

CASE NO. A05-2287

State of Minnesota
In Court of Appeals

CARGILL, INC.,

Appellant,

vs.

JORGENSEN FARMS, INC.,

Respondent.

RESPONDENT'S BRIEF

FAEGRE & BENSON, L.L.P.
Bruce A. Jones, Esq. (#179553)
Allan A. Thoen, Esq. (#313889)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Phone: 612-766-7000

Attorneys for Appellant

GISLASON & HUNTER, L.L.P.
Dustan J. Cross, Esq. (#248952)
Ryan R. Dreyer, Esq. (#0332252)
2700 South Broadway
Post Office Box 458
New Ulm, Minnesota 56073
Phone: 507-354-3111

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED.....	1
STANDARD OF REVIEW.....	3
STATEMENT OF THE CASE AND FACTS.....	4
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS	5
ARGUMENT	12
I. THE DISTRICT COURT PROPERLY DETERMINED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF THE SUPPOSED CONTRACT.	12
A. The Parties Did Not Have an Oral Agreement.....	13
B. Kurt Peterson’s Affidavit Did Not Create a Genuine Issue of Material Fact.	16
C. The Circumstantial Evidence Does Not Reasonably Support an Inference that the Parties Reached an Oral Agreement.....	19
D. The Court Did Not Abuse Its Discretion by Refusing to Allow Cargill More Time for Discovery Pursuant to Minn. R. Civ. P. 56.06.	23
1. Cargill was not diligent.....	26
2. Cargill seeks a fishing expedition.	28
II. THE DISTRICT COURT CORRECTLY DETERMINED ARBITRATION WAS NOT PROPER.....	29
III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING CARGILL.....	31
CONCLUSION.....	37

TABLE OF AUTHORITIES

Page

MINNESOTA CASES

<i>Albert v. Paper Calmenson & Co.,</i> 515 N.W.2d 59 (Minn. App. 1994).....	16
<i>Anderson v. Federated Mut. Ins. Co.,</i> 481 N.W.2d 48 (Minn. 1992).....	16, 30, 31
<i>Blackwell v. Eckman,</i> 410 N.W.2d 390 (Minn. App. 1987).....	13, 18
<i>Boulevard Del, Inc. v. Stillman,</i> 343 N.W.2d 50 (Minn. App. 1984).....	26
<i>Carlisle v. City of Minneapolis,</i> 437 N.W.2d 712 (Minn. App. 1989).....	16
<i>Cederstrand v. Lutheran Bhd.,</i> 263 Minn. 520, 117 N.W.2d 213 (1962).....	13
<i>Cokley v. City of Otsego,</i> 623 N.W.2d 625 (Minn. App. 2001).....	19
<i>Cole v. Star Tribune,</i> 581 N.W.2d 364 (Minn. App. 1998).....	3
<i>DLH, Inc. v. Russ,</i> 566 N.W.2d 60 (Minn. 1997).....	17, 19
<i>Erickson v. General United Life Insurance Co.,</i> 256 N.W.2d 255 (Minn. 1977).....	17
<i>Fahrendorff v. North Homes, Inc.,</i> 597 N.W.2d 905 (Minn. 1999).....	17
<i>Feges v. Perkins Restaurants, Inc.,</i> 483 N.W.2d 701 (Minn. 1992).....	14
<i>Forsblad v. Jepson,</i> 292 Minn. 458, 195 N.W.2d 429 (1972).....	23

<i>Gresser v. Hotzler</i> , 604 N.W.2d 379 (Minn. App. 2000).....	12
<i>Gutwein v. Edwards</i> , 419 N.W.2d 809 (Minn. App. 1988).....	13, 18
<i>Heideman v. Northwestern Nat'l Life Ins. Co.</i> , 546 N.W.2d 760 (Minn. App. 1996).....	13
<i>Hermeling v. Minnesota Fire & Casualty Co.</i> , 548 N.W.2d 270 (Minn. 1996).....	3
<i>Herron v. Green Tree Acceptance, Inc.</i> , 411 N.W.2d 192 (Minn. App. 1987).....	14
<i>Johnson v. Lorraine Park Apts. Inc.</i> , 268 Minn. 273, 128 N.W.2d 758 (1964).....	19
<i>Johnson v. Piper Jaffray, Inc.</i> , 530 N.W.2d 790 (Minn. 1995).....	3
<i>Kellar v. Von Holtum</i> , 605 N.W.2d 696 (Minn. 2000).....	32, 34
<i>Lubbers v. Anderson</i> , 539 N.W.2d 398 (Minn. 1995).....	16
<i>Meaney v. Newell</i> , 367 N.W.2d 472 (Minn. 1985).....	27
<i>Murphy v. Country House, Inc.</i> , 307 Minn. 344, 240 N.W.2d 507 (1976).....	13, 18
<i>Nicollet Restoration, Inc. v. City of St. Paul</i> , 533 N.W.2d 845 (Minn. 1995).....	17
<i>Onvoy, Inc. v. SHAL, LLC</i> , 669 N.W.2d 344 (Minn. 2003).....	29
<i>Peterson v. Hinz</i> , 605 N.W.2d 414 (Minn. App. 2000).....	13, 33

<i>Radloff v. First American Nat. Bank of St. Cloud, N.A.</i> , 470 N.W.2d 154 (Minn. App. 1991).....	34, 35
<i>Rice v. Perl</i> , 320 N.W.2d 407 (Minn. 1982).....	25, 26
<i>State Bank of Young America v. Fabel</i> , 530 N.W.2d 858 (Minn. App. 1995).....	33
<i>State v. Cross Country Bank, Inc.</i> , 703 N.W.2d 562 (Minn. App. 2005)	3
<i>State v. Meany</i> , 262 Minn. 491, 115 N.W.2d 247 (1962).....	19
<i>Urbaniak Implement Co. v. Monsrud</i> , 336 N.W.2d 286 (Minn. 1983).....	13, 17
<i>Uselman v. Uselman</i> , 464 N.W.2d 130 (Minn. 1990).....	32, 33, 34
<i>Vosbeck v. Lerdall</i> , 245 Minn. 164, 72 N.W.2d 371 (1955).....	25, 26
<i>W.J.L. v. Bugge</i> , 573 N.W.2d 677 (Minn. 1998).....	16
OTHER CASES	
<i>Delozier v. First Nat'l Bank of Gatlinburg</i> 109 F.R.D. 161 (E.D. Tenn. 1986).....	35, 36
<i>Litton Microwave Cooking Products v. Leviton Mfg. Co.</i> 15 F.3d 790 (8 th Cir. 1994).....	14
<i>Long v. Quantex Resources, Inc.</i> 108 F.R.D. 416 (S.D. N.Y. 1985)	35, 36
<i>Steinberg v. St. Regis/Sheraton Hotel</i> 583 F. Supp. 421 (S.D. N.Y. 1984).....	35
<i>Wymer v. Lessin</i> 109 F.R.D. 114 (D.D.C. 1985).....	35, 36

STATUTES

Minn. Stat. § 336.1-201(3)..... 14

Minn. Stat. § 336.2-201..... 23

Minn. Stat. § 336.2-204..... 14

Minn. Stat. § 480A.08 34

Minn. Stat. § 549.211 31, 32, 35

Minn. Stat. § 572.08 30

Minn. Stat. § 572.09 27

OTHER AUTHORITIES

U.C.C. § 336.1-201 14

Standards and Guidelines for Practice Under Rule 11 of the
Federal Rules of Civil Procedure, 121 F.R.D. 101 (1988) 35

RULES

Minn. Gen. R. Prac. 119.02..... 31

Minn. R. Civ. P. 11 31 - 35

Minn. R. Civ. P. 56.06 24, 25

STATEMENT OF ISSUES PRESENTED

- I. DID THE DISTRICT COURT ERR BY DETERMINING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF A PURPORTED CONTRACT BETWEEN PLAINTIFF AND DEFENDANT?

Holding Below: The district court held that there was no genuine issue of material fact as to the existence of an enforceable agreement between the parties and awarded summary judgment in Jorgenson Farms' favor.

Most Apposite Cases:

Gresser v. Hotzler, 604 N.W.2d 379 (Minn. App. 2000);
Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701 (Minn. 1992);
Albert v. Paper Calmenson & Co., 515 N.W.2d 59 (Minn. App. 1994);
DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997).

Most Apposite Statutes:

Minn. Stat. § 336.2-201 (2003);
Minn. Stat. § 336.2-204 (2003).

- II. DID THE DISTRICT COURT ERR IN NOT ORDERING ARBITRATION?

Holding Below: Because the district court determined there was no contract between the parties, it did not explicitly reach the issue of whether the purported "arbitration clause" in Cargill's unsigned contract proposal could be enforced as to Jorgenson Farms.

Most Apposite Cases:

Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344 (Minn. 2003);
Anderson v. Federated Mut. Ins. Co., 481 N.W.2d 48 (Minn. 1992).

Most Apposite Statutes:

Minn. Stat. § 572.08 (2003).

III. DID THE DISTRICT COURT ABUSE ITS DISCRETION BY SANCTIONING CARGILL PURSUANT TO MINN. STAT. § 549.211?

Holding Below: The district court held that Cargill's lawsuit and pleadings violated the objective standard of reasonableness required by Minn. Stat. § 549.211 (2005).

Most Apposite Cases:

Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990);
Peterson v. Hinz, 605 N.W.2d 414 (Minn. App. 2000);
Kellar v. Von Holtum, 605 N.W.2d 696 (Minn. 2000);
Radloff v. First American Nat. Bank of St. Cloud, N.A., 470 N.W.2d 154 (Minn. App. 1991).

Most Apposite Statutes:

Minn. Stat. § 549.211 (2005).

Most Apposite Rule of Civil Procedure:

Minn. R. Civ. P. 11 (2005).

STANDARD OF REVIEW

On appeal from the grant of summary judgment, this Court reviews the record to determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Hermeling v. Minnesota Fire & Casualty Co.*, 548 N.W.2d 270, 273 (Minn. 1996). The Court of Appeals “reviews *de novo* the denial of a motion to compel arbitration.” *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 568 (Minn. App. 2005) (citing *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995)). The Court of Appeals applies an abuse of discretion standard to a district court’s decision on sanctions under Minn. Stat. § 549.211 or Minn. R. Civ. P. 11. *Cole v. Star Tribune*, 581 N.W.2d 364, 370 (Minn. App. 1998).

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is an appeal from a summary judgment and judgment for sanctions entered by the Cottonwood County District Court (Honorable Bruce Gross) on September 23, 2005. Appellant Cargill, Inc. ("Cargill") commenced this action on January 31, 2005, by serving defendant Jorgenson Farms ("Jorgenson") with a Summons and Complaint seeking to compel arbitration or, in the alternative, for an award of compensatory damages for Jorgenson's alleged breach of a July 17, 2003, verbal contract to sell Cargill 80,000 bushels of corn. On March 4, 2005, Jorgenson served its Answer denying the existence of the contract among other things. On July 1, 2005, Cargill filed its Summons and Complaint with the District Court and on July 5, 2005, served and filed a Notice of Motion to Compel Arbitration. On July 7, 2005, Jorgenson served (but did not file) a Notice of Motion and Motion for Sanctions Pursuant to Minn. Stat. § 549.211 and Minn. R. Civ. P. 11. On July 12, 2005, Jorgenson served and filed a Notice of Motion and Motion for Summary Judgment. Jorgenson subsequently filed its Notice of Motion and Motion for Sanctions with the District Court following expiration of the 21-day safe harbor provision required by both Minn. Stat. § 549.211 and Minn. R. Civ. P. 11. The District Court heard all pending motions on August 26, 2005, and on September 23, 2005, the District Court entered an order (1) denying Cargill's motion to compel arbitration; (2) granting Jorgenson's motion for summary judgment dismissing the Complaint with prejudice; and (3) granting Jorgenson's motion for sanctions pursuant to Minn. Stat. § 549.211 and ordering entry of judgment in Jorgenson's favor and against Cargill in the amount of \$5,000.00. Judgment

consistent with the Court's Order was entered on September 23, 2005, by the Cottonwood County Court Administrator. On November 18, 2005, Cargill served and filed a Notice of Appeal from this judgment of the District Court.

STATEMENT OF FACTS

Jorgenson Farms is a Minnesota family farm corporation which is in the business of raising grain crops (specifically corn and soybeans). AA-46, para. 1. Jorgenson had marketed grain to Cargill, Inc. from time to time over the years. AA-27, para. 2. Ben Presthus ("Presthus") was an employee of Cargill during the summer of 2003. AA-27, para. 1. While Presthus was at Cargill, he was the exclusive contact with Jorgenson and that prior to his departure from Cargill, all contract negotiations between Cargill and Jorgenson were performed through him. *Id.*, para. 2. Presthus established a consistent approach to negotiating contracts with his farmer contacts, including Jorgenson, by keeping daily notes of each contract entered into between Cargill and his contacts and personally contacting Cargill's accounting department to enter all contracts into the client record system. AA-27 to AA-28, paras. 2-3. During Presthus' tenure at Cargill, Jorgenson honored all properly formed contracts between Jorgenson and Cargill and any time there was a dispute, Jorgenson faithfully negotiated and honored their agreements. AA-28, para. 4.

July 17, 2003 Meeting.

On July 17, 2003, James Jorgenson ("Mr. Jorgenson")¹ representing Jorgenson, met with Presthus at Jorgenson's property and negotiated the pricing of four contracts between

¹ In order to distinguish James Jorgenson, the individual, from Jorgenson Farms, the family farm corporation, the former will be referred to as "Mr. Jorgenson" throughout

Jorgenson and Cargill. *Id.*, para. 6 and Exhibit A (AA-31). Presthus and Jorgenson priced two existing 10,000-bushel contracts of corn, and formed a new 100,000-bushel and another 135,000-bushel contract for corn. *Id.* The only participants at this meeting, Ben Presthus for Cargill and Jim Jorgenson for Jorgenson Farms, both unequivocally state that at no time did Jorgenson enter or intend to enter into contract MILO-AH-27985 (“Contract #27985”) on or about July 17, 2003, either verbally, in writing or otherwise. AA-28, para. 7 (Presthus); AA-46, para. 3 (Jorgenson).

After the meeting on July 17, 2003, Presthus called Cargill’s accounting department and entered contracts for 100,000 bushels of corn and 135,000 bushels of corn. AA-28, para. 7. Although Presthus’ daily journal for July 17, 2003, lists entries for the two 10,000-bushel contracts priced that day and the 100,000-bushel and 135,000-bushel corn contracts created that day, there is no notation whatsoever relative to Contract #27985 that forms the basis of Cargill’s Complaint. AA-28, para. 7 and Exhibit A (AA-31).

Nonetheless, in addition to the contracts that were agreed to on that date, apparently a proposed “purchase contract” for the sale of 80,000 bushels of U.S. No. 2 yellow corn by Jorgenson was also generated within Cargill on or about July 17, 2003.² AA-17 to AA-19. This Contract #27985 was signed by a Cory Bratland for Cargill, but it is undisputed the

this Brief.

² Cargill made no attempt to place into the record the other two written contracts for 100,000 bushels and 135,000 bushels entered into that day which Jorgenson fully performed on without dispute, most likely because those two fully signed contracts would contradict Cargill’s suggestion (1) that this Contract #27985 was sent in the usual course of business to Jorgenson (in which case it would have been signed and returned by Jorgenson at the time of the other two if it had in fact been agreed to); and (2) that there was a course of dealing between the parties by which Jorgenson would perform without a written agreement between it and Cargill.

document was never signed by anyone on behalf of Jorgenson. AA-19. The only evidence Cargill offers that the document was sent to Jorgenson was from Kurt Peterson, who simply states without explanation (or foundation) that this writing was “sent to Jorgenson Farms on or about July 17, 2003.” AA-14, para. 4. There is, however, nothing in the record to contradict Mr. Jorgenson’s testimony that this writing was never received by Jorgenson. AA-47, para. 7.

Put Options.

During the fall of 2003, Presthus contacted Jorgenson about placing “put” options on Jorgenson’s existing corn contracts. AA-47, para. 5. The put option discussions were in general terms between Presthus and Jorgenson regarding all of Jorgenson’s “then current corn contracts;” neither party specifically referred to contract numbers or bushel totals. *Id.* Mr. Jorgenson agreed to the put options on all existing Jorgenson corn contracts and in October of 2003, Jorgenson received a packet of information from Cargill, including approximately ten documents. *Id.* One of the documents received included a put option for Contract #27985. *Id.* October is harvest season for Jorgenson and they do not have a fulltime employee that monitors incoming mail and documents on a daily basis. *Id.* Accordingly, Mr. Jorgenson did not notice the put option document referring to Contract #27985 immediately. *Id.* Upon discovering the put option on Contract #27985, however, Mr. Jorgenson immediately questioned Cargill about this option and the existence of this supposed contract. *Id.*, para. 6.

Meetings Regarding the Contract Dispute.

During December 2003, Presthus and Brad Morrison, who was at the time Presthus' supervisor, met Mr. Jorgenson at Jorgenson's farm to discuss the phantom Contract #27985. There is a dispute in the record regarding whether or not Morrison agreed at this meeting that Contract #27985 never existed and was simply a clerical error. *Compare* AA-28, para. 8 (Presthus: "[I]t was agreed by all present parties that contract MILO-AH27985 was never entered into"), *and* AA-47, para. 6 (Jorgenson Affidavit) (same) *with* AA-61, para. 3 (Morrison: "I did not agree that the contract was never entered into. I recall that I told Ben Presthus and the Jorgensons that I would look into the matter further.") However, it is critical to note that Morrison never controverts the fact that he was told by both Presthus and Mr. Jorgenson that no such contract was ever entered into between Cargill and Jorgenson. Cargill continues to find significance in Mr. Jorgenson's ability to reference Contract #27985 during this December 2003 meeting and thereafter. AA-61, para. 2; Appellant's Brief, page 17. However, Mr. Jorgenson acknowledges receiving the put option contracts during the 2003 harvest including one identifying Contract #27985 by number. AA-47, para. 5. His ability to identify this supposed contract by number, therefore, is hardly surprising.

Another meeting was held between Mr. Jorgenson, Morrison and Presthus sometime during January of 2004. AA-29, para. 9. During this meeting, Presthus again told Morrison that Jorgenson and Cargill never had an oral agreement for 80,000 bushels of corn. *Id.* Again, none of this testimony is controverted by Morrison, who only claims that he "cannot

recall at this time whether I had one or two meetings with Ben Presthus” but does not dispute the position Jorgenson (and Presthus) set forth in those meetings. AA-61, para. 2.

Cargill and Jorgenson conducted a third meeting on or about April 1, 2004, at Jorgenson’s farm, which for the first time involved Kurt Peterson, a Farm Services Group Manager with Cargill. AA-54, para. 3. (Peterson Affidavit); AA-48, para. 8 (Jorgenson Affidavit).³ Importantly, while Peterson claims that during this meeting (1) Jorgenson never told him that Morrison had agreed with the claim that no valid contract existed at an earlier meeting; and (2) that Jorgenson admitted receiving the October, 2003 “put” notice, Peterson does not claim that Jorgenson ever admitted there was a valid contract between the parties or that either Jorgenson’s or Presthus’ statements to him (or anyone else at Cargill) differed materially from what was set forth in their respective affidavits. AA-54 to AA-55 (Peterson Affidavit).

On July 29, 2004, Cargill sent a letter to Jorgenson indicating Cargill cancelled Contract #27985 on April 16, 2004, at \$2.92/bushel. AA-48, para. 9 and AA-50 (Exhibit A). After the market price for corn had climbed to \$2.99/bushel, Cargill sent

³ In his August 17, 2005, affidavit, Kurt Peterson states that Presthus “alleges [in his affidavit] that he was the only person to have contact with Jorgenson Brothers with the exception of meetings on or about October 15, 2004, and January 16, 2005,” and then goes on to question Presthus’ credibility because those dates are at least a year off. AA-54, para. 3; AA55, para. 3 (“I suspect the meetings referred to by Mr. Presthus would have occurred a year earlier than his affidavit indicates.”). Cargill wisely drops any argument predicated on Morrison’s criticism, since a review of Presthus’ affidavit shows that neither of these two dates is ever mentioned by him, and Presthus’ affidavit is in fact entirely consistent with the time frames outlined by all of the other affiants, including Peterson. See AA-27 to AA-31 (Presthus Affidavit).

Jorgenson another cancellation notice with a "pricing date" of May 11, 2004. AA-48, para. 9 and AA-52 (Exhibit B).

On September 23, 2004, Cargill wrote to the National Grain and Feed Association ("NGFA") requesting arbitration of Contract #27985. AA-15, para. 15 and AA-23 (Exhibit B). This letter was not copied to Jorgenson. AA-23 to AA-24. On October 5, 2004, NGFA wrote to Jorgenson via certified mail enclosing Cargill's complaint letter, attachments and the NGFA Trade Rules and Arbitration Rules Booklet. AA-15, para. 16 and AA-25 (Exhibit C). Jorgenson replied to the NGFA by letter dated October 26, 2004, explaining that there was no Contract #27985, and therefore no agreement to arbitrate. AA-16, para. 17 and AA-26 (Exhibit D). Accordingly, Jorgenson would not agree to submit this dispute to arbitration by the NGFA. *Id.*

Notice of Sanctions.

Cargill initiated the current action on or about January 31, 2005, by serving the Summons and Complaint upon Jorgenson. AA-1 to AA-10. Jorgenson submitted the Complaint to its attorneys and during the investigation necessary to prepare an Answer, Jorgenson's attorneys interviewed Mr. Jorgenson and Presthus concerning the allegations in Cargill's Complaint. AA-32, para. 2. Both individuals denied that the parties ever entered into Contract #27985 either verbally or in writing. *Id.* In fact, both denied even discussing such a contract on or about July 17, 2003. *Id.*

On March 4, 2005, Jorgenson's counsel, Dustan Cross, spoke by telephone with Kevin Stroup, Cargill's then-counsel. AA-33, para. 3. During this conference, Cross informed Stroup that from the investigation of facts underlying Cargill's alleged claim, it

did not appear that the allegations and other factual contentions had evidentiary support or were likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. *Id.* That same day, Cross drafted a letter to Cargill's counsel placing Cargill on notice that if it did not voluntarily withdraw its claims in this matter, Jorgenson would apply to the Court for sanctions pursuant to Minn. R. Civ. P. 11 and Minn. Stat. § 549.211. AA-33, para. 3 and AA-39 to AA-41 (March 4, 2005, letter from Dustan Cross to Kevin Stroup).

Cargill took no steps to investigate or obtain discovery concerning the statements outlined in the March 4, 2005, letter, but instead waited four months and then filed its Summons and Complaint with the District Court on July 1, 2005. Notice of Filing. Almost immediately thereafter on July 5, 2005, Cargill also served and filed a Notice of Motion and Motion to Compel Arbitration, Memorandum of Law in Support of Motion to Compel Arbitration and Affidavit of Kurt Peterson in Support of Motion to Compel Arbitration. AA-33, para. 4. As a result of the motion to compel arbitration and Cargill's continued refusal to withdraw the Complaint, Jorgenson served Cargill with (but did not immediately file) a Notice of Motion and Motion for Sanctions pursuant to Minn. Stat. § 549.211 and Minn. R. Civ. P. 11, on July 7, 2005. AA-33, para. 4 and AA-42 to AA-45.

The hearing on all pending motions was not held until August 26, 2005, AA-64, or almost six months after Cargill had notice of its lack of evidentiary support because of the March 4, 2005, letter, and over seven weeks after being served with the formal Notice of Motion and Motion for Sanctions pursuant to Minn. Stat. § 549.211. During this time, Cargill did not attempt to conduct any written discovery nor take the depositions of Mr.

Jorgenson, Presthus or anyone else. Instead, and despite the sworn testimony of Cargill's undisputed sole liaison with Jorgenson during the time in question, Cargill submitted Affidavits of Kurt Peterson and Brad Morrison on or about August 18, 2005, neither of which claim to have any personal knowledge of the alleged oral agreement on or about July 17, 2003. *See* A-54 to A-60 (Peterson Affidavit); A-61 to A-62 (Morrison Affidavit).

On September 23, 2005, the district court (1) denied Cargill's motion to compel arbitration; (2) granted Jorgenson's motion for summary judgment; and (3) granted Jorgenson's motion for sanctions and ordered entry of judgment in Jorgenson's favor and against Cargill in the amount of \$5,000.00. AA-64 to AA-71. On September 23, 2005, judgment was entered. Notice of Entry of Judgment. On November 18, 2005, Cargill served and filed its Notice of Appeal.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE EXISTENCE OF THE SUPPOSED CONTRACT.

The District Court concluded that there was no genuine issue of material fact regarding the alleged existence of the July 17, 2003, contract that was unequivocally denied by the only two participants to the meeting at which the contract was supposedly formed. This determination was not error.

While the issue of whether a contract exists is generally an issue for the fact finder, when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary judgment is appropriate. *Gresser v. Hotzler*, 604 N.W.2d 379, 382 (Minn. App. 2000) (internal quotations and citations omitted).

Further, affidavits in opposition to a motion for summary judgment must “be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Minn. R. Civ. P. 56.05. In opposition to a motion for summary judgment, statements in an affidavit must contain more than unsupported conclusionary facts and unwarranted opinions or legal conclusions. *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983). An affidavit completed by an individual who may not properly testify at trial will have no effect. *Peterson v. American Family Mutual Ins. Co.*, 280 Minn. 482, 487, 160 N.W.2d 541, 545 (1968). Affidavits containing inadmissible hearsay may properly be disregarded. *Gutwein v. Edwards*, 419 N.W.2d 809, 813 (Minn. App. 1988); *Blackwell v. Eckman*, 410 N.W.2d 390, 391 (Minn. App. 1987) (“[i]t is well settled hearsay is inadmissible evidence that must be disregarded on a motion for summary judgment”) (citing *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976)).

A. The Parties Did Not Have an Oral Agreement.

Whether parties have formed a contract is judged by their objective conduct and not their subjective intent. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). Under ordinary contract principles, “acceptance is a manifestation of assent to the offer, as evaluated under an objective standard.” *Heideman v. Northwestern Nat’l Life Ins. Co.*, 546 N.W.2d 760, 763 (Minn. App. 1996) (internal quotations and citations omitted). Unsurprisingly, for a contract to be formed, “the offer must be communicated to the offeree.” *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d

701, 707 (Minn. 1992) (quoting *Herron v. Green Tree Acceptance, Inc.*, 411 N.W.2d 192, 195 (Minn. App. 1987)).

Under Minn. Stat. § 336.2-204, the requisites for the formation of a contract include an offer and acceptance:

A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

As the official commentary to section 2-204 recognizes, “[t]he legal effect of such an agreement is, of course, qualified by other provisions of Article 2.” For purposes of the Uniform Commercial Code, an “agreement” “means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter.” Minn. Stat. § 336.1-201(3). As the official commentary to section 336.1-201 recognizes, an “agreement” under the Uniform Commercial Code is narrower than the definition in Restatement of Contracts “since this definition requires both Assent *and Bargain.*” U.C.C. § 1-201 cmt. (emphasis added).

These fundamental precepts for contract formation require communication of a clear, definite and explicit offer and acceptance and apply equally to contracts governed by Article 2 of the Uniform Commercial Code. *See, e.g., Litton Microwave Cooking Products v. Leviton Mfg. Co.*, 15 F.3d 790 (8th Cir. 1994).

In this case, the undisputed material facts demonstrate without question that Cargill never offered to purchase the 80,000 bushels of Jorgenson corn referred to in Contract #27985 and Jorgenson did not accept any such offer. Presthus and Jorgenson

unequivocally testified that no such contract was ever discussed, much less agreed to, between Cargill and Jorgenson. AA-28, para. 7 (Presthus); AA-46, para. 3 (Jorgenson). It was undisputed that Presthus was the sole liaison between Cargill and Jorgenson at the time that Cargill alleges the parties formed an oral agreement. AA-27, para. 2. The only factual dispute is whether Morrison, Presthus's supervisor, admitted in December, 2003 that Contract #27985 was the result of an internal data entry error. *Compare* AA-28, para. 8 (Presthus), *with* AA-61, para. 3 (Morrison). However, neither Peterson nor Morrison controvert the testimony of Presthus and Mr. Jorgenson that no such putative agreement was ever discussed, much less entered into, on July 17, 2003. Nor could they since neither Peterson nor Morrison was present nor does either individual ever claim that any representative of Jorgenson ever acknowledged the existence and validity of this contract to them personally or anyone else at Cargill.

Cargill's only claim to evidence supporting the existence of an agreement is the unsigned writing itself and the Affidavit of Kurt Peterson, who by his own admission never had any direct contact with Jorgenson until April, 2004, by which time Peterson acknowledges the Jorgensons were clearly disputing the existence of Contract #27985. Peterson simply states in his Affidavit that the parties reached an oral agreement but he failed to identify who made the offer for Cargill, who accepted such an offer for Jorgenson, or any factual basis for his knowledge. *See* AA-14, para. 3. Both Presthus and Mr. Jorgenson are clear that Peterson had no direct dealings with Jorgenson in July of 2003 or at any time before Morrison left Cargill in approximately February of 2004, and neither of Peterson's two Affidavits dispute this. *See* AA-29, para. 10. (Presthus); AA-

48, para. 8 (Jorgenson). Thus, Peterson simply has no basis upon which to make the statements set forth in paragraphs 2 and 3 of his June 30, 2005, Affidavit.

Instead, Cargill has only a pre-printed, unsigned farm contract with the date and bushels entered into it. Upon this basis, Cargill would have this Court find a genuine issue of material fact on the possible existence of this contract. Cargill has not and cannot offer any evidence that this form was ever sent to Jorgenson or that it was ever received by Jorgenson. Moreover, whether the form was ever sent or not is irrelevant, since the only two individuals with personal knowledge about what was discussed and what was agreed to on July 17, 2003, Ben Presthus and James Jorgenson, both state unequivocally that no such contract was ever entered into.

B. Kurt Peterson's Affidavit Did Not Create a Genuine Issue of Material Fact.

“To resist summary judgment, the evidence must be significantly probative, not merely colorable.” *Albert v. Paper Calmenson & Co.*, 515 N.W.2d 59, 64 (Minn. App. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989)). “To forestall summary judgment, the nonmoving party must do more than rely on ‘unverified or conclusionary allegations’ in the pleadings or postulate evidence which might be produced at trial.” *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998) (quoting *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995)). “The nonmoving party must present specific facts which give rise to a genuine issue of material fact for trial.” *Id.* “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely

creates a *metaphysical doubt* as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (emphasis added).

To survive summary judgment Cargill must point to "specific admissible facts" in dispute. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "It is not enough in an affidavit to allege in argumentative and conclusory fashion that a debt is usurious; the affidavit which seeks to oppose successfully a motion for summary judgment must set out that 'specific facts are in existence which create a genuine issue for trial.'" *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) (quoting *Erickson v. General United Life Insurance Co.*, 256 N.W.2d 255, 259 (Minn. 1977)).

"In the past, [the Minnesota Supreme Court has] found affidavits to be insufficient to raise a question of material fact if they merely stated legal or factual conclusions without providing a basis for the affiants' knowledge and without making any showing that the affiants were competent to testify as to the matters stated." *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 912 (Minn. 1999).

Here, the record demonstrates that there simply is no genuine issue of material fact. To supplement Peterson's hearsay affidavit, Cargill relies on hearsay notes from

Brad Morrison attached as Exhibit 2 to Peterson's second affidavit (AA-58)⁴ and to an internal email within Cargill (AA-57) as somehow supporting its position that there is a genuine issue of material fact as to the existence of Contract #27985. Kurt Peterson alleges that the parties reached an oral agreement on July 17, 2003. AA-14, para. 3. It is undisputed that Kurt Peterson was not present at Jorgenson's on July 17, 2003, did not witness the parties' interactions that day and has no personal knowledge to support his conclusory allegation. Peterson does not even identify who, on behalf of Jorgenson, allegedly assented to the terms of Contract #27985; who, on behalf of Cargill, allegedly offered the terms of Contract #27985; where or how the agreement took place; or on what basis he knows anything at all about this contract. Kurt Peterson's affidavit is a textbook example of conclusory allegations based on inadmissible hearsay properly disregarded by the district court. *See Gutwein v. Edwards*, 419 N.W.2d 809, 813 (Minn. App. 1988) (holding that affidavits containing inadmissible hearsay may properly be disregarded); *Blackwell v. Eckman*, 410 N.W.2d 390, 391 (Minn. App. 1987) ("[i]t is well settled hearsay is inadmissible evidence that must be disregarded on a motion for summary judgment") (citing *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976)).

As opposed to Peterson's speculation and conjecture, there is sworn testimony from Ben Presthus, Cargill's undisputed sole liaison with Jorgenson, and Mr. Jorgenson that Contract #27985 was never discussed, let alone entered into. AA-28, para. 7

⁴ Although Cargill was able to secure an Affidavit from Brad Morrison, Morrison himself does not discuss or explain either the preparation or the meaning of these notes of his whatsoever.

(Presthus); AA-46, para. 3 (Jorgenson). Presthus' and Mr. Jorgenson's sworn testimony are supported by documentary proof from Presthus's daily journal showing no notation relative to the terms or existence of Contract #27985. AA-28, para. 7 and AA-31 (Presthus' Daily Record of Events for July 17, 2003). No reasonable jury could find an oral agreement in light of sworn testimony from the only two people who could have created the oral agreement. Without testimony from someone who witnessed the oral agreement or some other record of that interaction, Cargill's speculations do not even create a "metaphysical doubt" as to the existence of an oral agreement, much less sufficient evidence to survive summary judgment. *DLH*, 566 N.W.2d at 71.

C. **The Circumstantial Evidence Does Not Reasonably Support an Inference that the Parties Reached an Oral Agreement.**

"A fact is proved by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. Inferences must be reasonably supported by the available evidence; sheer speculation is not enough." *Cokley v. City of Otsego*, 623 N.W.2d 625, 633 (Minn. App. 2001) (citation and quotation omitted). "[I]nferences may be drawn from proven or admitted facts, but they may not be based upon suspicion that unproven facts may exist." *Johnson v. Lorraine Park Apts. Inc.*, 268 Minn. 273, 128 N.W.2d 758, 762 (1964). The Minnesota Supreme Court "pointed out in *State v. Meany*, 262 Minn. 491, 115 N.W.2d 247 [1962], that facts may be established by circumstantial evidence but where there is no evidence, direct or circumstantial, to support an inference any conclusion based thereon becomes merely a conjecture." *Id.*

Here, Cargill's claimed inference that there is a genuine issue of material fact as to whether the parties created a contract is not reasonable because Cargill relies on pure speculation. For instance, Cargill argues that "[g]iven the detailed, special terms of Contract #27985, it is reasonable to infer that it was created based on a conversation or conversations between representatives of Cargill and Jorgenson Farms" and "[o]ne of the corn contracts that Cargill recorded and entered into its accounting systems [sic] after Presthus's phone call to the Cargill office was Contract #27985 for the sale of 80,000 bushels of corn." Appellant's Brief, at pages 15-16. Of course, Cargill never attempted to define what "uncommon terms" and "not a normal, run-of-the-mill contract" mean or prove that Contract #27985 contained these terms or that other contracts entered into circa July 17, 2003, did or did not also contain these terms. Moreover, Presthus and Jorgenson readily admit that two other contracts were entered July 17, 2003, one for 100,000 bushels of corn and another for 135,000 bushels of corn. The fact that Cargill erroneously entered Contract #27985 into its system proves nothing. The only inference that can reasonably be made from these circumstances is that whoever erroneously entered Contract #27985 into the system (and Cargill makes no attempt to identify that person or provide an affidavit from such person), possibly made it consistent with other contracts from Presthus or other contracts between Cargill and Jorgenson, or even other contracts between Cargill and its other customers. This does nothing to show that the parties entered into this specific contract.

Cargill also claims that Mr. Jorgenson referred to Contract #27985 by number during a meeting with Brad Morrison in December 2003 even though he claimed not to

have received Contract #27985, and that this somehow impeaches Mr. Jorgenson's testimony creating a credibility issue for resolution by a fact finder. Appellant's Brief, at page 17. However, it is undisputed that Mr. Jorgenson received a packet of put options in October 2003, including one for this supposed contract, that he did not review until following the 2003 harvest. AA-47. One of the put options was on the phantom Contract #27985 and specifically identified Contract #27985 by number. *Id.* In fact, it was Mr. Jorgenson's discovery of and questioning about this put option that led to the meetings between the parties in December, 2003, by which time Mr. Jorgenson knew the "contract number" from the put option itself. AA-47. Thus, it is not suspicious that Mr. Jorgenson was able to refer to Contract #27985 by its number in December 2003.

Cargill places great significance on the fact that while the alleged contract was between Cargill and Jorgenson Farms, Mr. Jorgenson's affidavit only technically states that he individually did not enter into Contract #27985. *See* AA-46, para. 3; Appellant's Brief, at page 22. Cargill suggests that some other unidentified representative of Jorgenson Farms possibly could have agreed to the contract, although this unknown representative is never identified. The problem with this argument, aside from relying on a hyper-technical literalist interpretation of Mr. Jorgenson's affidavit, is that such an argument does nothing to address Mr. Presthus' testimony, which unequivocally states that "[a]t no time did **Jorgenson Farms** ever enter, or intend to enter, into Contract MILO-AH-27985 in or about July of 2003, either verbally or in writing or otherwise." AA-28, para. 7 (emphasis added).

Cargill goes one step further in its attempt to create a genuine issue of material fact out of thin air. It suggests without evidence that Presthus may possibly be “a close relative of the Jorgensons” or that his testimony may be tainted by his new employment position. Appellant’s Brief, at page 19. Of course, none of this speculation is evidence nor does it explain why neither Morrison nor Peterson contradicts Presthus’ and Mr. Jorgenson’s account that Jorgenson’s position denying the existence of this contract was clearly communicated to Morrison in the December, 2003, meeting when Presthus was still working for Cargill. If such hypothetical impeachment evidence were sufficient to create a genuine issue of material fact, summary judgment based upon affidavits would rarely if ever be granted since the possibility of similar theoretical impeachment evidence would always exist.

Finally, Cargill claims that Presthus’ affidavit has a hidden ambiguity that should be explained further with additional discovery, namely that while Presthus unequivocally states that **Jorgenson Farms** never entered into Contract #27985, the scope of his statement is limited to “in or about July of 2003,” suggesting possibly that Presthus is equivocating with the date but not actually denying the existence of the contract itself. Appellant’s Brief, at page 20. To say this is grasping at straws is an understatement; there are no straws here to be grasped. Presthus’ affidavit repeatedly reiterates, both in the immediately following sentence from the one quoted by Cargill, and in the subsequent paragraphs, that no such contract was ever entered into between Cargill and anyone at Jorgenson Farms at any time.

Cargill has not and cannot provide any witness that can state such a contract was ever entered into nor can Cargill explain why its sole liaison with Jorgenson unequivocally testified that no such contract ever existed. Finally, Cargill cannot explain why their sole liaison with Jorgenson completely failed to note the creation of Contract #27985 in his daily planner even though that day he made notations regarding four other contracts between the parties. Circumstantial evidence which merely arouses suspicion cannot defeat a motion for summary judgment. *See Forsblad v. Jepson*, 292 Minn. 458, 460, 195 N.W.2d 429, 429 (1972) (holding that circumstantial evidence arousing suspicion cannot overcome motion for summary judgment where there is undisputed direct evidence to the contrary). Here, Cargill's creative speculation about theoretical equivocations and possible ambiguities (most of which arguments never occurred to Cargill until this appeal) does not even arouse suspicion; the District Court did not err in granting summary judgment to Jorgenson dismissing Cargill's Complaint with prejudice and on the merits.⁵

D. The Court Did Not Abuse Its Discretion by Refusing to Allow Cargill More Time for Discovery Pursuant to Minn. R. Civ. P. 56.06.

Cargill's primary position on appeal appears to be that while the facts do not justify granting Cargill summary relief, Cargill should have been granted a continuance to conduct discovery before the Court ruled on Jorgenson's motions for summary

⁵ Jorgenson does agree with Cargill that insofar as the District Court did not reach Jorgenson's alternative argument for summary judgment on the grounds that the putative contract is unenforceable under Minn. Stat. § 336.2-201, that issue would be properly presented to the District Court in the first instance in the unlikely event this Court reverses summary judgment.

judgment and for sanctions. Cargill's argument ignores the fact that (1) the timetable for the motion hearings was set by Cargill itself filing its Summons and Complaint and almost immediately thereafter its motion to compel arbitration; (2) Cargill had almost seven months from the date of its Summons and Complaint until the motion hearing to conduct discovery and yet did nothing; (3) Cargill had almost six months from the March 4, 2005, letter from Jorgenson's counsel outlining Mr. Jorgenson's and Presthus' testimony until the motion hearing to conduct discovery and yet did nothing; (4) Cargill had over seven weeks from the date it was served with Jorgenson's Notice of Motion and Motion for Sanctions until the motion hearing to conduct discovery and yet did nothing; and (5) Cargill had over six weeks after Jorgenson served and filed its summary judgment motion (including the affidavits of Presthus and Mr. Jorgenson) until the motion hearing to conduct discovery and yet did nothing. Cargill had every opportunity to conduct the discovery it now wishes with full notice of the testimony that was going to be presented in opposition to its case and yet chose to forego that discovery and itself brought matters to a head by filing its Complaint and filing its motion for summary disposition.

“Should it appear *from the affidavits* of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” Minn. R. Civ. P. 56.06 (2005) (emphasis added).

Cargill argues that “[t]he trial court abused its discretion in rejecting Cargill's request for time to take discovery before ruling on Jorgenson Farms' summary judgment

motion.” Appellant’s Brief, page 24. However, Cargill never submitted an affidavit describing to the trial court why it was entitled to a continuance pursuant to Minn. R. Civ. P. 56.06. “Where there has been no attempt to comply with [Rule 56.06], the disposition of the motion for summary judgment must be determined on the pleadings, affidavits, and depositions before the court at the hearing thereon.” *Vosbeck v. Lerdall*, 245 Minn. 164, 167-68, 72 N.W.2d 371, 374 (1955). Nowhere in Cargill’s Responsive Memorandum served August 12, 2005, and cited by Cargill at page 25 of its brief, does Cargill cite to Rule 56.06, nor is it even clearly asking for a continuance at all. Before the district court, Cargill simply claimed that these supposed discrepancies in and of themselves created a genuine issue of material fact, not that a continuance was needed before Cargill could even respond to the summary judgment motion. The same is true of the statements of counsel at oral argument before the district court.

Even had Cargill complied with Minn. R. Civ. P. 56.06, the trial court still correctly declined to grant a continuance. Minnesota courts consider two factors when determining a request for a continuance for further discovery in the context of a summary judgment motion: “(1) [H]as plaintiff been diligent in obtaining or seeking discovery prior to its Rule 56.06 motion? [a]nd (2) Is plaintiff seeking further discovery in the good faith belief that material facts will be uncovered, or is she merely engaging in a ‘fishing expedition?’” *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982).

“The court should be quite strict in refusing continuances where the party merely expresses a hope or a desire to engage in a fishing expedition either by discovery or at the

time of trial.” *Rice*, 320 N.W.2d at 412 (quotation marks and citation omitted); *see also Vosbeck v. Lerdall*, 245 Minn. 164, 167-68, 72 N.W.2d 371, 374 (1955)).

“The evidence shows that long before the summary judgment motion was heard, [Cargill] knew who had personal knowledge of facts which might support triable issues of fact, yet no effort was made to obtain their deposition testimony or affidavits. Summary judgment was properly entered by District Judge [Bruce Gross].” *Boulevard Del, Inc. v. Stillman*, 343 N.W.2d 50, 53 (Minn. App. 1984). Here Cargill has not even alleged who may have “personal knowledge of facts which might support triable issues of fact.” *Id.* Thus, the district court properly determined that there was no genuine issue of material fact. *Id.*

1. Cargill was not diligent.

The trial court did not “depriv[e] Cargill of the opportunity to depose each of the Jorgenson brothers about their communications with Cargill regarding Contract #27985.” Appellant’s Brief, page 22. Cargill never noticed any deposition in this matter. Cargill never served any interrogatories. In fact, on the record before the Court, it does not appear that Cargill even bothered to contact Ben Presthus or even attempt to contact him.

In short, no one “deprived” Cargill of the right to conduct discovery. Cargill simply failed to diligently pursue its case. Cargill initiated the action on or about January 31, 2005, and by the summary judgment hearing on August 26, 2005, Cargill had not so much as sent a request for admissions, an interrogatory or a document request, much less a notice of deposition. During that time, several rounds of discovery, including numerous depositions, could have taken place. As a result of Jorgenson’s

counsel's letter of March 4, 2005, Cargill was well aware of the factual basis upon which both Jorgenson's motion for summary judgment and motion for sanctions were based; yet Cargill did nothing to investigate that position at any time before the August 26, 2005, hearing. To now argue that Cargill was "deprived" of the discovery process is not a "fair reading" of the record. In *Meaney v. Newell*, 367 N.W.2d 472 (Minn. 1985), the Minnesota Supreme Court recognized that summary judgment after approximately the same period of time (nine months in that case) was not premature and a continuance should not have been granted where the party opposing the motion could have conducted the desired discovery during that time frame. *Id.* at 472.

Cargill's argument is premised on its claim that its Summons and Complaint originally sought a summary disposition of its request to compel arbitration pursuant to Minn. Stat. § 572.09. However, Cargill has known since at least December, 2003, that Jorgenson disputed the very existence of the contract upon which Cargill's claimed agreement to arbitrate is premised. It has known since at least October 26, 2004, that Jorgenson would not voluntarily arbitrate since it denied the very existence of the underlying contract. AA-26. It has known since at least March 4, 2005, if not earlier, the facts upon which Jorgenson based this denial. AA-39 to AA-41. The very facts that Cargill now seeks to "explore" and "develop" with additional discovery all go to contract formation, which Cargill has known about since before it initiated this action. Cargill had every opportunity to conduct whatever discovery it wished, and its inexplicable failure to do so cannot now serve as the basis to defer this matter further.

It is significant to note that before the district court, Cargill claimed it was entitled immediately to summary disposition in its favor ordering Jorgenson to arbitration. Recognizing the unsustainability of its original position that, on the one hand, there are no genuine issues of material fact precluding summary disposition in Cargill's favor, while simultaneously arguing on the other hand that there are genuine issues of material fact precluding summary judgment in Jorgenson's favor, Cargill now before this Court only requests that the district court's order be "vacated" "without prejudice to Cargill's ability to again move to compel arbitration after an opportunity to conduct discovery." Appellant's Brief, at page 26.

Further, the entire hearing schedule was driven by Cargill. Cargill chose when to sue this matter out. It chose when to file its Summons and Complaint with the District Court. It chose to immediately file its motion to compel arbitration arguing the case was ripe for summary adjudication. It cannot now be heard to complain that the District Court agreed with it and resolved this case summarily on the facts then before it.

2. Cargill seeks a fishing expedition.

Cargill can at best surmise what evidence *might* help its case. Cargill declares that it needs more time for discovery because "the fact that James Jorgenson may not have entered into the contract on or about July 17, 2003 says nothing about what another representative of Jorgenson Farms may have done." Appellant's Brief, at page 22. (quotations omitted). Implying that another individual with authority to bind Jorgenson may have entered in an oral agreement with Cargill despite Presthus's testimony to the contrary is not a sufficient excuse to completely fail to conduct discovery. Suggestions

that Presthus may be related to the Jorgensons or out “to get” Cargill are nothing more than unsupported allegations that do not justify the continued time and expense already incurred by Jorgenson in defending this matter.

II. THE DISTRICT COURT CORRECTLY DETERMINED ARBITRATION WAS NOT PROPER.

The Minnesota Supreme Court recently analyzed whether parties should be compelled to arbitrate claims arising out of a contract when the parties dispute the existence of the contract:

We find the distinction made by the Second Circuit in *Sandvik* persuasive and adopt the exception to the *Prima Paint* doctrine enunciated therein; *parties may not be compelled to arbitrate claims if they have alleged that the contract at issue never legally existed.* Therefore, allegations that a contract is void may be heard by a court, even if not specifically directed to the arbitration clause, while allegations that a contract is voidable must be sent to arbitration.

Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344, 354 (Minn. 2003) (emphasis added).

As discussed *supra*, Jorgenson did not agree to any alleged contract on or about July 17, 2003. Cargill attempts to bootstrap enforcement of an arbitration provision to its argument that a contract existed. As the *Onvoy* decision requires, the first question the Court must face and answer is whether or not there was a contract. *See id.* If there was no contract, there cannot be an agreement to arbitrate. There is no claim by Cargill that the putative July 17, 2003, contract was ever signed by any representative of Jorgenson. Even if this Court somehow were to find a genuine issue of material fact as to the existence of an oral contract, arbitration would still be inappropriate since it presupposes that a valid agreement to arbitrate existed as well.

Under the Minnesota Uniform Arbitration Act, an agreement to arbitrate must be in writing to be enforceable. Minn. Stat. § 572.08. The Minnesota Supreme Court has squarely held that “an oral agreement [to arbitrate] is revocable at any time before the matter is deemed submitted to the arbitrator,” and therefore even if, as Cargill claims, there was a verbal agreement between the parties to arbitrate, it is not enforceable insofar as Jorgenson has not agreed and does not agree to submit the matter to the arbitrator. *Anderson v. Federated Mut. Ins. Co.*, 481 N.W.2d 48, 49-50 (Minn. 1992).

Cargill’s suggestion that Jorgenson Farms did not timely object to submission of this matter to the NGFA for arbitration is without merit. The September 23, 2004, letter from Cargill to the NGFA was not copied to Jorgenson. AA-23 to AA-24. The first notice that Jorgenson had of the proposed submission to the NGFA of this dispute was the October 5, 2004, letter sent from Washington, D.C., to Jorgenson dated October 5, 2004. AA-25. The letter enclosed a proposed arbitration contract. On October 26, 2004, Jorgenson Farms responded in writing to the NGFA’s October 5, 2004, letter stating that “neither Jorgenson Farms nor any agents on its behalf entered into a contract number 27895 with Cargill. . . . No documents will be signed related to Case Number 2109. At this time, there will be no contracting of any services from NGFA and Jorgenson Farms will not agree to be bound by NGFA rules as stipulated in your contract.” AA-26. This letter, which would have been sent no more than two weeks after Jorgenson received its first notice of the attempted submission of this matter to the NGFA for arbitration, clearly demonstrates that Jorgenson never agreed to submit this matter to arbitration, and under *Anderson v. Federated Mut. Ins. Co.*, any supposed verbal agreement to submit this

matter to arbitration is unenforceable as a matter of law regardless of whether there is or is not a genuine issue of material fact as to the existence of the putative July 17, 2003, contract. 481 N.W.2d at 49-50.

Therefore, even if this Court were otherwise to find a genuine issue of material fact on the existence of an alleged oral contract, Cargill's claim that this matter is subject to arbitration is incorrect, and the supposed arbitration provision found in an unexecuted document prepared by Cargill is unenforceable as a matter of law. Therefore, Cargill's motion to compel arbitration was properly denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING CARGILL.

In addition to granting Jorgenson summary judgment, the District Court further found that Cargill violated Minn. Stat. § 549.211, subd. 2(3), and awarded Jorgenson \$5,000.00 in costs as a sanction. AA-70 to AA-71. As the District Court found, and Cargill does not dispute, "it is uncontested that the procedural requirements as mandated under Minn. Stat. § 549.211, subd. 3 (2004) and Minn. Gen. R. Prac. 119.02 have been met by Jorgenson." AA-70 to AA-71. Cargill was provided with well more than the 21 days mandated by both statute and rule to reconsider its litigation position, and did not do so.

Jorgenson's motion for sanctions relied upon both Minn. Stat. § 549.211 and Rule 11 of the Minnesota Rules of Civil Procedure. *See* Notice of Motion and Motion for Sanctions dated July 7, 2005. However, as noted above, the District Court relied only upon Minn. Stat. § 549.211 in reaching its decision. In practical effect, since the 2000

amendments to the Minnesota Rules of Civil Procedure, both the procedural and substantive requirements for imposition of sanctions under either statute or rule are essentially the same. *See* Minn. R. Civ. P. 11, Advisory Committee Comments to 2000 amendments (“Rule 11 is amended to conform completely to the federal rule . . . [a]dditionally, the Minnesota Legislature has created a statutory mechanism that follows the federal procedure. . .”).

Pursuant to Minn. Stat. § 549.211, a pleading presented by or on behalf of a party constitutes representation to the Court that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the allegations and other factual contentions have evidentiary support or, as specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery.” Minn. Stat. § 549.211, subd. 2(3).

The “imposition of sanctions is mandatory” if Rule 11 has been violated. *Uselman v. Uselman*, 464 N.W.2d 130, 142 (Minn. 1990) (superceded on other grounds). The “fundamental purpose” of imposing sanctions is deterrence. *Id.* The district court has “wide discretion” to award the type of sanctions it deems necessary “provided that notice has been given and the subject party has an opportunity to respond.” *Kellar v. Von Holtum*, 605 N.W.2d 696, 702 (Minn. 2000).

Jorgenson does not speculate about Cargill’s initial drafting of its claim. A defending party should be given an opportunity to respond to the notice of a possible sanction. *See Von Holtum*, 605 N.W.2d at 701 (discussing policy and practice of sanctions). However, Jorgenson provided due notice and a detailed explanation to Cargill

on March 4, 2005, and again on July 7, 2005, questioning the evidentiary support for Cargill's factual allegations and the potential for sanctions if Jorgenson was forced to continue incurring costs and attorneys' fees in defending this matter; Cargill failed to even investigate these claims, must less respond. Instead, it ignored Presthus altogether and proceeded ahead with filing its Summons and Complaint and its Motion to Compel Arbitration, thereby forcing Jorgenson to incur considerable expense in preparing its response and its own motion for summary judgment.

Rule 11 and Minn. Stat. § 549.211 "provide relief to parties who are victims of bad pleading and abusive process." *State Bank of Young America v. Fabel*, 530 N.W.2d 858, 863 (Minn. App. 1995), *rev. denied* (Minn. June 29, 1995). "[T]he objective standard under Rule 11 permits the imposition of sanctions for the filing of a meritless claim, *without a finding of subjective bad faith*." *Peterson v. Hinz*, 605 N.W.2d 414, 417 (Minn. App. 2000) (emphasis added). Cargill erroneously contends on appeal that "an award of sanctions under § 549.211 requires a finding that an attorney or party acted in bad faith." Appellant's Brief, page 27 (quotations omitted). The *Hinz* case specifically rejected precisely this same argument: "[r]espondent erroneously insists that Rule 11 sanctions cannot be imposed without a subjective showing of bad faith, such as a knowingly false pleading or a pleading made for ill purposes such as harassment. *Uselman* flatly contradicts respondent's position." 605 N.W.2d at 417. As *Hinz* notes, *Uselman* analyzed the changes in Rule 11 eliminating the "bad faith" requirement:

The current version of Rule 11 significantly altered counsel's certification responsibility, *eliminating the bad faith threshold* and substituting in its stead, a certification that, upon belief after

reasonable inquiry, a pleading or other paper is well-grounded factually, warranted by existing law or is a good faith argument for changing existing law and filed for proper purposes only. In other words, an affirmative duty is imposed on counsel to investigate the factual and legal underpinnings of a pleading. Moreover, the imposition of sanctions is mandatory if the rule is violated.

Uselman, 464 N.W.2d at 142 (emphasis added) (footnote omitted). Cargill here ignores the precedential, published decisions of this Court and the Supreme Court and instead relies entirely on unpublished, non-precedential decisions to support its argument on the applicable standard. See Minn. Stat. § 480A.08, subd. 3(c) (unpublished decisions of the Court of Appeals are not precedential).

Today, Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 are virtually identical. Minnesota Courts often read and apply the two provisions together. See *Radloff v. First American Nat. Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 156 (Minn. App. 1991) (“The trial court awarded attorney fees under both section 549.21 and rule 11 without specifically differentiating between their respective grounds for sanctions. *Considering the similarity between the statute and rule, that was not an abuse of discretion.*”) (emphasis added). Although the trial court couched its determination in terms of § 549.211, case law interpreting either authority is relevant to the trial court’s holding. See *Radloff*, 470 N.W.2d at 156.

The trial court has wide discretion in determining the type of sanctions it deems necessary. *Von Holtum*, 605 N.W.2d at 702. Under both Rule 11 and Minn. Stat. § 549.211, a party has an affirmative duty to investigate the factual and legal basis for its claims. *Radloff v. First American Nat’l Bank*, 470 N.W.2d 154, 156 (Minn. App. 1991),

rev. denied (Minn. July 24, 1991); *see also* Minn. Stat. § 549.211, subd. 2 (outlining duties of a party in acknowledging claims).

Minnesota courts rely on federal authority when construing Minn. R. Civ. P. 11. *See Radloff*, 470 N.W.2d at 157 (relying on Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 118 (1988)). The “under the circumstances” prong of the test is important. It forms a sliding scale of reasonableness. Thus, a party who needs to make a strategic litigation decision near the end of a limitations period or who is involved in a briefing schedule with little time to respond should be held to a lower standard while a sophisticated party such as Cargill, with more time to reflect and inquire, has an obligation to investigate and rectify errors. *See, e.g., Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421 (S.D. N.Y. 1984) (holding case filed in good faith, but facts discovered subsequent to the filing of the complaint contradicted allegations and justified sanctions). It is not permissible, however, to file the complaint first and then develop a factual basis for the action. *See, e.g., Delozier v. First Nat'l Bank of Gatlinburg*, 109 F.R.D. 161 (E.D. Tenn. 1986); *Wymer v. Lessin*, 109 F.R.D. 114 (D.D.C. 1985); *Long v. Quantex Resources, Inc.*, 108 F.R.D. 416 (S.D. N.Y. 1985), *aff'd*, 888 F.2d 1376 (2d Cir. 1989). After making a reasonable inquiry, a party must be able to conclude that it reasonably appears that there is a factual basis for the assertions in a Court pleading.

Here, it is clear that Cargill’s claims in its Complaint and the Affidavit of Kurt Peterson (based entirely on second-hand inadmissible hearsay at most) cannot reasonably be squared with the factual background provided by Presthus, Cargill’s undisputed sole

liaison with Jorgenson. Presthus's firsthand version of the facts directly contradicts the allegations underlying Cargill's Complaint and the conclusory allegations in Kurt Peterson's Affidavit. As the district court held, Presthus's testimony demonstrates conclusively that there is no genuine issue of material fact as to whether the parties reached an agreement on or about July 17, 2003, relative to Contract #27985.

Upon learning of Presthus' version of the facts on March 4, 2005, Cargill's failure to investigate or conduct any investigation or discovery to test the veracity of Presthus' affidavit, or to explain the foundation for Peterson's conclusions in his Affidavit, is not objectively reasonable. *See Delozier*, 109 F.R.D. 161; *Wymer*, 109 F.R.D. 114, *Quantex*, 108 F.R.D. 416. By the time of the summary judgment hearing, Cargill had had 175 days from the date it learned of Presthus' factual contentions to investigate or conduct discovery. However, Cargill did not investigate anything, and instead filed its Summons and Complaint and Motion for Arbitration. Cargill's initial motion papers and supporting Affidavit from Kurt Peterson do not even acknowledge the existence of Presthus' account or the contradictory information that its own former employee would provide; the entire issue is ignored. Cargill continues on appeal to unreasonably rely on a factually unsustainable record. Cargill's litigation and appellate positions serve no purpose other than to increase the costs of this litigation.

Regardless of the reasons for Cargill's ignoring the facts of this case and its failure to act reasonably, Cargill has forced Jorgenson to defend this action both before the District Court in this Court all while incurring significant costs and fees. The District

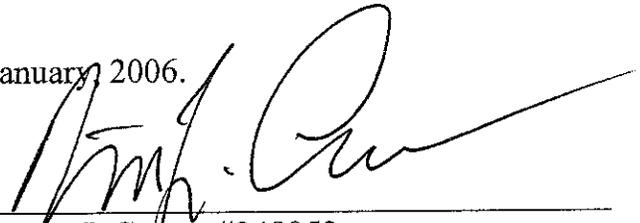
Court did not abuse its discretion in sanctioning Cargill in the amount of \$5,000.00 pursuant to Minn. Stat. § 549.211.

CONCLUSION

The District Court properly determined that no genuine issue of material fact existed, and properly dismissed Cargill's Complaint with prejudice. The District Court did not abuse its discretion by sanctioning Cargill.

Jorgenson Farms respectfully submits that the District Court's decision should be affirmed in its entirety.

Respectfully submitted this 9th day of January, 2006.



Dustan J. Cross #248952
Ryan R. Dreyer #0332252
GISLASON & HUNTER LLP
Attorneys for Respondent Jorgenson Farms
2700 South Broadway
P. O. Box 458
New Ulm, MN 56073-0458
Phone: 507-354-3111

NULIB:226025 1