise Act, and brought additional claims as well – in that case, a claim for fraud. The Court in *Noble* ratified the jury's conclusion that CKI violated Section 80C.13 of the Franchise Act. Nevertheless, the Court (like the district court) *did not* award Huber and Mann any attorney's fees under Minn. Stat. § 80C.17, even though the Court agreed that "[t]he jury could reasonably have concluded that CKI and CPI violated the Franchise Act." 374 N.W.2d at 740. The Court, noting elsewhere in the opinion that the jury "accepted some claims [of damage] and rejected others," refused to award any attorney's fees to the Franchise Act to plaintiffs that, like Dunn and Twin City, obtained no relief on their Franchise Act claims. *Id.* at 742.[10]

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[10] The Court of Appeals in *Noble* rejected as time-barred a separate cross-claim by Huber and Mann for attorney's fees under the Franchise Act. *Id.* at 742. It is unclear from the reported decision whether Huber and Mann explicitly sought attorney's fees as a consequence of the jury award. What is clear, and important, is that neither the trial court nor the Court of Appeals awarded any attorney's fees despite the damages award on fraud.

Similarly, in *Steve Parker Supply, Inc. v. Ecolab, Inc.*, No. CX-98-168, 1998 WL 612905 (Minn. Ct. App. Sept. 15, 1998) (Reply Add. at 10-12), plaintiffs sought damages on claims of breach of contract and violation of the Minnesota Franchise Act. Just like Dunn and Twin City, they recovered some damages on the contract claim, and no damages on the Franchise Act claim. Neither the district court nor the Court of Appeals awarded any attorney's fees under the Franchise Act.

Noble and *Steve Parker Supply*, therefore, provide the only precedent that our research has revealed in which plaintiffs recovered some damages elsewhere on the jury's special verdict form while being awarded no relief on their Franchise Act claim. In each case, no attorney's fees were recovered.

The cases cited by Dunn and Twin City do not establish any precedent for reversing the district court and awarding attorney's fees in this situation. The *Wadena Implement* case does not support this position. *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383 (Minn. Ct. App. 1992). The notable point in *Wadena Implement* is that the plaintiff obtained, under the statute, the relief that it came before the Court to obtain: in that case, summary judgment on its bid for a permanent injunction. Accordingly, it was entitled to attorney's fees. 480 N.W.2d at 386.[11] The rule that

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[11] *Wadena Implement* says nothing inconsistent with the common sense rule that National Beverage ask be followed in this case: attorney's fees can never be the sole remedy obtained under the Act: "The statutory language clearly gives respondents a right to *seek* fees *as part of* their remedy for Deere's violation of the MAEDA." 480 N.W.2d at 389 (emphasis added), citing *Lindevig v. Dairy Equipment Co.*, 442 N.W.2d 504, 508 (Wis. Ct. App.1989) (concluding, in case under the Wisconsin Fair Dealership Law, that claimed attorney's fees must be disallowed because a plaintiff must succeed on a WFDL

emerges is a simple, common-sense one: a plaintiff should not and does not recover attorney's fees under the Franchise Act if it fails to get any relief awarded to it under the Act. *Cf. Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc.*, 603 N.W.2d 336, 340 (Minn. Ct. App. 1999) (refusing to award attorney's fees for claim under the Deceptive Trade Practices Act when plaintiff did not receive any relief under the Act and noting that the court should not "provide a statutory exception for the award of attorney fees in negligence and breach of contract actions without an explicit legislative mandate"). No case cited by either side is even remotely inconsistent with that principle, including *Martin Investors, Inc. v. Vander Bie*, 269 N.W.2d 868, 875 (Minn. 1978), which merely failed to disturb the trial court's determination that a Franchise Act plaintiff that had sought relief (in that case rescission and restitution) under the Franchise Act, and obtained that relief specifically under the Franchise Act, could be awarded fees.

Indeed, the Sixth Circuit Court of Appeals, on facts nearly identical to those in this case, upheld a district court's refusal to award attorneys' fees. *See Little Caesars Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547 (6th Cir. 2000). In *Little Caesars*, a former franchisee brought a variety of claims against the franchisor, including a claim under the South Dakota Franchise Act. *Id.* at 552-54. The appellate court upheld the district court's finding that the franchisor had violated the South Dakota Franchise Act, but nonetheless upheld the district court's discretion to deny attorney's fees under the Act.

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claim for damages before it can recover attorney's fees expended in pursuit of WFDL damages). Furthermore, the Court did not hold that claimants had a *right* to the fees sought; merely that it had a right to seek them. Accordingly, like the Minnesota Franchise Act, any award of fees was permissive, rather than mandatory.

While the appeals court did not disturb the lower court finding that a statutory violation had occurred, it noted that the statutory language governing the award of fees, which provided that parties who violated the Act "'shall be liable to the franchisee . . . who may sue for damages caused thereby, for rescission, or other relief as the court may deem appropriate,'" was discretionary. *Id.* at 554 (quoting S.D. Codified Laws § 37-5A-83); *cf.* Minn. Stat.§ 80C.17 subd. 1. The Court recognized that "it is mandatory that a person who violates the statute be found liable." *Little Caesars*, 219 F.3d at 554. In contrast, the provision governing the award of fees, which provided that "'any suit [authorized under the Act] *may be* brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees . . .'" was discretionary. *Id.* (quoting S. D. Codified Laws § 37-5A-85) (emphasis original); *cf.* Minn. Stat. 80C.17 subd. 3 (same). Because the district court had not abused its discretion in refusing to award attorney's fees, the appellate court upheld the denial of any fee award. *Id.* Indeed, the appellate court upheld this denial notwithstanding the fact that the district court actually awarded some relief to plaintiffs, namely, a rescission of the franchise agreements. *Id.*

The reasoning of *Little Caesars* – upholding a trial court's refusal to award attorney's fees notwithstanding a finding of liability under state franchise law – more than amply supports the conclusion that the district court here did not abuse its discretion in denying attorney's fees in this case. Here, despite finding (incorrectly, in National

Beverage's view)[12] that the Franchise Act applied and had been violated, the jury nonetheless refused to award *any* relief to Dunn and Twin City on this claim. (*Id.*) Because Dunn and Twin City failed to obtaining relief on their claims under the Franchise Act, the district court, exercising its discretion under the Act, properly refused to award them. Dunn and Twin City have failed to meet the heavy burden of showing that the trial court abused its discretion when it denied their motion for attorneys fees.

Contrary to Dunn and Twin City's assertions, interpretations of other remedial statutory provisions support the district court's refusal to award attorney's fees.[13] Indeed, this Court has repeatedly upheld a lower court refusals to award attorney's fees under permissive fee statutes similar to that found in the Minnesota Franchise Act.

For example, in *Bachovchin v. Stingley*, 504 N.W.2d 288, 291 (Minn. Ct. App. 1993), this Court held that "[a] person who sustains no actual damages is not entitled to an award of costs and disbursements, including attorney's fees, under Minn. Stat. § 325E.16, subd. 3" a statute with similar language to that of Minn. Stat § 80C.17.[14] The

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[12] *See* footnotes 3 and 4, *supra.*

[13] *See Four Corners Serv. Station, Inc. v. Mobil Oil Corp.*, 51 F.3d 306, 315 (1st Cir. 1995) (holding court did not abuse its discretion under the Petroleum Marketing Practices Act by refusing to award attorneys fees where plaintiff did not recover any damages or receive any injunctive relief); *Coey v. Dave Gill Pontiac-GMC, Inc.*, 2005 Ohio 464, at *17-*18 (Ohio Ct. App. Feb. 8, 2005) (holding that trial court abused its discretion in awarding attorney's fees under the Magnuson-Moss Warranty Act because without an award of damages, the judgment in plaintiff's favor was did "not create a material alteration of the legal relationship between the parties so as to justify an award of attorneys' fees").

[14] *Compare* Minn. Stat. § 325E.16, subd. 3("[a]ny person injured by a violation of sections 325E.13 to 325E.16 shall recover the actual damages sustained together with costs and disbursements, including a reasonable attorney's fee . . . .") *with* Minn. Stat. §

Bachovchin Court recognized that this language linked an award of damages and an award of costs, disbursements, and attorney's fees. 504 N.W.2d at 290 ("[T]he phrase 'together with' suggests that an award of damages is a prerequisite for any award of costs, disbursements, or attorney's fees."). The reasoning of *Bachovchin* supports the trial court's denial of attorney's fees in this case. Dunn and Twin City have provided no support for their contention that the trial court abused its discretion in refusing to award fees in this case. Dunn and Twin City did not recover actual damages. Nor did they receive *any* relief under the Act. Accordingly, they are not entitled to attorney's fees under the Act. [15]

Very recently, this Court further underscored the permissive nature of attorney's fees provisions such as the one in the Franchise Act. In *County of Blue Earth v. Wingen*, No. A-5-1699, 2006 WL 1738182 (Reply Add. at 13-15), the Court rejected a claimed right to attorney's fees under Minn. Stat. § 117.195, subd. 2, which provides in relevant part that an owner of property that is subject to an eminent domain proceeding that is

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80C.17, subd. 3 ("Any suit authorized under this section may be brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees.").

[15] Dunn and Twin City invite the Court effectively to transpose the jury's answers to Special Verdict Form Question No. 4 (awarding breach of contract damages) and No. 10 (denying Franchise Act damages) (Br. at 47.) But Dunn and Twin City withdrew their JNOV motion challenging the jury's answer to Question No. 10 (see Transcript of Proceedings (Nov. 10, 2005) at Tr. 1613, App. at A-135. An actual or effective alteration of the jury's answer to Question No. 10 is not properly before this Court and is unwarranted in any event. It is not inconsistent for a jury to determine that, although there may have been a violation (technical or otherwise) of the Act, the violation resulted in $0 any damages to the plaintiff. Not every statutory violation necessarily results in damages. The jury here found no damages under the Franchise Act. That finding is not properly challenged in this appeal and is entitled to remain in place in any event.

ultimately dismissed by a petitioner "may recover . . . reasonable costs and expenses including attorney's fees." After the County of Blue Earth moved to dismiss its petition to take the appellant-landowners' land by eminent domain, the landowners moved for the costs and attorney fees they incurred in the eminent-domain proceeding. *Wingen*, 2006 WL 1738182, at *1. This Court, applying an abuse-of-discretion standard, upheld the trial court's denial of this motion. *Id.* The Court noted that the statute provides merely that an owner "may recover" fees or costs, "not that the owner 'must' or 'shall' recover" such fees or costs. *Id.* Accordingly, appellants were not automatically entitled to the award of attorney's fees. *Id.*

This same reasoning supports the district court's denial of Dunn and Twin City' motion for attorney's fees in this case. Nowhere does the Minnesota Franchise Act compel an award of attorney's fees upon a finding of liability. *See* Minn. Stat. § 80C.17 (providing merely that a franchise *may* bring suit to recover actual damages and attorney's fees and costs). If the legislature had wanted to provide for the mandatory award of attorney's fees upon a finding of liability under the Franchise Act, it could have expressly done so. *Compare* Minn. Stat. § 80C.17 *with* Minn. Stat. § 325F.6643(b); *cf. Holiday Recreational Indus., Inc. v. Manheim Servs. Corp.*, 599 N.W. 2d 179, 184 (Minn. Ct. App. 1999) ("Section 325F.6643(b) *mandates* that an injured party '*shall* recover . . . reasonable attorney fees.' The legislature requires the award of reasonable attorney fees for violations of the title branding law.") (emphasis added). The plain language of the Franchise Act does not compel the award of attorney fees in this case. The Court should uphold the district court's exercise of its discretion.

CONCLUSION

For all of these reasons: (1) in A06-396, the judgment of the district court should be reversed with an order that a judgment of dismissal of all claims with prejudice and on the merits be entered in the district court; and (2) the appeal of Dunn and Twin City in A06-397 should be denied, as moot or otherwise.

Respectfully submitted,

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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, subds. 1 and 3, for a brief produced with a proportional font. The total length of this brief is 6,529 words. This is a combined brief, comprising a Appellant's Reply in A06-396 (calculated at 4,298 words) and a Respondent's Brief in A06-397 (calculated at 2,323 words), and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

Dated: August 4, 2006.

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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).