B. DISTRIBUTOR shall not make any deductions or offsets from payments due to COMPANY on account of returned Products, warranty, and/or because of or based upon any other claim that DISTRIBUTOR may have against COMPANY.

8. TRADEMARKS

A. COMPANY represents and warrants to DISTRIBUTOR that COMPANY has the right to use the trademarks listed on Schedule 7.A, as well as other trademarks that COMPANY owns and may use in connection with the Products in the future (the "Trademarks").

B. The Trademarks listed on Schedule 7.A are used by COMPANY to identify the Products to be sold under this Agreement, and no right is granted to DISTRIBUTOR to use any of the Trademarks in association with DISTRIBUTOR's business. DISTRIBUTOR recognizes that (1) the Trademarks are owned by COMPANY (or COMPANY's licensor, if applicable), and (2) this Agreement shall not operate to convey to DISTRIBUTOR any right, title or interest in any of the Trademarks. All use of the Trademarks as provided herein shall inure to the benefit of COMPANY (and/or COMPANY's licensor, if and as applicable).

C. In order to protect the goodwill associated with the Trademarks, DISTRIBUTOR shall not without the prior written consent of COMPANY acting through an Authorized Officer:

(1) Alter the labeling of any of the Products displaying the Trademarks from the form of labeling supplied by COMPANY;

(2) Use any advertising or promotional materials in association with the Products unless COMPANY has provided the same to DISTRIBUTOR;

(3) Use any Trademark in connection with the Products;

(4) Use any Trademark (i) as a trade or corporate name or in connection with DISTRIBUTOR's business; (ii) in connection with any product or service other than the Products; or (iii) in connection with any other trademark; or

(5) Register any of the Trademarks or any mark similar to the Trademarks.

D. DISTRIBUTOR shall have an affirmative obligation to notify COMPANY of any Trademark infringements or products similar to the Products, as well as any products displaying marks, graphics, logos or trade dress similar to any of the Trademarks.

E. DISTRIBUTOR shall not do or omit to do anything in relation to the Products that DISTRIBUTOR knows or has reason to know may adversely affect the validity of the Trademarks or their enforceability, or the quality, image or reputation of the Products.

F. DISTRIBUTOR hereby acknowledges that STEWART's Restaurants, Inc. is the proprietor and rightful owner of the STEWART'S trademark and that COMPANY has been appointed as its exclusive licensee for purposes of selling the Products. DISTRIBUTOR covenants not to do or permit to be done any act calculated to prejudice, affect, impair, or destroy the title and interest of STEWART's Restaurants, Inc. or of COMPANY as its licensee, in and to the said Trademark. If it shall come to the notice of the DISTRIBUTOR that any person, firm or corporation is infringing said Trademark, DISTRIBUTOR will promptly notify COMPANY.]

G. DISTRIBUTOR hereby acknowledges that COMPANY is the proprietor and rightful owner of the Fountain Classics Trademark. DISTRIBUTOR covenants not to do, or permit to be done, any act calculated to prejudice, affect, impair, or destroy the title and interest of COMPANY in and to said Trademark. If it shall come to the notice of the DISTRIBUTOR that any person, firm or corporation is infringing said Trademark, DISTRIBUTOR will promptly notify COMPANY.]

9. PRODUCT DISTRIBUTION & DISTRIBUTOR COVENANTS

A. DISTRIBUTOR shall at all times use its best efforts to promote and expand the sale of Products in the Territory. Without limiting the foregoing, DISTRIBUTOR's right to distribute the Products under this Agreement shall be subject to DISTRIBUTOR meeting and continuing to meet the performance targets mutually agreed between the parties and set forth on Schedule 8.A. If DISTRIBUTOR fails to meet any of the performance targets set forth on Schedule 8.A for any reason other than continued failure of supply by COMPANY, then COMPANY may terminate this Agreement pursuant to Paragraph 9.

B. Nothing contained in Paragraph 8.A above shall limit or affect COMPANY's rights under Paragraph 9.A(7) hereof.

C. DISTRIBUTOR shall cooperate in good faith with COMPANY to create a mutually agreed upon written annual plan with quarterly and monthly calibrations ("Annual Plan") to achieve successful distribution and increased consumption of the Products in the Territory by the first day of each calendar year. The Annual Plan shall not diminish or affect the requirements of Paragraph 8.A above. As soon as possible and in no event later then one hundred twenty (120) days after the Effective Date, DISTRIBUTOR also shall comply with the COMPANY information reporting program, as in effect from time to time, the current version of which is attached as Schedule 8.C. DISTRIBUTOR shall also provide to COMPANY a written monthly sales report on its inventory and sales activities, specified by beverage size, beverage type and channel. DISTRIBUTOR agrees and acknowledges that such reports are necessary to promote and merchandise the Products in the Territory in order to maintain and increase demand for the Products in the Territory. Accordingly, DISTRIBUTOR acknowledges the importance of participating in cooperative merchandising and promotions that may be reasonably established by COMPANY on a regional or national basis.

D. DISTRIBUTOR shall: (i) store, handle and distribute its inventory of Products in clean and sanitary conditions as required to maintain Product quality and traceability; (ii) not alter the Products in any manner; and (iii) comply with all applicable federal, state and local food, health and other relevant laws and regulations within the Territory. Without limiting the foregoing, DISTRIBUTOR shall comply with COMPANY's Product dating and quality requirements as in effect from time to time. DISTRIBUTOR shall also notify COMPANY of any inspection of its facilities by any federal, state or local food or health agency. If COMPANY determines, in its sole discretion, that COMPANY shall undertake a market withdrawal or recall of any of the Products, DISTRIBUTOR agrees that it shall fully cooperate with COMPANY and take all necessary actions, including but not limited to a notification to accounts and retrieval of Products from retailers at COMPANY's expense (unless the reason for such action was caused by DISTRIBUTOR in which case it shall be at DISTRIBUTOR's expense).

E. DISTRIBUTOR shall carry sufficient inventory (at least a two (2) week aggregate supply on the floor) to assure that there are no breaks in the supply of Products to customers and consumers.

F. DISTRIBUTOR shall grant COMPANY's representatives access during normal business hours on twenty-four (24) hours notice: (i) to inspect DISTRIBUTOR'S facilities, inventory of Product and transport fleet to review compliance with health and safety requirements; (ii) to inspect DISTRIBUTOR's records relating to sale of the Products and placement of vending machines, visi-coolers and other refrigeration units and merchandising equipment; and (iii) to inspect other records related to the terms of this Agreement (including the basis of equipment pursuant to Paragraph 9.D).

G. DISTRIBUTOR shall purchase Product only from COMPANY unless DISTRIBUTOR shall have been authorized in writing by COMPANY acting through an Authorized Officer to purchase Product from a manufacturer or other source designated or authorized by COMPANY.

H. DISTRIBUTOR agrees that, during the term of this Agreement and except as regards the Products set forth herein, it shall not produce, promote, advertise, merchandise, distribute, sell or offer for sale, directly or indirectly, in the Territory without the prior written consent of COMPANY acting through an Authorized Officer, any: (i) product (other than those under the Trademark Brand) of the type as listed for the Products on Schedule 1B (regardless of packaging type or size) ; (ii) beverages having the same flavor profile as the Products; (iii) beverages of the same category as any Products or any New Product included as Products pursuant to Paragraph 3.C; or (iv) any and all beverages which COMPANY determines in its sole discretion are competitive to the Products. The provisions of this Paragraph 8.H shall not apply to any beverage products currently distributed by DISTRIBUTOR and set forth on Schedule 8.H.

I. DISTRIBUTOR agrees to carry and sell a representative portion of each line of the Products offered to DISTRIBUTOR by COMPANY. In any event DISTRIBUTOR shall carry and sell a minimum of 6 SKU's of the Products.

J. DISTRIBUTOR shall keep confidential, during the duration of this Agreement and for five (5) years thereafter, all information of COMPANY and all information of DISTRIBUTOR' which relates to COMPANY's business and which is not known to the public, including any all product, marketing and sales strategies or plans, as well as the terms and conditions of this Agreement.

K. COMPANY is an indirect subsidiary of Cadbury Schweppes plc, which has published and adopted both a Human Rights and Ethical Trading Policy and an Environmental Policy. These are available on website www.cadburyschweppes.com. Cadbury Schweppes integrates these standards and commitments into the way it runs its businesses globally to address such concerns. DISTRIBUTOR is expected to review and adhere to these policies. DISTRIBUTOR is required to achieve high ethical and environmental standards and social responsibility in its business practices and production supplies.

10. TERMINATION

A. Upon the occurrence of any of events (1) to (7) below, this Agreement shall automatically terminate and DISTRIBUTOR shall have no opportunity to cure. Upon the occurrence of any of the events (8) to (10) below, this Agreement may be terminated upon thirty (30) days written notice by COMPANY if DISTRIBUTOR has not cured the breach set forth in such notice within such period:

(1) the liquidation or dissolution or notice thereof of DISTRIBUTOR's business;

(2) an assignment by DISTRIBUTOR for the benefit of creditors;

(3) the filing of a voluntary or involuntary petition under the provisions of the United States Bankruptcy Code or any similar state statute or the appointment of a receiver or trustee for the property of DISTRIBUTOR, the filing of which remains uncontested and undischarged by DISTRIBUTOR at the end of sixty (60) days after such filing;

(4) the inability of DISTRIBUTOR to pay its obligations when they become due;

(5) a purposeful misuse of the funds of COMPANY by DISTRIBUTOR or any fraudulent act by DISTRIBUTOR with respect to COMPANY (including without limitation those relating to funding and performance reporting);

(6) DISTRIBUTOR shall fail to sell, market and distribute the Products for a period in excess of five (5) days;

(7) DISTRIBUTOR shall act in bad faith in carrying out the terms of this Agreement. The following acts (among other things and not by way of limitation) shall constitute bad faith by DISTRIBUTOR:

(i) systematic or intentional deviations from the methods, procedures or quality standards specified by COMPANY;

(iii) any repeated and/or deliberate failures to provide COMPANY promptly with information required by this Agreement;

(iv) any disclosure, licensing, sale or other revelation of Product formulae, methods, procedures or other confidential information (including, without limitation, quality standards) furnished to DISTRIBUTOR by COMPANY (excluding, however, the disclosure in confidence of relevant portions of such information to DISTRIBUTOR's employees which is required in order to perform their respective duties);

(v) any breach by DISTRIBUTOR of the provisions of Section 7 hereinabove; and/or

(vi) DISTRIBUTOR consummates or fails to take acts to prevent the sale, transfer, pledge, conveyance, assignment, encumbrance, or other disposal, by law or otherwise, of this Agreement or any of DISTRIBUTOR's rights, license or interest hereunder.

(8) transshipping by DISTRIBUTOR in breach of COMPANY's transshipping policy pursuant to Paragraph 3.B hereof, where DISTRIBUTOR knows or has reason to know of such transshipping;

(9) if, at the end of each of three (3) consecutive months, DISTRIBUTOR's purchases of Products for the prior twelve (12) month period are less than 1,000 cases; or

(10) DISTRIBUTOR's failure to pay for Product when due pursuant to Paragraph 6.A.

B. Without limiting any other specific termination rights provided in this Agreement which do not provide for a cure period (that is, a period to remedy the breach) and/or which provide for a different cure period than that provided in this Paragraph, COMPANY may terminate this Agreement immediately upon notice to DISTRIBUTOR in the event of breach by DISTRIBUTOR of any provision of this Agreement, provided that DISTRIBUTOR fails to cure such breach within thirty (30) days after DISTRIBUTOR's receipt of written notice from COMPANY specifying the breach by DISTRIBUTOR.

C. Notwithstanding Paragraphs 9.A and 9.B above, the parties acknowledge that COMPANY may in the future have business reasons for reorganizing or otherwise changing its distribution of beverages in the Territory and that COMPANY may wish to terminate this Agreement during its term as provided in this Paragraph. Accordingly, this Agreement may be terminated by COMPANY, at COMPANY's sole and absolute discretion and at any time, upon thirty (30) days prior written notice to DISTRIBUTOR.

D. In order to effect an orderly termination, within fifteen (15) days of the expiration or termination of this Agreement for any reason hereunder, DISTRIBUTOR must resell to COMPANY all saleable Products and promotional items held or controlled by DISTRIBUTOR. COMPANY will buy back from DISTRIBUTOR all saleable and merchantable inventory of Products and promotional items in the possession or control of DISTRIBUTOR at the time of termination, at DISTRIBUTOR's net cost. Any unsaleable or unmerchantable inventory of Products must be destroyed by DISTRIBUTOR at DISTRIBUTOR's sole cost and expense with proof of destruction provided to COMPANY. COMPANY will also accept return of COMPANY pallets in good condition and reimburse DISTRIBUTOR for the costs of such pallets. Upon termination of this Agreement, DISTRIBUTOR shall deliver to COMPANY copies of customer lists, routing maps, call books, routing schedules, customer sales history and any and all confidential information relating to the Products or the business of COMPANY. In addition, COMPANY and/or the successor DISTRIBUTOR shall have the option to purchase all COMPANY-identified visi-cooler equipment based on a reimbursement of DISTRIBUTOR's portion of the initial cost thereof (not the total cost thereof), as follows:

0-6 months after placement	=	100%
7-12 months after placement	=	80%
13-24 months after placement	=	60%
25-36 months after placement	=	40%
36+ months after placement	=	20% or $100, whichever is greater

The above formula shall be used for all cold drink equipment placements where DISTRIBUTOR is not (with respect to that equipment) participating in another COMPANY equipment placement program with buyback terms.

E. Neither party shall be liable to the other party as a result of termination or non-renewal of this Agreement pursuant to its terms, except in the event of termination for material breach when the party in default shall be liable for damages arising out of such breach. Termination in accordance with this Agreement shall be without prejudice to any of the rights or liabilities of either party accrued at the date of termination. Upon any termination of this Agreement: (i) DISTRIBUTOR shall continue to be obligated to make all payments due; and (ii) DISTRIBUTOR shall immediately cease any use of the Trademarks permitted under this Agreement, if any, and shall deliver all promotional or other materials bearing the Trademarks to COMPANY as reasonably instructed by COMPANY. The provisions of Paragraphs 6, 13, and 16, and Paragraphs 8.J, 9.D, 9.E and 9.F shall survive termination of this Agreement.

F. Notwithstanding any contrary provisions in this Agreement, COMPANY shall have the unlimited right to set off and apply any and all amounts owed to it by DISTRIBUTOR against any of COMPANY's obligations to DISTRIBUTOR upon termination or expiration of this Agreement.

11. SUB-DISTRIBUTORS

Upon COMPANY's written consent and approval only, DISTRIBUTOR may appoint by agreement SUB-DISTRIBUTORs in furtherance of its obligations under this Agreement to service the Territory. Such approval shall not be unreasonably withheld. DISTRIBUTOR shall, upon request, supply COMPANY with a copy of any written agreement with any SUB-DISTRIBUTOR within three (3) days of such request. Notwithstanding any such appointment, DISTRIBUTOR's obligations under the terms of this Agreement will not be thereby altered or otherwise affected, and DISTRIBUTOR shall be directly responsible for the conduct of any and all of its SUB-DISTRIBUTORS. In the event this Agreement is terminated, any and all SUB-DISTRIBUTOR agreements shall be automatically and concurrently terminated unless COMPANY notifies DISTRIBUTOR in writing otherwise. No SUB-DISTRIBUTOR shall be or is intended as a third-party beneficiary of this Agreement. DISTRIBUTOR agrees to indemnify and hold harmless COMPANY from and against any and all claims asserted by any of DISTRIBUTOR's SUB-DISTRIBUTORs, including attorney fees and all other expenses and costs incidental thereto.

DISTRIBUTOR shall provide to each of its SUB-DISTRIBUTORs adequate supervision and support to promote the Products, including but not limited to providing information regarding New Products, promotional program participation, periodic sales meetings, and point of sale materials.

It is understood by DISTRIBUTOR that distribution and promotion of the Products and the rendering of first-class service to retail accounts by DISTRIBUTOR is of paramount importance to COMPANY. In the event that COMPANY is dissatisfied for any reason whatsoever with the performance of any of DISTRIBUTOR's SUB-DISTRIBUTORs, COMPANY may notify DISTRIBUTOR of such dissatisfaction and it shall be the obligation of DISTRIBUTOR to terminate the SUB-DISTRIBUTOR within sixty (60) days of said notification from COMPANY, without any disruption of service to the accounts being serviced by said SUB-DISTRIBUTOR.

Any SUB-DISTRIBUTOR agreement with DISTRIBUTOR as to any Product shall be subject to and shall incorporate by reference all of the obligations of DISTRIBUTOR and all of the rights of COMPANY under this Agreement. DISTRIBUTOR shall not grant to any SUB-DISTRIBUTOR rights that are greater than DISTRIBUTOR's rights under this Agreement, such as a longer term than DISTRIBUTOR's term hereunder, and shall also not grant the right to appoint sub-sub-distributors without the prior written consent of COMPANY.

12. NOTICES

Whenever notice is required to be given under the terms of this Agreement to either party, it shall be given to the other party by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, or by telecopier confirmed by machine confirmation at the addresses and/or telecopier numbers designated below:

A. If to COMPANY, addressed as follows:

STEWART'S BEVERAGES LLC.
5301 Legacy Drive
Plano, TX 75024
Attention: James C. Epley, Vice President
Phone: (972) 673-6976
Fax: (972) 673-8013

With a copy to:
James Urmin, Esq.
Dr Pepper Seven Up
5301 Legacy Drive
Plano, TX 75024
Phone: (972) 673-7000
Fax: (972) 673-7981

B.

ROHLFING OF DULUTH
1 South 24th Avenue West
Duluth, MN 55806
Attention: Jerry Spehar
President & General Manager
Tel: 218-727-8191
Fax: 218-727-4843

or to such other or further address as either party may specify to the other, by notice in accordance with the provisions of this Paragraph.

13. **ASSIGNMENT AND CHANGE OF CONTROL**

A. This Agreement is personal to DISTRIBUTOR and therefore may not be sold, transferred, assigned, or otherwise conveyed by DISTRIBUTOR, in whole or in part, whether to an affiliate or to any other person or entity, except upon COMPANY's prior written consent (acting through an Authorized Officer), which consent may or may not be granted at COMPANY's sole and absolute discretion. This restriction includes but is not limited to: (i) any sale, transfer, assignment or other disposal of DISTRIBUTOR's business, including (a) any transfer by operation of law, (b) any sale, transfer or disposition of all or substantially all of the assets of DISTRIBUTOR's business other than sales of assets in the ordinary course of business; and (ii) any other change of control (which shall mean a change in the ability to elect a majority of the directors or vote in excess of 10% of the stock or other ownership interests of DISTRIBUTOR).

B. In the event that COMPANY agrees to any transfer or assignment of this Agreement pursuant to Paragraph 12.A, the new DISTRIBUTOR shall enter into the then current form of distribution agreement.

14. **GOVERNING LAW AND JURISDICTION**

This Agreement and any disputes relating to it shall be governed by and interpreted in accordance with the substantive laws of the State of New York that apply to contracts entered into and performed entirely within such State without regard to principles of conflicts of law. The parties have explicitly negotiated and agreed that any suits or actions by either party shall be brought only in the United States District Court for the Southern District of New York at White Plains, New York, or the New York State Court sitting in such city. The parties to this Agreement hereby irrevocably and exclusively submit to the jurisdiction and venue of such courts. The parties to this Agreement irrevocably waive trial by jury in all suits or actions brought under or with respect to any provision of this Agreement or otherwise relating to it. The parties to this Agreement irrevocably waive all causes of action not filed in the appropriate court within one (1) year after the termination of this Agreement.

15. FORCE MAJEURE

Whenever performance by COMPANY or DISTRIBUTOR of any of its obligations is substantially prevented due to circumstances beyond the control of that party, including but not limited to any act of God, law, regulation or ordinance, war or war conditions, or failure of transport or supply, then such performance (except for the payment of money) shall be excused, and this Agreement shall be deemed suspended during the continuation of such circumstances.

16. PRODUCT QUALITY

COMPANY represents and warrants to DISTRIBUTOR that the Products sold by COMPANY at the time and place of delivery to DISTRIBUTOR shall comply with applicable legal requirements.

17. INDEMNIFICATION; INSURANCE

A. COMPANY shall defend, indemnify and hold DISTRIBUTOR harmless from and against any claim that a Product fails to comply with COMPANY's warranties provided in Paragraphs 7.A and 15. DISTRIBUTOR shall defend, indemnify and hold COMPANY harmless from and against any claim arising out of DISTRIBUTOR's failure to perform its obligations under this Agreement, including but not limited to those relating to Trademarks and Product handling and quality control, and any other form of action or inactions by DISTRIBUTOR or any other person or entity acting on its behalf.

B. Neither party shall have any obligation for indemnity under this Paragraph 16 unless the party seeking indemnification: (i) notifies the other party of such claim as soon as practicable after the party seeking indemnification first obtains knowledge of such claim (provided that failure to give such notice shall not affect the indemnifying party's obligations except to the extent it can show actual prejudice); (ii) gives control of the defense of such claim to the other party; and (iii) provides the other party with all reasonable cooperation in the defense of such claim. In addition, neither party shall have any obligation to indemnify if the indemnified party makes any settlement without prior written consent of the other party acting through an Authorized Officer of such party. Each indemnified party shall have the right (but not the obligation) to participate in the defense of a claim by the indemnifying party, in which event such party shall pay for its respective attorneys fees.

C. DISTRIBUTOR shall maintain for the benefit of both DISTRIBUTOR and COMPANY occurrence basis comprehensive general liability insurance (including contractual liability with respect to the indemnity obligations set forth in Paragraph 16 hereof). The insurance shall be maintained with limits of not less than $5,000,000 bodily injury per occurrence and $100,000 property damage per occurrence (or $5,000,000 combined single limit per occurrence bodily injury and property damage).

DISTRIBUTOR agrees to provide a certificate of insurance acceptable to COMPANY within thirty (30) days of executing this Agreement. The certificate shall name COMPANY as an additional insured and shall provide that the insurance afforded applies as primary coverage and will not be contributory with any other insurance available to COMPANY, and that the coverage afforded under the policy will not be canceled or changed so as to reduce or restrict the coverage unless and until after at least thirty (30) days prior written notice has been given to COMPANY.

18. INDEPENDENT RELATIONSHIP

DISTRIBUTOR and COMPANY understand and agree that each is an independent principal and not an agent, employee, partner, joint venturer, or franchiser or franchisee of the other in the performance of this Agreement, and that each party retains the right to conduct its business as it shall determine, including without limitation the manner in which it shall fulfill its obligations under this Agreement. Neither party, nor its agents, shall in any way act, or undertake to act, on behalf of, or hold itself out as, the agent of the other party without the express prior written consent of such other party acting through an Authorized Officer of such party.

19. MISCELLANEOUS

A. COMPANY and DISTRIBUTOR each represent to the other that each has the lawful right to enter into and perform this Agreement without violating the rights of any third parties.

B. This Agreement, together with its Schedules, collectively contain the entire understanding of the parties and supersede, revoke and cancel, without any other consideration being due, any and all other inducements, arrangements, understandings, agreements, representations and warranties, whether oral or written, between the parties hereto or their predecessors, relating to the subject matter of this Agreement. The existence and terms of this Agreement shall remain confidential, except as needed to comply with state or federal law or as agreed upon by the parties. COMPANY expressly reserves all rights relating to its products not expressly granted in this Agreement. DISTRIBUTOR acknowledges that it has not and will not pay any "franchise fee" or any other fee to COMPANY, directly or indirectly, in connection with this Agreement, or any prior agreement, and DISTRIBUTOR shall not be considered or deemed a "franchisee" of COMPANY for any purpose whatsoever. This Agreement does not contemplate and does not require DISTRIBUTOR to establish or maintain a fixed place of business for the sale of COMPANY's Product.

C. The parties agree that the obligations of the parties under this Agreement may be modified or amended only by a written agreement signed by Authorized Officers of both parties. Without limitation, no term contained on any purchase order shall amend or modify this Agreement.

D. Should any provision of this Agreement be illegal, invalid or unenforceable, all other terms and conditions of this Agreement shall remain in full force and effect. The parties shall negotiate in good faith to attempt to modify provisions of this Agreement to implement the original business intent of the parties, and in the absence of agreement on revised terms within sixty (60) days of commencing such negotiations, either party may terminate this Agreement by written notice to the other party.

E. The failure of any party, in any one or more instances, to insist upon full performance of any of the terms, covenants and conditions of this Agreement, or to exercise any right to terminate this Agreement, shall not be deemed a waiver of such provisions or right or any other provision or right. No waiver by any party at any time with respect to any right or provision contained in this Agreement shall be valid unless in writing and signed by Authorized Officers of COMPANY and DISTRIBUTOR.

F. DISTRIBUTOR has complied with and will fulfill its obligations under this Agreement in compliance with all United States and non-United States federal, state, provincial, municipal, and local laws, statutes, legislation, regulations, rules and codes, including the United States Occupational Safety and Health Act, Toxic Substance Control Act, Hazardous Material Transportation Act, Motor Carrier Act, Environmental Protection Act, Fair Labor Standards Act, child labor laws, Food Drug & Cosmetic Act, Executive Order 11246, Consumer Product Safety Act, Robinson-Patman Act, Americans with Disabilities Act, Foreign Corrupt Practices Act, Bioterrorism Preparedness and Response Act, Homeland Security Act, and the Maritime Transportation Security Act.

G. This Agreement is subject to COMPANY's approval and shall not be effective until so approved and until a copy signed by an Authorized Officer of COMPANY has been received by DISTRIBUTOR. Delivery of any draft of this Agreement by COMPANY shall not constitute an offer but shall be understood to be for discussion purposes only.

IN WITNESS WHEREOF, the parties to this Agreement have duly executed this Agreement by their duly authorized officers as of the day, month and year noted below.

STEWART'S BEVERAGES, LLC.		ROHLFING OF DULUTH	
BY:	[signature]	BY:	[signature]
Name:	James C. Epley	Name:	GERALD SPEHAR (Please Print)
Title:	Vice President Licensing	Title:	PRESIDENT
Date:	8/1/04	Date:	July 20, 2004

Schedule 1.B

PRODUCTS

All of the following Products under the Trademark Brand(s) in bottles and/or cans:

All flavors of ready-to-drink regular and diet beverages
(specifically excluding STEWART'S post-mix syrup or premix beverages for fountain soft drinks)

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

Schedule 1.D

TERRITORY

In the State of Minnesota, the following Counties in their entirety:

Carlton	Cook	Lake
St. Louis County:	The Southern half.	
Pine County:	The Northern half.	

***

In the event of a dispute with respect to territorial boundaries between two adjacent DISTRIBUTORS, COMPANY shall have the right to decide such dispute in its sole discretion, and any such decision shall be final and binding upon the parties.

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

Schedule 3.D

COMPANY DIRECT ACCOUNTS

Cracker Barrel

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

<u>SCHEDULE 7A</u>

<u>TRADEMARKS</u>

Stewart's
Fountain Classics
S™

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

Schedule 8.A

Performance Requirements

To be mutually agreed upon in writing on annual basis.

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

Schedule 8.C

COMPANY INFORMATION REPORTING PROGRAM

Stewart's

Distributor Number:
Distributor Contact:
Distributor Name:
City,State:
Fax #:
Phone #:

Cadbury Schweppes Americas Beverages

900 King Street, Rye Brook, NY 10573

Fax: (914) 612-6304

CASE SALES DEPLETION REPORT

Submit via ORDERBEV.COM

Case Sales to be sumitted no later than the 5th working day of the following month

12oz 4-Pack		12oz 4-Pack		12oz 4-Pack		12oz 4-Pack		12oz 4-Pack	
Grape 12z 4pk		Cream Soda 12z 4pk		Orange 'N Cream 12z 4pk		Orange 'N Cream 12z 4pk		Cherry Cream 12z 4pk	
Black Cherry Wishniak 12z 4pk		Root Beer 12z 4pk		Peach 12z 4pk		Key Lime 12z 4pk			

MONTH	
TOTAL	

Schedule 8.H

List of all competing products carried by DISTRIBUTOR immediately prior to signing this Agreement:

Snapple Products

Other Products

Red Bull
Buddy's
1919 Root Beer

ROHLFING OF DULUTH, INC.

STEWART'S BEVERAGES, LLC.

DEPOSITION EXHIBIT
19

October 13, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Dave Watrin
President
Sandstone Distributing, Inc.
24926 Groningen Road
Sandstone, MN 55072

Re: Stewart's Sandstone Distributing Agreement dated 12/16/2004 (the "Agreement")

Dear Mr. Sandstone:

Stewart's Beverages, LLC, and/or its predecessors and affiliates (collectively the "Company") hereby provides Sandstone Distributing, Inc.,("Sandstone Distributing"), prior written notice of its election to not renew the Agreement upon the expiration of the current term on 12/31/2006.

Therefore, please take notice that Sandstone Distributing's Stewart's Agreement will terminate effective the close of business on 12/31/2006 (the "Termination Date"). Regarding transition details, please be advised of the following:

1. If Sandstone Distributing expects to have any remaining saleable inventory of Products in inventory after the Termination Date, please advise the quantity and type by flavor, SKU and the date purchased, together with the costs paid by you for such Products. Sandstone Distributing shall have 15 days following the Termination Date within which to resell to the Company, at Sandstone Distributing's net cost, all remaining saleable inventory of Products and all useable promotional items held by Sandstone Distributing (i.e., those that are not over aged, damaged or outdated).
2. Please advise by the Termination Date if Sandstone Distributing has any pallets that were used to purchase Products and which are in good condition that it wishes to return to the Company and the costs paid by you for such pallets. The Company will reimburse Sandstone Distributing's costs of same.
3. Please advise if Sandstone Distributing has any Brand-identified cold drink equipment, and if so, the number of units, the date of each unit's placement, an estimate of the fair market value, its net book value, and the amount of support paid by the Company for each unit.
4. From any amounts owed to Sandstone Distributing on or after the Termination Date, the Company will deduct outstanding receivables owed by Sandstone Distributing to Company.
5. Effective immediately following the Termination Date, Sandstone Distributing shall not use any of the Brand Trademarks in its business or trade.

Thank you in advance for your cooperation in these matters.
As always, should there be any questions, please contact me directly at 914-612-4480.

Sincerely,

John Gennarelli
Director of Licensing

cc: J. Epley
R. Callan
D. Terry-Braude

Cadbury Schweppes

AMERICAS BEVERAGES

TERMINATION LETTER

DEPOSITION EXHIBIT
15

October 19, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Gerald Spehar
President
Rohlfing of Duluth, Inc.
1 South 24th Avenue West
Duluth, MN 55806

Re: Stewart's Distributor Agreement dated 07/30/2004 (the "Agreement")

Dear Mr. Spehar:

As a follow up to our recent conversation regarding the Stewart's brand, Stewart's Beverages, LLC, and/or its predecessors and affiliates (collectively the "Company") hereby provides Rohlfing of Duluth, Inc.,(the "Distributor"), prior written notice of its election to not renew the Agreement upon the expiration of the current term on 12/31/2006.

Therefore, please take notice that Distributors Stewart's Agreement will terminate effective the close of business on 12/31/2006 (the "Termination Date").
Regarding transition details, please be advised of the following:

1. If DISTRIBUTOR expects to have any remaining saleable inventory of Products in inventory after the Termination Date, please advise the quantity and type by flavor, SKU and the date purchased, together with the costs paid by you for such Products. DISTRIBUTOR shall have 15 days following the Termination Date within which to resell to the Company, at Distributor's net cost, all remaining saleable inventory of Products and all useable promotional items held by DISTRIBUTOR (i.e., those that are not over aged, damaged or outdated).
2. Please advise by the Termination Date if DISTRIBUTOR has any pallets that were used to purchase Products and which are in good condition that it wishes to return to the Company and the costs paid by you for such pallets. The Company will reimburse Distributor's costs of same.
3. Please advise if DISTRIBUTOR has any Brand-identified cold drink equipment, and if so, the number of units, the date of each unit's placement, an estimate of the fair market value, its net book value, and the amount of support paid by the Company for each unit.
4. From any amounts owed to DISTRIBUTOR on or after the Termination Date, the Company will deduct outstanding receivables owed by DISTRIBUTOR to Company.

5. Effective immediately following the Termination Date, DISTRIBUTOR shall not use any of the Brand Trademarks in its business or trade.

Thank you in advance for your cooperation in these matters.
As always, should there be any questions, please contact me directly at 914-612-4480.

Sincerely,

John Gennarelli
Director of Licensing

cc: J. Epley
R. Callan
D. Terry-Braude

DEPOSITION EXHIBIT
13

October 13, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Rick Day
Vice President
Day Distributing Company
5901 Highway 12
Maple Plain, MN 55359

Re: Stewart's

Dear Mr. Day

Previously, Cadbury Schweppes Americas Beverages (the "Company") has offered for purchase and resale by you the Stewart's brand (the "Brand" or the "Product", as applicable). Our sales to you of the Brand has occurred without an agreement defining the roles of the parties or contemplating the market development and changing dynamics for the Brand.

In response to our strategic review of the Brand and the development of plans for future growth, the Company has determined that it would prefer to engage an alternative distributor for the Brand in the entire geographical area currently serviced by Day Distributing Company ("Day Distributing") in the State of Minnesota.

Therefore, the Company hereby provides prior written notice of its election to terminate its relationship with Day Distributing as of the close of business on 12/31/2006 (the "Termination Date").

Regarding transition details, please be advised as follows:

1. If Day Distributing expects to have any remaining saleable inventory of Products in inventory after the Termination Date, please advise the quantity and type by flavor, SKU and the date purchased, together with the costs paid by you for such Products. Day Distributing shall have 15 days following the Termination Date within which to resell to the Company, at Day Distributing's net cost, all remaining saleable inventory of Products and all useable promotional items held by Day Distributing (i.e., those that are not over aged, damaged or outdated).
2. Please advise by the Termination Date if Day Distributing has any pallets that were used to purchase Products and which are in good condition that it wishes to return to the Company and the costs paid by you for such pallets. The Company will reimburse Day Distributing's costs of same.
3. Please advise if Day Distributing has any Brand-identified cold drink equipment, and if so, the number of units, the date of each unit's placement, an estimate of the fair market value, its net book value, and the amount of support paid by the Company for each unit.
4. From any amounts owed to Day Distributing on or after the Termination Date, the Company will deduct outstanding receivables owed by Day Distributing to Company.
5. Effective immediately following the Termination Date, Day Distributing shall not use any of the Brand Trademarks in its business or trade.

Thank you in advance for your cooperation in these matters.
As always, should there be any questions, please contact me directly at 914-612-4480.

Sincerely,

John Gennarelli
Director of Licensing

cc: J. Epley
R. Callan
D. Terry-Braude

Cadbury Schweppes

AMERICAS BEVERAGES

RECD BY KPR
DATE 10-18-6

EXHIBIT 20

PENGAD 800-631-6989

October 16, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Kevin Ryan
Vice President
Mark VII Distributors
475 North Prior Avenue
St. Paul, MN 55104

Re: Stewart's

Dear Mr. Ryan:

Previously, Cadbury Schweppes Americas Beverages (the "Company") has offered for purchase and resale by you the Stewart's brand (the "Brand" or the "Product", as applicable). Our sales to you of the Brand has occurred without an agreement defining the roles of the parties or contemplating the market development and changing dynamics for the Brand. In response to our strategic review of the Brand and the development of plans for future growth, the Company has determined that it would prefer to engage an alternative distributor for the Brand in the entire geographical area currently serviced by Mark VII in the State of Minnesota.

Therefore, the Company hereby provides prior written notice of its election to terminate its relationship with Mark VII effective as of the close of business on 12/31/2006 (the "Termination Date").
Regarding transition details, please be advised as follows:

1. If Mark VII expects to have any remaining saleable inventory of Products in inventory after the Termination Date, please advise the quantity and type by flavor, SKU and the date purchased, together with the costs paid by you for such Products. Mark VII shall have 15 days following the Termination Date within which to resell to the Company, at Mark VII's net cost, all remaining saleable inventory of Products and all useable promotional items held by Mark VII (i.e., those that are not over aged, damaged or outdated).
2. Please advise by the Termination Date if Mark VII has any pallets that were used to purchase Products and which are in good condition that it wishes to return to the Company and the costs paid by you for such pallets. The Company will reimburse Mark VII's costs of same.
3. Please advise if Mark VII has any Brand-identified cold drink equipment, and if so, the number of units, the date of each unit's placement, an estimate of the fair market value, its net book value, and the amount of support paid by the Company for each unit.
4. From any amounts owed to Mark VII on or after the Termination Date, the Company will deduct outstanding receivables owed by Mark VII to Company.
5. Effective immediately following the Termination Date, Mark VII shall not use any of the Brand Trademarks in its business or trade.

Thank you in advance for your cooperation in these matters.
As always, should there be any questions, please contact me directly at 914-612-4480.

Sincerely,

John Gennarelli
Director of Licensing

cc: J. Epley
R. Callan
D. Terry-Braude

DEPOSITION EXHIBIT
14

October16, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David Needham
President / Owner
Needham Distributing Company
6080 Lake Elmo Drive
Stillwater, MN 55082

Re: Stewart's

Dear Mr. Needham:

Previously, Cadbury Schweppes Americas Beverages (the "Company") has offered for purchase and resale by you the Stewart's brand (the "Brand" or the "Product", as applicable). Our sales to you of the Brand has occurred without an agreement defining the roles of the parties or contemplating the market development and changing dynamics for the Brand.
In response to our strategic review of the Brand and the development of plans for future growth, the Company has determined that it would prefer to engage an alternative distributor for the Brand in the entire geographical area currently serviced by Needham Distributing Company ("Needham Distributing") in the State of Minnesota.

Therefore, the Company hereby provides prior written notice of its election to terminate its relationship with Needham Distributing as of the close of business on 12/31/2006 (the "Termination Date").
Regarding transition details, please be advised as follows:

1. If Needham Distributing expects to have any remaining saleable inventory of Products in inventory after the Termination Date, please advise the quantity and type by flavor, SKU and the date purchased, together with the costs paid by you for such Products. Needham Distributing shall have 15 days following the Termination Date within which to resell to the Company, at Needham Distributing's net cost, all remaining saleable inventory of Products and all useable promotional items held by Needham Distributing (i.e., those that are not over aged, damaged or outdated).
2. Please advise by the Termination Date if Needham Distributing has any pallets that were used to purchase Products and which are in good condition that it wishes to return to the Company and the costs paid by you for such pallets. The Company will reimburse Needham Distributing's costs of same.
3. Please advise if Needham Distributing has any Brand-identified cold drink equipment, and if so, the number of units, the date of each unit's placement, an estimate of the fair market value, its net book value, and the amount of support paid by the Company for each unit.
4. From any amounts owed to Needham Distributing on or after the Termination Date, the Company will deduct outstanding receivables owed by Needham Distributing to Company.
5. Effective immediately following the Termination Date, Needham Distributing shall not use any of the Brand Trademarks in its business or trade.

Thank you in advance for your cooperation in these matters.
As always, should there be any questions, please contact me directly at 914-612-4480.

Sincerely,

John Gennarelli
Director of Licensing

cc: J. Epley
R. Callan
D. Terry-Braude

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Day Distributing Co., a Minnesota corporation; Mark VII Distributors, Inc., a Minnesota corporation; Sandstone Distributing Co., Inc., a Minnesota corporation; Needham Distributing Co., Inc., a Minnesota corporation; and Rohlfing of Duluth, Inc., a Minnesota corporation,

Plaintiffs,

v.

Defendant Nantucket Allserve, Inc., f/k/a Stewart's Beverages, LLC, and d/b/a Cadbury Schweppes Americas Beverages, a Delaware corporation,

Defendants.

Case Type: Breach of Contract, Statutory Violation

Civ. No.: 0:07-cv-01132 (PJS/RLE)

PLAINTIFF MARK VII DISTRIBUTORS, INC.'S ANSWERS TO DEFENDANTS' SECOND SET OF INTERROGATORIES AND DOCUMENT REQUESTS

TO: Defendant Nantucket Allserve, Inc., f/k/a Stewart's Beverages, LLC, and d/b/a Cadbury Schweppes Americas Beverages, and its counsel of record, William L. Killion, Esq., Elizabeth Taylor, Esq., Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901:

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Mark VII Distributors, Inc. hereby submits the following Answers and Objections to Defendant's Second Set of Interrogatories and Document Requests.

GENERAL OBJECTIONS

1. Plaintiffs object to Defendants' Interrogatories and Document Requests in their entirety to the extent that they purport to seek information that is precluded from discovery by virtue of attorney-client privilege or attorney work-product doctrine.

either have been or will be produced, to the extent such documents exist. Said customers have only a limited amount of "shelf space" to sell any particular product. By terminating Plaintiff's distributorship with respect to Stewart's brand products and taking over the distribution of the same with respect to Plaintiff's customers, Defendant has interfered with and will continue to interfere with existing and prospective contractual business relationships of Plaintiff.

As to witnesses, Plaintiff answers that the following individuals may have knowledge relevant to Plaintiff's allegations:

- Frank Warner, President and CEO, Day Distributing Co.;
- Kevin Ryan, General Manager and Executive Vice President, Mark VII Distributors, Inc.;
- David Watrin, President, Sandstone Distributing Co., Inc.;
- David Needham, President, Needham Distributing Co., Inc.;
- Gerald Spehar, President, Rohlfing of Duluth, Inc.;
- Michael Stover and/or other former employees of Cable Car Beverage;
- Representatives of Lunds/Byerly's, Supervalu/Cub Foods, Super Target, Walmart, Holiday Station Stores, and other of Plaintiff's customers in Plaintiff's respective territory to which Plaintiff sold the Stewart's brand products; and,
- John Gennarelli, Michael Cernoch, and/or other representatives of Cadbury Schweppes Americas Beverages or its predecessors in interest.

Discovery and investigation are ongoing.

INTERROGATORY NO. 6: With respect to Plaintiffs' Fifth Cause of Action alleging estoppel, please identify:

a. All facts that support or relate to your allegations including, specifically, the "numerous express and implied promises and representations" allegedly made to you and, as to each such promise or representation, the details or when such promise or representation was allegedly made, by whom it was made, and to whom it was made. Also identify as part of your answer the specific "relationships with alternative manufacturers" which you allegedly refrained from entering into as referenced in paragraph 43 of the First Amended Complaint;

b. All witnesses that have knowledge relevant to your allegations; and

c. All documents that support or relate to your allegations.

ANSWER: Objection. This Interrogatory is objected to for the reasons set forth at General Objection No. 1, 3, 4, 5 and 6, above, to the extent it calls for Plaintiff to speculate as to the knowledge of others, to the extent it calls for expert or legal knowledge, analysis, opinions or conclusions, and as exceeding the numerical limit prescribed by the Court. Subject to and without waiving any objection, Plaintiff answers that Defendants predecessor in interest, Cable Car Beverage, initially targeted beer wholesalers within Minnesota to introduce and distribute their gourmet brand soda in order to capitalize on the distributors' established distribution network. In 1992, Mike Stover, a representative of Cable Car Beverage, persistently called Kevin Ryan, General Manager and Executive Vice President of Mark VII, to solicit and induce Plaintiff to carry the Stewart's brand products. Just prior to that time, Rex Distributing Company, another Minnesota distributor, had been carrying the Stewart's brand products. However, Rex Distributing closed down and many of its lines were sold to Miller Acquisition Corporation. Soon thereafter, Miller abandoned the Stewart's line after which no other distributors were selling the Stewart's line in the Minneapolis/St. Paul metropolitan area. Plaintiff was a major distributor in Minnesota with a well-established distribution network and was specifically targeted by Mr. Stover to carry the Stewart's brand products. Mr. Stover came to Minnesota and made several presentations to Plaintiff in an effort to induce it to take on the line. During such presentations, Mr. Stover advised Plaintiff that the new gourmet, upscale soda could be sold at margins as good as if not better than the margins Plaintiff made on the sale of beer in effect guaranteeing Plaintiff that it would derive income from the sale of the Defendants' soft drink in excess of Plaintiff's costs. Prior to making a commitment to carry the brand, Plaintiff and its representatives sampled the brand and discussed with Mr. Stover such items as targeted price to retail, pricing strategy, gross profit margins, laid-in cost, pre-orders, and prospective accounts .

Throughout the tenure of Plaintiff's relationship with Defendant and its predecessors in interest, Plaintiff also participated in various vendor partnership programs created and designed by Defendants, such as discounted pricing and cooperative advertising programs. These programs were all designed to induce Plaintiff to continue to grow and expand the Stewart's brand within Plaintiff's existing and prospective customer base. Defendants also knew or should have known that as a beer wholesalers and franchisee, Plaintiff reasonably believed that Plaintiff's distribution rights would not be terminated without good cause, notice, and an opportunity to cure any such alleged deficiencies. Defendants made both verbal and written comments which lead Plaintiff to believe that Plaintiff would not be arbitrarily terminated. For example, Michael Cernoch sent a memo to all Stewart's distributors dated December 13, 2005, in which he advised all of the Stewart's distributors, "I look forward to a fantastic year as we continue to work together and take the Stewart's brand to the next level." Also, on March 3, 2006, Michael Cernoch sent an e-mail to Mike Ryan, a representative of Plaintiff, in which he stated, "I think we are primed to have a great year as long as the follow through and execution happens." Plaintiff reasonably believed that it would not be arbitrarily and summarily terminated absent good cause. Defendants knew or should have known that these promises and representations would induce action or forbearance on behalf of Plaintiff. Defendants' promises and representations did, in fact, induce action and/or forbearance to Plaintiff's detriment insofar as Plaintiff entered into and maintained their distribution relationship with Defendants, developing and maintaining a market for Stewart's brand products. Plaintiff made a substantial commitment of time, effort and capital in the penetration and development of a market for Stewart's brand products. In further reliance upon Defendants' promises and representations, Plaintiff refrained from entering into relationships with alternative manufacturers to distribute competitive product lines. Plaintiff's reliance upon, and resulting action and/or forbearance, was reasonable under the circumstances.

As to witnesses, Plaintiff answers that the following individuals may have knowledge relevant to Plaintiff's allegations:

- Frank Warner, President and CEO, Day Distributing Co.;

- Kevin Ryan, General Manager and Executive Vice President, Mark VII Distributors, Inc.;

- David Watrin, President, Sandstone Distributing Co., Inc.;
- David Needham, President, Needham Distributing Co., Inc.;
- Gerald Spehar, President, Rohlfing of Duluth, Inc.;
- Michael Stover and/or other former employees of Cable Car Beverage; and,
- John Gennarelli, Michael Cernoch, and/or other representatives of Cadbury Schweppes Americas Beverages.

Discovery and investigation are ongoing.

INTERROGATORY NO. 7: With respect to Plaintiffs' Sixth Cause of Action alleging breach of the implied covenant of good faith and fair dealing, please identify:

a. All facts that support or relate to your allegations including, specifically, "all covenants contained in or reasonably implied by the agreements and course of conduct" referenced in paragraph 46 as having been breached by Cadbury Schweppes;

b. All witnesses that have knowledge relevant to your allegations; and

c. All documents that support or relate to your allegations.

ANSWER: Objection. This Interrogatory is objected to for the reasons set forth at General Objection No. 1, 3, 4, 5 and 6, above, to the extent it calls for Plaintiff to speculate as to the knowledge of others, to the extent it calls for expert or legal knowledge, analysis, opinions or conclusions, and as exceeding the numerical limit prescribed by the Court. Subject to and without waiving any objection, Plaintiff answers that in reliance upon Defendants' agreement and course of conduct with Plaintiff, and the covenants contained in or reasonably implied by the agreement and course of conduct, Plaintiff fully and successfully performed all parts of its agreement with Defendants at all times and invested money, time, resources, skill and expertise in developing the market for Stewart's brand products within Plaintiff's respective exclusive territories. From the inception of Plaintiff's

RESPONSE: Objection. This Request is objected to for the reasons set forth at General Objection No. 1, 2, 3, 4, 5 and 6, above, as overly broad and unduly burdensome, to the extent it seeks information not reasonably calculated to lead to the discovery of admissible evidence, and to the extent it calls for expert or legal knowledge, analysis, opinions or conclusions. Subject to and without waiving any objection, Plaintiff responds that all non-privileged documents responsive to this request have already been produced in connection with this litigation. Discovery and investigation are ongoing.

AS TO RESPONSES AND OBJECTIONS:

Dated: November 5, 2007

MADIGAN, DAHL & HARLAN, P.A.

By: A. L. Dekok

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Attorneys for Plaintiffs

Brawley Distribution Co., Inc. v. Polaris Industries Partners L.P., Polaris Industries L.P., Polaris Industries Associates L.P., Polaris Industries Capital Corp., and W.H. Wendel, Jr.

U.S. District Court, District of Minnesota, Third Division. Civil File No. 3-89-0191. Filed May 1, 1989.

Distributorship Probably Not "Franchise"; Injunction Barring Termination Denied

Minnesota Franchise Act

Preliminary Relief —Injunction Against Termination —Irrepararable Harm —Balance of Harm —Probability of Success on Merits —Public Interest. —A snowmobile and all-terrain vehicle distributor was denied a preliminary injunction barring termination of its distributorship because it failed to establish irreparable harm, a favorable balance of hardships, or probability of success on the merits of its Minnesota Franchise Act claim. The distributor would not suffer irreparable harm if the injunction were denied because an award of damages would be an adequate remedy. The harm suffered by the distributor from termination was outweighed by the injury to the manufacturer that would flow from the injunction. The manufacturer had already taken steps to change its distribution system by entering direct agreements with snowmobile dealers. Issuance of an injunction would require the manufacturer to abrogate those agreements, severely impairing its ability to reestablish these agreements in the future. The distributor was not likely to succeed on the merits of its relationship/termination law claims because the distributorship probably did not qualify as a "franchise" within the law. The public interest factor was not an important consideration in this case, since the cause of action was essentially a private business dispute that affected the public only to the extent that issuance of an injunction would improve or impair consumer access to the manufacturer's products and service.

What Is a Franchise? —Franchise Fee —Wholesale Price Arrangement —Penalty for Charging Above Suggested Price —Minimum Purchase Requirement —Advertising, Training Fees. —A snowmobile and all-terrain vehicle distributorship was probably not a "franchise" within the Minnesota Franchise Act because the distributor did not appear to pay a franchise fee as required by the statute. An alleged penalty imposed on the distributor for charging more than the suggested retail price was not a franchise fee. If the distributor charged more than the suggested price, the distributor was required to pay 50% of the difference to the manufacturer. However, this payment was a legitimate means of limiting the price of the products and not a franchise fee. There was no evidence that the distributor ever charged more than the suggested price or ever paid any additional fee under this arrangement. An alleged minimum purchase requirement was not a franchise fee because the distributor did not establish that the number of all terrain vehicles set for distribution constituted any sales quota. There was evidence that the number of vehicles was renegotiated on at least one occasion and insufficient evidence that the number of vehicles was not based on current market research, proper experience with the distributor, and valid business purposes. Fees for training seminars, for advertising, and for processing warranty work constituted ordinary business expenses that could not amount to franchise fees. The advertising programs benefitted the distributor. The warranty work apparently caused no out-of-pocket expenses to the distributor; therefore, it could not be characterized as an expense. Since the distributorship was not shown to be a "franchise" at this stage of the litigation, the distributor failed to demonstrate a likelihood of success on the merits of its franchise law claim.

Memorandum and Order

[In full text]

MAGNUSON, D.J.: This matter is before the court upon the motion of Brawley Distributing Company, Inc. (Brawley) for a preliminary injunction to prevent the defendants (collectively referred to as Polaris) from terminating a distributorship agreement. For the reasons set forth below the court denies this motion.

Factual Background

Defendants manufacture snowmobiles, all-terrain vehicles (ATVs) and related parts, accessories and clothing. Plaintiff is a distributor of Polaris products and lawn and garden products manufactured by other companies. On April 1, 1982, Brawley and Polaris executed a one-year distributorship agreement designating Brawley as a nonexclusive distributor of Polaris snowmobiles. The parties renewed the distributorship agreement on an annual basis in 1983, 1984 and 1985, essentially on the same terms as the 1982 agreement.

In 1985 Polaris began to manufacture ATVs. Polaris and Brawley executed a distributorship agreement for ATVs similar to the one in effect for snowmobiles. The parties renewed each of the agreements on substantially the same terms annually for the years 1985 through 1988. On March 2, 1989, prior to the March 31 termination date of the distributorship agreements, Polaris notified Brawley that it would not renew the agreements for the coming year. Polaris had decided to change its distribution network from the existing two-tiered system to a dealer-direct system. All other snowmobile or ATV manufacturers that market their products in the United States use dealer-direct systems. Polaris has already taken steps to implement the new distribution system, including reviewing and accepting several applications of prospective Polaris direct dealers.

Brawley filed this action in the United States District Court for the Middle District of Pennsylvania on March 29, 1989. Brawley simultaneously filed a motion for a temporary restraining order enjoining defendants from terminating the distributorship. Brawley's seven-count complaint alleges unlawful termination of a franchise in violation of the Minnesota Franchise Act (MFA), Minn.Stat. §80C.01 *et seq.;* breach of an oral commitment to enter into a two-year distributorship agreement; misrepresentation; unjust enrichment; breach of contract; and federal and state anti-trust violations. The complaint seeks injunctive relief only for its claims under the MFA and breach of contract counts.

The Honorable Sylvia H. Rambo denied on the merits Brawley's motion for a temporary restraining order and granted a motion by Polaris to transfer the action to Minnesota pursuant to 28 U.S.C. §1404(a). Upon transfer Brawley sought a preliminary injunction to prevent Polaris from terminating the distributorship agreement. A hearing was held on April 21, 1989, in which Brawley relied solely on its MFA claim as the basis for an injunction. Brawley contends that it is a franchisee under the MFA, and as such, it was entitled to 180-day notice prior to termination. Since Polaris failed to give Brawley adequate notice, Brawley claims that the MFA authorizes injunctive relief. Polaris denies that Brawley is a franchisee and argues that the MFA therefore does not apply to this case.

Analysis

In deciding whether to grant a motion for a preliminary injunction the court must consider four factors: (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the injury that would be inflicted upon other parties litigant by granting the injunction; (3) the probablity that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). No single factor is dispositive, but the movant bears the burden of proving that the four factors taken as a whole weigh in favor of granting a preliminary injunction. *Geico Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

I. *Irreparable Harm*

Brawley has failed to establish that absent an injunction it will suffer irreparable harm. Each cause of action alleged in Brawley's complaint provides for damages, and several include claims for punitive damages, treble damages or attorneys' fees. Where a moving party's claims are measurable in damages, a preliminary injunction is not necessary because the threat of irreparable harm is reduced. *O.M. Droney Beverage Co. v. Miller Brewing Co.,* 365 F.Supp. 1067, 1070 (D. Minn. 1973).

In *Droney,* a Miller Brewing Company distributor sought a temporary restraining order to continue the party's relationship after being notified by Miller that it was being terminated. The *Droney* court described that case as presenting "a classical example of a situation where the remedy of law in the form of an award of damages should plaintiffs prevail is adequate." *Id.* at 1068. In reviewing the plaintiff's claim for injunctive relief to reinstate a 33 year-old distributor relationship, the court concluded that a manufacturer's alleged failure to abide by its distributorship contracts was measurable in damages. *Id.* at 1070.

II. ***Balance of Harm***

To the extent that Brawley will suffer any irreparable harm, that harm is outweighed by the injury to Polaris that would flow from an injunction. Brawley requests the court to force the parties to remain in a business relationship that is unsatisfactory to Polaris. The court's power to do so is limited. As the *Droney* court acknowledged, this court "could never issue any sort of permanent injunction requiring the two parties to continue in perpetuity to do business with each other." *Id.* At some point, either now or in the future, Polaris has the right to use the type of distribution system that best serves its own interests. Polaris has already taken steps in this direction and has reached agreements with a number of dealers. If the court were to enjoin Polaris now, Polaris would be forced to abrogate those agreements. This result would severely impair the ability of Polaris to reestablish relationships with these dealers in the future.

III. ***Probability of Success on the Merits***

The majority of the parties' briefs and oral argument was devoted to the issue of Brawley's probability of success on the merits, and in particular, whether Polaris violated the Minnesota Franchise Act. In *Dataphase* the Court of Appeals for the Eighth Circuit cautioned against considering likelihood of success in isolation and engaging in an estimation of the mathematical probability of success. 640 F.2d at 113. However, in this case the parties have had ample time to explore and argue the relevant issues under the MFA, and the court has had an opportunity to review both the submissions and the applicable law in this matter. Therefore the probability that Brawley will or will not succeed on the merits in this case weighs heavily at the preliminary injunction stage.

[***What Is a Franchise?*****]**

In order for a distributor to be a franchisee under the MFA, three prerequisites must be satisfied. The three elements of a franchise are described in Minn. Stat. §80C.01 Subd. 4 and were summarized by the Minnesota Supreme Court in *Martin Investors, Inc. v. VanderBie,* 269 N.W. 2d 868, 874 (Minn. 1978):

> (1) A right granted to the franchisee to engage in business using the franchiser's trade name or other commercial symbol, (2) a "community of interest" in the marketing of goods or services between the franchisee and franchiser, and (3) a "franchise fee" paid by the franchisee.

[***Franchise Fee*****]**

In this case only the third element, payment of a franchise fee, is contested. Minn. Stat. §80C.01 Subd. 9 defines franchise fee as:

any fee or charge that a franchisee or sub-franchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges; provided, however, that the following shall not be considered the payment of a franchise fee:

(a) The purchase of goods or agreement to purchase goods at a bona fide wholesale price.

This definition is potentially very broad, but the types of fees described here are not franchise fees unless the alleged franchisee is required to pay them for the right to do business under a franchise agreement.

The distributorship agreements between Brawley and Polaris expressly state that Brawley "for all purposes shall be an independent contractor, and not an agent, employee, partner, joint venturer, or franchisee of Polaris." This clause suggests that the parties intended that the MFA not apply to their business relationship. Brawley now contends that a potential franchisee may not waive its rights under the MFA and that several costs incurred or payments made during Brawley's relationship with Polaris qualify as franchise fees. Without ruling on the waiver issue, the court will address Brawley's arguments regarding the franchise fee.

Brawley characterizes the wholesale price arrangement for ATVs as a franchise fee because Polaris allegedly penalizes Brawley for charging more than the suggested price. Polaris does specify a suggested sale price for its ATVs. If Brawley charges more than the suggested price, Brawley is required to pay 50% of the difference to Polaris. This payment is not a franchise fee. The arrangement is merely a legitimate means of limiting the price of Polaris products. Indeed, there is no evidence that Brawley ever charged more than the suggested price or paid Polaris any additional fees under this arrangement.

[*Minimum Purchase Requirement*]

Brawley also contends that Polaris imposed minimum purchase requirements for ATVs and that this constitutes a franchisee fee. The Minnesota Court of Appeals acknowledged this possibility in *OT Industry, Inc. v. OT-Tehdas OY Santasalo-Sohl-Berg AB*, 346 N.W.2d 162 (Minn. Ct. App. 1984). The court stated that "a minimum volume requirement, even at *bona fide* factory prices, may in itself be a franchise fee if the franchisee is required to purchase amounts or items that it otherwise would not." *Id.* at 166.

Brawley has failed to provide credible evidence of the elements described in *O.T. Industries.* Brawley has not established that the number of ATVs set by Polaris for distribution by Brawley was any sort of minimum sales quota. In fact there is evidence that the number of ATVs was renegotiated on at least one occasion. Moreover, evidence is lacking to show that the number of ATVs was not based on current market research, priorexperience with Brawley and valid business purposes.

[*Advertising, Training Fees*]

Brawley finally claims that it was required to pay Polaris fees for advertising and for training seminars and to process warranty work on behalf of Polaris. According to Brawley these expenses are franchise fees. The court disagrees. At most they are ordinary business expenses. The advertising programs employed by Polaris were intended to encourage consumers to purchase more Polaris products from dealers. This in turn would cause dealers to demand more products from distributors. Thus Brawley benefitted from the payments. The warranty work performed by Brawley apparently caused no out of pocket costs to Brawley, and therefore cannot be characterized as an expense at all. At this stage of the litigation the court is unable to discover any hidden royalty payments or franchise fees.

IV. *Public Interest*

The final *Dataphase* factor, the interests of the public, is not a serious concern in this case. The cause of action is essentially a private business dispute between Brawley and Polaris. The public is affected only to the extent that issuance of an injunction would improve or impair consumer access to Polaris products and service. The court need not decide whether distributing Polaris products through Brawley or through a dealer-direct system is superior. Both systems should adequately provide Polaris products and service. Therefore the public interest is not an important consideration.

Having considered the four factors outlined in *Dataphase*, the court determines that Brawley has not met its burden of demonstrating the need for a preliminary injunction.

Accordingly, It Is Ordered that plaintiff's motion for a preliminary injunction shall be, and hereby is, Denied.

STATE-DECISION, BUSINESS FRANCHISE GUIDE ¶10,820, **R.A., Inc., Parkview Management, Inc., Richard J. Arrell, and Paul C. Schnoebelen, III v. Anheuser-Busch, Inc.** (Dated December 21, 1995)

R.A., Inc., Parkview Management, Inc., Richard J. Arrell, and Paul C. Schnoebelen, III v. Anheuser-Busch, Inc.

Minnesota District Court, Fourth Judicial District, Hennepin County. File No. CT 95-001778. Dated December 21, 1995.

Common Law —Tortious Interference with Contract —Refusal to Approve Transfer —Standing to Sue —Prospective Transferee, Officers. —Prospective purchasers of a beer distributorship lacked standing to bring tortious interference claims against a manufacturer for failing to disapprove the sale of the distributorship within the time period required by the distribution agreement. The prospective purchasers were not parties to the agreement and, therefore, could not challenge the manufacturer's compliance with the agreement's terms.

Back reference: ¶1290.

Common Law —Tortious Interference with Contract —Refusal to Approve Transfer —Existence of Contract. —No valid contract existed between a beer distributor and prospective purchasers of the distributorship because the manufacturer had disapproved the proposed transfer within 30 days of receiving the final requested information regarding the proposed purchasers, as required under the distribution agreement. Therefore, the prospective purchasers could not prevail on their tortious interference with contract claims against the manufacturer.

Back reference: ¶1290.14.

Common Law —Tortious Interference with Contract —Refusal to Approve Transfer —Existence of Contract —Condition Precedent. —A beer manufacturer's approval of a proposed distributorship transfer was a condition precedent to every agreement between the distributor and the prospective transferees. Since the manufacturer had not approved the transfer, no valid contract existed between the parties. Therefore, the manufacturer was entitled to summary judgment on tortious interference with contract claims brought by the prospective transferees.

Back reference: ¶1290.93.

Common Law —Tortious Interference with Contract —Refusal to Approve Transfer —Duty to Act Reasonably. —A brewer did not have a duty towards prospective distributorship transferees to act reasonably in approving or disapproving the proposed transfer. Therefore, tortious interference claims predicated on the existence of such a duty were dismissed. Even if such a duty existed, the brewer satisfied it by conducting an extensive financial, legal, and market analysis of the proposed transfer prior to disapproval. A duty to act reasonably did not equal a duty to make the correct business decision.

Back reference: ¶1290.

Common Law —Tortious Interference with Prospective Advantage —Refusal to Approve Transfer —Source of Business Opportunity. —A brewer could not have tortiously interfered with the prospective economic advantage of a distributorship's proposed transferees by refusing to approve the transfer. Although the contracts allegedly interfered with were between the distributor and the prospective transferees, the brewer was the source of the business opportunity that would have been obtained by the transferees and, as a matter of law, could not have tortiously interfered with that opportunity.

Back reference: ¶1290.

Common Law —Tortious Interference with Prospective Advantage —Refusal to Approve Transfer —Justification —Improper Intent, Means. —A beer manufacturer's decision not to approve a proposed distributorship transfer was justified as a matter of law and did not constitute tortious interference with the proposed transferees' prospective economic advantage. Other than conclusory allegations by the proposed transferees, there was no evidence that the manufacturer's refusal to approve the transfer resulted from an improper intent or improper means —which would defeat the manufacturer's justification defense.

Back reference: ¶1290.

Procedure —Sanctions —Frivolous Claims. —Rule 11 sanctions against the prospective purchasers of a beer distributorship were not warranted, even though their tortious interference claims against a manufacturer for refusing to approve the proposed transfer were summarily dismissed.

Back reference: ¶1860.45.

MEMORANDUM OF LAW

[In full text]

BUSH, D.J.: This case arises from an attempted sale of a beer wholesalership. Pursuant to a contract between the brewer and the owners of the wholesale business, the brewer refused to approve the sale of the business. The prospective purchaser of the business then sued the brewer, alleging tortious interference with contract and tortious interference with prospective economic advantage. Defendant brewer now moves for summary judgment. Plaintiffs also move for summary judgment on the issue of defendant's liability.

Facts

Anheuser-Busch, Inc. ("A-B") is a brewer of beers. A-B sells the beer through a network of authorized wholesalers. Capitol City Distributing Co., Inc. ("Capitol City") was the exclusive wholesaler of A-B products in the eastern metropolitan region, including most of Ramsey County and parts of Washington, Dakota, and Anoka counties.

Plaintiff R.A., Inc., ("RA") is a corporation formed on or about January 25, 1994 to purchase Capitol City. Plaintiff Richard Arrell is a shareholder of RA and is also a director of RA. Arrell was the general manager of Capitol City and had an agreement to serve as RA's President and Chief Executive Officer. Plaintiff Paul Schnoebelen is also a director of RA. Schnoebelen had a written employment contract to serve as RA's Chief Financial Officer. Plaintiff Parkview Management, Inc. ("Parkview") is a corporation wholly owned by Schnoebelen and had a written contract to provide management services to RA. Non-party Beechwood Partners, L.P., ("Beechwood") is the other RA shareholder. Parkview is the general partner of Beechwood.

A-B had a written agreement with Capitol City entitled the "Anheuser-Busch, Inc. Wholesaler Equity Agreement" ("Equity Agreement"). The Equity Agreement, drafted by A-B, sets forth the terms and conditions governing Capitol City's wholesaler relationship with A-B and Capitol City's rights to distribute A-B products within the eastern metropolitan territory. The Equity Agreement provides that it is a personal services contract. Equity Agreement, Art. 2.

The Equity Agreement also has provisions relevant to a change in ownership. Paragraph 4 and Exhibits 5, 6, and 7 detail procedures concerning A-B's process for evaluating proposed changes in wholesaler ownership and the standards A-B applies in deciding whether to approve a proposed sale. In the agreement, Capitol City agreed that it would not sell, transfer, or assign its right to wholesale A-B's products without first obtaining A-B's written consent. Equity Agreement Art. 4. According to the agreement, if A-B approved a sale of Capitol City, then A-B would either enter into a new Equity Agreement with the purchaser, or would permit Capitol City to assign its rights under the existing A-B/Capitol City Equity Agreement.

The Equity Agreement lists factors that A-B might take into consideration in evaluating a prospective purchaser, including financial capability, business experience, and moral character and personality. Equity Agreement, Art. 4(b)(iv). Under the Agreement, Capitol City was obligated to provide A-B with the appropriate information to evaluate the potential purchaser. Equity Agreement, Art. 4(b)(iii).

Exhibit 6 to the Equity Agreement governs the collection of information by A-B for the purpose of evaluating the proposed purchaser. After Capitol City requested A-B's approval of a sale of the wholesalership, A-B had thirty days in which to notify Capitol City of its decision. Equity Agreement, Exhibit 6, ¶1(b). However, if A-B determined that it needed more information, A-B could request additional information within ten days of receipt of the request for approval. Equity Agreement, Exhibit 6, ¶2. After receiving new information, A-B had another ten days to request additional information or 30 days to make a decision. Equity Agreement, Exhibit 6, ¶4. This process continues until A-B makes a decision. A-B's failure to make a decision or request additional information in a timely manner “automatically constitute[s] approval of the proposed change in ownership.” Equity Agreement, Art. 4(e). If A-B decided not to approve the proposed transfer, the Equity Agreement gave A-B the right of first refusal to purchase the wholesalership. Equity Agreement, Art. 4(d).

The Equity Agreement states that no third parties, such as prospective purchasers, have claims against A-B. Equity Agreement, Art. 4(f). None of the plaintiffs is a party to the Equity Agreement and all parties agree that plaintiffs are not third party beneficiaries to that contract.

On or about May 26, 1993, Richard Arrell and Paul Schnoebelen, on behalf of a corporation to be formed, entered into a letter of intent with the shareholders of Capitol City. The letter provided that the corporation would purchase substantially all of Capitol City's assets, including its rights under the Equity Agreement.

On or about June 2, 1993, A-B received a Request for Approval of Proposed Change of Ownership from Capitol City owners Michael Groppoli and Lauro DiSanto. Over the next few weeks, A-B requested information from Capitol City concerning A-B's analysis of RA. As part of one of those requests, A-B asked Capitol City to obtain information from the Bureau of Alcohol, Tobacco and Firearms (“BATF”) and forward it to A-B. Over the course of the next year, A-B requested information necessary to complete its extensive analysis of RA and interviewed plaintiffs. Capitol City responded to A-B's requests for information.

On February 15, 1994, Richard Arrell, on behalf of RA, and Michael Groppoli and Lauro Di Santo, on behalf of Capitol City, signed an Acquisition Agreement.

On May 11, 1994, Schnoebelen forwarded the information to A-B from the BATF that A-B had earlier asked Capitol City to provide.

On May 31, 1994, Capitol City attorney Elliot Kaplan sent a letter to A-B executive Robert Goughenour, informing A-B that Capitol City believed a response was due regarding A-B's decision. On June 3, 1994, A-B attorney Dan Kolditz responded to Kaplan, explaining that the last information had been received on May 11, 1994, making a decision due on June 10, 1994.

On June 10, 1994, A-B informed Capitol that it was denying approval of the transfer of Capitol City to RA. The disapproval letter stated that A-B was concerned that RA would be unable to comply with Equity Agreement marketing and capital expenditure requirements while servicing its debt, that RA would breach several loan covenants which would place it in default, and that RA would have other financial difficulties. In addition, A-B was concerned that many of the provisions of the R.A. Shareholders' Agreement imposed serious and unacceptable constraints upon the management and business operations of RA. The letter also noted a concern about veto power given to the limited partners, saying the provision indicated that the limited partners lacked confidence in Arrell's ability to manage the business.

The disapproval letter also indicated that, pursuant to the Equity Agreement, A-B intended to exercise its right to purchase the wholesalership at the price and under the terms applicable to the proposed sale to RA. Shortly thereafter, Capitol City was purchased by Quality Beverage Sales and Service Limited Partnership n/k/a/ Capitol Beverage Sales, Limited Partnership. Anheuser-Busch Investment Capitol Corporation owns eighty percent of Capitol Beverage Sales and is the limited partner. The other twenty percent owner and general partner is a corporate entity owned by Paul Morrissey, a former A-B employee. Morrissey is the general manager of the business.

Plaintiffs commenced this lawsuit against defendant alleging that: 1) A-B tortiously interfered with RA's contract to purchase Capitol City, 2) A-B tortiously interfered with the contract between Parkview and RA, 3) A-B tortiously interfered with Arrell's economic expectancy in his relations with RA, and 4) A-B tortiously interfered with Schnoebelen's employment contract with RA.

This matter is presently before the court on three motions: 1) defendant's motion for summary judgment on all claims asserted by plaintiffs, 2) plaintiffs' motion for summary judgment on the issue of defendant's liability, and 3) plaintiff's motion to compel discovery. The court considers each motion separately.

SUMMARY JUDGMENT STANDARD

The court may render summary judgment “when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. In deciding the motion, the court must view evidence in the light most favorable to the nonmoving party. *Petersen v. DeKalb Pfizer Genetics*, 354 N.W.2d 887, 889 (Minn.Ct.App. 1984). If any doubt exists as to the existence of a genuine issue of material fact, then the doubt must be resolved in favor of finding that the fact issue exists. *Lubbers v. Anderson*, 539 N.W.2d 398 (Minn. 1995).

The moving party carries the burden of proof and persuasion to establish that no genuine issues of material fact exist. *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988); *Grand Northern, Inc. v. West Mall Partnership*, 359 N.W.2d 41, 44 (Minn.Ct.App. 1988). The moving party must also demonstrate that it is entitled to summary judgment as a matter of law. *Vacura v. Haar's Equipment, Inc.*, 364 N.W.2d 387, 391 (Minn. 1987).

Once the moving party makes a prima facie case for summary judgment, the non-moving party must come forward to defeat the motion with “material facts” which show something more than “some metaphysical doubt.” *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.Ct.App. 1989). A “material fact” is one that will affect the outcome or result of a case depending on its resolution. *Musicland Group Inc. v. Ceridian* Corp., 508 N.W.2d 524, 531 (Minn.Ct.App. 1993). To survive a summary judgment motion, a party must make a showing sufficient to establish the existence of all elements essential to that party's case. *Glass Service Co. v. State Farm Ins. Co.*, 530 N.W.2d 867, 870 (Minn.Ct.App. 1995).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment on the issue of defendant's liability on all counts. To prevail on the claims for tortious interference with contract, a plaintiff must show: 1) existence of contract, 2) alleged wrongdoer's knowledge of contract, 3) intentional procurement of the contract's breach, 4) without justification, and 5) damages resulting therefrom. *Royal Realty Co. v. Levin*, 244 Minn. 288, 292, 69 N.W.2d 667, 671 (1955). The basis for plaintiffs' interference with contract claim is the Acquisition

Agreement between RA and Capitol City, the Parkview Management contract, and Schnoebelen's employment contract.

Plaintiff Arrell has a claim against A-B for tortious interference with prospective economic advantage. To prevail, the plaintiff must show that defendant intentionally and improperly interfered with plaintiff's prospective contractual relations. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982). The interference may consist of inducing or otherwise causing a third person not to enter into or continue the prospective relation or preventing the other from acquiring or continuing the prospective relation. *Id.* The basis of plaintiffs' tortious interference with prospective economic advantage claim is Arrell's agreement with RA to serve as president.

Plaintiffs claim that there are no genuine issues of material fact remaining on the issue of defendant's liability to all of the plaintiffs. Plaintiffs claim that all elements of the claims of tortious interference with contract and tortious interference with prospective economic advantage have been met.

1. *Plaintiffs' standing to challenge compliance with the Equity Agreement*

The basis of plaintiffs' summary judgment motion is that A-B failed to disapprove the sale of Capitol City in the time frame required by the Equity Agreement and thereby automatically approved the sale of Capitol City. The parties to the Equity Agreement were A-B and Capitol City. None of the plaintiffs were parties to the Equity Agreement and all parties agree that plaintiffs were not third party beneficiaries of the Equity Agreement. The only entity with standing to challenge A-B's compliance with the terms of the Equity Agreement is Capitol City. [1] Capitol City is not a party to this action. Because none of the plaintiffs are parties to the agreement and are not third party beneficiaries, they lack standing to bring a claim based on the Equity Agreement.

2. *Existence of a contract*

Even if plaintiffs had standing to challenge A-B's compliance with the Equity Agreement, plaintiffs have not demonstrated that they had a valid contract and are entitled to summary judgment. The condition precedent present in that agreement required approval of the transfer by A-B. Plaintiffs claim the condition precedent was satisfied when A-B automatically approved the sale of Capitol City according to the terms of the Equity Agreement between A-B and Capitol City.

The Equity Agreement provided that if A-B failed to take action within any of the time frames established in Exhibit 6 to the Agreement, the proposed purchase was approved automatically. Exhibit 6 required A-B to either render a decision regarding the purchase within 30 days of receiving requested information from Capitol City, or to make a request for further information within 10 days of the last received information.

Plaintiffs claim that A-B received all of the information it had requested from Capitol City on August 2, 1993. Therefore, A-B automatically approved the transfer on September 1, 1993 if no further requests for information had been made. However, the evidence shows that on June 11, 1993, A-B requested documentation concerning information Capitol City had requested from BATF. A-B had not received the information as of September 1, 1993. Therefore, A-B did not automatically approve the purchase on September 1, 1993.

Plaintiffs also claim that A-B automatically approved the sale on May 28, 1994. A-B received information from Capitol City on April 29, 1994. On May 11, 1994, A-B requested additional information, but plaintiffs claim it was not a proper request. However, even if the request was not proper, A-B still had a request for information outstanding. The BATF information that A-B had requested from Capitol City in June, 1993 was not received by A-B until May 11, 1994. A-B notified Capitol City of its disapproval of the sale on June 10, 1994. Therefore, the notification of disapproval was timely.

Because plaintiffs lack standing to challenge A-B's compliance with the terms of the Equity Agreement and because A-B notified Capitol City of its disapproval in a timely manner, plaintiffs' motion for summary judgment is denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on both the tortious interference with contract and the tortious interference with prospective economic advantage claims asserted by plaintiffs.

Tortious Interference with Contract

1. ***Condition Precedent***

As discussed above, to prevail in an action for tortious interference with contract, a plaintiff must show: 1) existence of contract, 2) alleged wrongdoer's knowledge of contract, 3) intentional procurement of the contract's breach, 4) without justification, and 5) damages resulting therefrom. *Royal Realty Co. v. Levin*, 244 Minn. 288, 292, 69 N.W.2d 667, 671 (1955).

Defendant's first argument in support of its summary judgment motion is that none of the plaintiffs had valid, existing contracts. Defendant claims that A-B's approval of the sale of Capitol City to RA was a condition precedent to each of the contracts which are the basis of this claim. Defendant claims that because the condition was not satisfied, the contracts never actually came into existence.

A condition precedent is a condition which is to be performed before the agreement of the parties becomes operative. “A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend.” *Lake Company v. Molan*, 269 Minn. 490, 498-99, 131 N.W.2d 734, 740 (1964) (quoting *Chambers v. Northwestern Mutual Life Ins. Co.*, 64 Minn. 495, 497, 67 N.W. 367, 368).

The Minnesota Court of Appeals has held that a condition precedent prevents a party from acquiring any rights under the contract at issue unless the condition occurs. *Aslakson v. Home Savings Association*, 416 N.W.2d 786, 789 (Minn.Ct.App. 1987). A breach of contract does not occur when a contract is conditioned on third-party approval and the approval is not received. *Id.* A claim for tortious interference with contract cannot prevail if a condition precedent has not been met because there is not a valid contract, a necessary element of the tort. *Id.*

In *Aslakson,* plaintiffs entered into a purchase agreement with a prospective buyer of their mobile home. The agreement contained the following language: “This offer is contingent upon buyer being able to assume the loan.” *Id*. at 787. Defendant did not approve the buyer's assumption of the loan because defendant found the buyer's credit rating unsatisfactory. *Id*. A second prospective purchaser was also found uncreditworthy by defendant. *Id*. Plaintiffs sued, claiming tortious interference with contract, alleging that defendant had wrongfully rejected the applications of the prospective purchasers. The Minnesota Court of Appeals affirmed the trial court's grant of summary judgment to defendants. “[A] breach of contract does not occur when a contract is conditioned on third party approval and the approval is not received.” *Id*. at 789. The Court of Appeals held that because there had been no valid contract, there could not be a claim for tortious interference with contract. *Id*. at 789.

In *Aslakson,* the seller of the mobile home was the plaintiff. In the instant case the prospective buyers of Capitol City and others who would benefit from the prospective sale are the plaintiffs. Capitol City is not a party to this lawsuit. Plaintiffs argue that *Aslakson* was decided based upon reasonable refusal and not because of the failure of the condition precedent. The Court of Appeals gave alternate reasons for affirming the trial court's granting of summary judgment. In the instant case, as in *Aslakson*, this court believes that even if there was a valid contract, A-B had a valid justification for its decision and did not act unreasonably in denying the transfer of Capitol City.

Plaintiffs claim that contracts which are void due to the nonoccurrence of a condition precedent may nonetheless give rise to actionable interference. Plaintiffs base this assertion on the Restatement Second of Torts. The Restatement provides that by reason of the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, or conditions precedent, the third person may be in a position to avoid liability for any breach. "The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided." RESTATEMENT (SECOND) OF TORTS §766 cmt. f(1979). The Restatement is a secondary source and is not binding on this Court. Since this issue has been clearly decided by the Minnesota Court of Appeals decision in *Aslakson*, any secondary sources are not persuasive.

Plaintiffs also cite *Royal Realty Co. v. Levin,* 244 Minn. 288, 69 N.W.2d 667 (1955), claiming that it stands for the proposition that even if a contract is unenforceable between the parties, it is still a "contract" for purposes of evaluating the first element of a claim for tortious interference. In *Royal Realty*, the court considered whether a contract which was not enforceable against the other contracting party because of a Statute of Frauds violation was still actionable for interference. The Minnesota Supreme Court decided that a contract, unenforceable under the Statute of Frauds, was still subject to a tortious interference claim. 69 N.W.2d at 672. The Court did not make a broad assertion that all unenforceable contracts are subject to interference claims. Furthermore, the Court did not discuss conditions precedent at all. This case presents a different issue than *Royal Realty.*

Each contract upon which this action is based contains a clause which conditions enforceability of the contract on A-B's approval of the transfer of Capitol City to RA. [2] Because each contract contains a condition precedent which has not been satisfied, none of the contracts became valid or enforceable. Therefore, plaintiffs have not met the first element of the claim of tortious interference with contract.

2. *Duty to act reasonably*

Plaintiffs claim that A-B had a duty to act reasonably even if, because of the condition precedent, the contract was not valid. In support of this contention plaintiffs cite a Hennepin County District Court opinion in which an appeal is currently pending. *Adcom Express, Inc. v. EPK, Inc.*, (Henn. Cty. Dist. Ct. April 12, 1995). Plaintiffs claim that *Adcom* stands for the proposition that a franchiser who has a duty to act reasonably in consenting to a transfer of a franchise could not unreasonably deny consent and then escape liability by arguing no contract existed. Plaintiffs argue that the initial determination, in a case where approval of the contract is at issue, is whether the party with the discretion was reasonable, not whether a contract existed.

The *Adcom* decision is clearly distinguishable from the instant case. The *Adcom* decision, even though is was decided in Minnesota was based on California law, not Minnesota law. In addition, in *Adcom,* the franchisee proposing to sell the franchise was a party to the tortious interference with contract claims. Therefore, the seller, to whom the wholesaler had a duty not to be unreasonable in withholding consent, was a party to the lawsuit.

In this case, the Equity Agreement between A-B and Capitol City states that A-B has a duty to act reasonably to Capitol City when considering whether to approve the sale of Capitol City to a prospective purchaser. Equity Agreement, Art. 4(b)(iii). This duty extends only to Capitol City. The Equity Agreement does not impose a duty on A-B to act reasonably toward RA or the other plaintiffs. The duty to act reasonably flows only from the Equity Agreement. At oral arguments, counsel for plaintiffs conceded that A-B did not have a duty to become involved in any business transactions with plaintiffs. Capitol City, the only entity to whom a duty of reasonableness is owed, is not a party to the action. Unlike the plaintiff in *Adcom,* the plaintiffs here were neither parties to, nor third party beneficiaries of, the Equity Agreement, from which the duty not to unreasonably withhold consent flows.

Even if A-B would have had an obligation to act reasonably toward the plaintiffs, A-B satisfied that duty as a matter of law. The record shows that A-B completed an extensive financial, legal, and marketing analysis of RA's proposal to buy Capitol City. Plaintiffs contend that A-B used an incorrect “base case” and applied formulas incorrectly, and thus their outcomes were flawed. Whether or not that is true is irrelevant in deciding whether they acted reasonably. The duty to act reasonably does not mean that A-B had a duty to make a correct business decision. A-B did a full investigation before refusing to approve the transfer of Capitol City to RA. [3] In disapproving the sale of Capitol City to RA, A-B was simply doing what it had a right to do under the Equity Agreement. Even if they made predictions about RA or the wholesale business in the St. Paul territory that turned out to be inaccurate, that does not mean that they were unreasonable in their denial of consent to transfer Capitol City.

There are no genuine issues of material fact regarding plaintiffs' claims for tortious interference with contract. Defendant is entitled to summary judgment as a matter of law.

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

1. *Source of the business opportunity*

Defendant's first argument in support of its motion for summary judgment on the tortious interference with prospective economic advantage claim is that it is not actionable against A-B because A-B was the source of the business opportunity allegedly interfered with.

It is well settled in Minnesota law that a claim of tortious interference with existing contract is only actionable against third parties, not one of the parties to the contract. A party is not liable for interfering with its own contract. *Nordling v. Northern States Power Co.,* 478 N.W.2d 498, 505 (Minn. 1991); *Bouten v. Richard Miller Homes, Inc*., 321 N.W.2d 895, 901 (Minn. 1982). Minnesota courts have not previously decided whether or not interested third parties can be held liable for tortious interference with prospective economic advantage. However, courts in other states provide guidance on this issue.

A Florida court decided that no cause of action for tortious interference existed as a matter of law against a defendant who was a party to the business relationship interfered with. *Genet Co. v. Annheuser[sic]-Busch, Inc.*, 498 So.2d 683, 684 (Fl. Dist. Ct. App. 1986). In the *Genet* case, owners of an A-B wholesalership had a Wholesaler Equity Agreement with A-B which gave A-B the right to approve or disapprove any sale of the wholesalership. The plaintiffs in the case entered into an agreement to purchase the business. The written agreement was conditioned on A-B's approval of the sale. A-B did not approve the transaction. *Id.* The plaintiffs then filed suit, claiming that A-B's refusal to approve the sale tortiously interfered with their prospective economic relations. The court granted defendant's summary judgment motion because “A-B had the contractual right ... to approve or disapprove any proposed transfer ... . Thus, A-B was not a disinterested third party to plaintiffs' agreement.” 498 So.2d at 684. The court also noted that “A-B was the source of the business opportunity which plaintiffs sought. The tort of willful interference with a business relationship does not exist where the defendant was the source of the business opportunity allegedly interfered with.” *Id.*

The Supreme Court of Kansas reached the same conclusion when dealing with a prospective purchaser of a General Motors dealership. *Noller v. GMC Truck & Coach Div.,* 244 Kan. 612, 772 P.2d 271 (Kan. 1989). The plaintiff entered into an agreement to purchase an existing GMC dealership. The purchase agreement was conditioned on GMC's approval of the sale. In addition, the agreement between the existing dealer and GMC gave GMC the right to approve any proposed sale. 772 P.2d at 272. When GMC did not approve the sale, the prospective purchaser sued, claiming tortious interference with prospective business opportunities. The district court granted summary judgment because the alleged interference did not arise from a relationship between the plaintiff and a third person, but from plaintiff's potential relationship with GMC. The Supreme Court of Kansas affirmed, stating that “the tort of interference with a prospective business advantage occurs where a party improperly interferes with a prospective business advantage of a *third person.*” *Id.* at 276 (emphasis in original).

In this case, although the contracts that are the basis for the tortious interference claim are between RA and

Capitol City, the business opportunity that RA was seeking and would have obtained if A-B had approved the transfer, was with A-B. If A-B had approved the sale, RA would have entered into an Equity Agreement with A-B. [4] The sole source of plaintiffs' business would have been A-B. [5] A-B is not a disinterested third party, but rather a crucial and indispensable part of RA's prospective business opportunity. Because A-B was the source of the business opportunity interfered with, a claim for interference with that opportunity cannot stand.

2. *Justification*

Defendant's next argument is that even if A-B did interfere with plaintiffs' contract, defendant acted with justification. The tort of interference with contract requires that the alleged tortfeasor acted intentionally and improperly. *See Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506 (Minn. 1991). Interference is improper if it is without legal justification. *Id*. The Restatement comments that it is a defense to a tortious interference claim when an actor has a legally protected interest, the actor in good faith asserts that interest, and protects the interest by appropriate means. RESTATEMENT (SECOND) OF TORTS §773 cmt. a (1979). The Minnesota Supreme Court has stated that "[l]iability for wrongful interference may be avoided by showing that defendant was justified by a lawful object which he had a right to assert." *Bennett v. Storz Broadcasting Co.*, 270 Minn. 525, 134 N.W.2d 892, 897-98 (1965). A party is justified in interfering with a business opportunity if it is reasonable conduct under all the circumstances of the case. 270 Minn. at 537 (citing *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 463, 205 N.W. 630, 632). Defendant loses the justification defense when acting with an improper motive. *Nordling*, 478 N.W.2d at 506 (citing RESTATEMENT (SECOND) OF TORTS §766 cmt. s (1979)).

Plaintiffs claim there is a genuine issue of material fact regarding whether A-B acted with improper motive or by improper means, thereby defeating summary judgment on the justification defense. To prevail on this issue, plaintiffs must come forward to defeat the motion with "material facts which show something more than 'some metaphysical doubt.' " *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.Ct.App. 1989).

Plaintiffs contend that A-B had the improper motive of wishing to replace Capitol City management with A-B insiders who would be more likely to engage in illegal practices. In support of that claim, plaintiffs cite vague "irregularities" in the way A-B handled the analysis of RA. [6] Plaintiffs also offer the affidavit of Richard Arrell in support of the contention that A-B wished to replace Capitol City management with A-B insiders who would be more likely to engage in illegal practices. Arrell claims that A-B executives had, on several occasions, made commitments to retailers that Capitol City would make illegal cash payments in exchange for the retailers' promotion of A-B products. [7] However, plaintiffs have offered no solid, credible evidence that the alleged incidents even took place. Even if there were more solid evidence that A-B engaged in illegal transactions, plaintiffs have offered no evidence to connect those incidents with A-B's alleged improper motive in disapproving the sale of Capitol City to RA. Plaintiffs have made conclusory statements suggesting that there is a connection between these incidents and A-B's motive in disapproving the sale of Capitol City, but have failed to provide any admissible evidence connecting these incidents with A-B's decision not to approve the sale of Capitol City to RA.

Plaintiffs also claim that A-B used improper means in disapproving the sale of Capitol City. Plaintiffs allege that A-B made misrepresentations to Capitol City during the time they were analyzing the proposed sale of Capitol City. [8] However, plaintiffs offer no evidence to show that the alleged misrepresentations were anything more than minor misstatements.

None of the claims made by plaintiffs raise a genuine issue for a jury. The allegations of improper motive and improper means are too speculative and remote to raise a genuine issue of material fact. In addition, plaintiffs have failed to connect the alleged illegal activities on the part of A-B with A-B's disapproval of the sale of Capitol City. A-B's decision not to approve the sale of Capitol City was justified as a matter of law.

There are no genuine issues of material fact remaining regarding plaintiffs' claim for tortious interference with prospective economic advantage. Defendant is entitled to summary judgment as a matter of law on this claim.

DEFENDANT'S REQUEST FOR SANCTIONS

Defendants have requested Rule 11 sanctions against plaintiffs for the cost of defending plaintiffs' summary judgment motion. Defendants have not brought forth sufficient evidence to support sanctions. Defendant's request for sanctions is denied.

PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Because summary judgment has been granted, this Court will not rule on the discovery motion.

[1] The Equity Agreement states that "[n]o action taken by Anheuser-Busch, and no failure of it to act, under any of the terms of this Agreement shall give rise to a claim against Anheuser-Busch by any proposed purchaser." Equity Agreement, Art. 4(f).

[2] The Acquisition Agreement, which is the basis for the claim of tortious interference in count I, provides that the agreement is conditioned on obtaining "[a]ll consents necessary from Anheuser-Busch, Inc., including the approval of Buyer, as purchaser, by Anheuser-Busch, Inc. and Anheuser-Busch's execution of a new Wholesaler Equity Agreement with Buyer." This language clearly indicates that approval of the transfer by A-B was a condition precedent to a valid contract.

The agreement between Parkview Management and RA, which forms the basis for count II, was conditioned on the closing of the purchase of Capitol City. The letter of agreement began "[u]pon the closing of the Acquisition, the Company shall pay to Parkview Management, Inc. ... ." The provision that the agreement became operative only after the closing of the Acquisition is a condition precedent to the contract becoming operative. Acquisition of Capitol City was in turn conditioned on approval by A-B.

Similarly, the agreement between RA and Schnoebelen, which forms the basis for count IV, is conditioned on the acquisition of Capitol City. The letter of agreement states that "[e]ffective upon the closing of Employer's proposed acquisition of certain assets of Capitol City, you will be paid a base salary of ... ." This provision is clearly a condition precedent to the agreement becoming effective.

[3] The Supreme Court of Kansas affirmed a district court's grant of summary judgment in a case in which General Motors refused to approve the sale of a dealership without conducting any investigation of the proposed purchaser or giving any reason for the disapproval. *Noller v. GMC Truck & Coach Div.,* 772 P.2d 271 (Kan. 1989). In this case, A-B conducted an extensive investigation and gave a thorough explanation for the disapproval.

[4] To require A-B to enter into a contract with RA would violate the fundamental principle of law that a party has the right to choose the persons with whom it does business. No individual or business is required to enter into a business transaction with anyone. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 602 (1985) (quoting *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919)).

[5] The Equity Agreement acknowledges the importance of the sale of a wholesalership to both parties. "The change of ownership, ... of Wholesaler's business is a matter of vital concern to both Anheuser-Busch and Wholesaler. Anheuser-Busch recognizes and supports Wholesaler's desire to obtain the best available price for its business. Wholesaler understands that the ability of Anheuser-Busch to successfully market its products in the Territory is dependent upon the financial, marketing and other qualifications of the prospective purchaser of Wholesaler's business." Equity Agreement, Art. 4(b).

[6] Plaintiffs claim that the manner in which A-B executive Bruce Sandison became involved directly in the decision not to approve the sale of Capitol City is “suspect”. Plaintiff's fail, however, to suggest a concrete connection between Sandison's involvement and any improper motive. Plaintiffs merely claim that his involvement “raises serious questions about A-B's motives and purported methods.”

Next, plaintiffs claim that A-B wished to purchase Capitol City before it was aware that RA was a potential purchaser of the business and that Sandison was in charge of the acquisition attempt. However, plaintiffs have not demonstrated how this fact is evidence of an improper motive on the part of A-B. Plaintiffs merely claim that this incident “suggests that A-B was not being objective or ‘reasonable’ in its approach to [Capitol City's] proposed sale to RA.”

Plaintiffs also claim that documents produced by Mr. Sandison's department prove that A-B stopped evaluating RA as a potential purchaser at least one month before it informed Capitol City of its decision. Assuming that this is true, plaintiffs do not demonstrate how this proves an improper motive on the part of A-B.

[7] Arrell offered only two examples of the alleged illegal transactions. First, Arrell claimed that Steve Zelinsky, A-B District Manager, “made commitments to the owners of Gabes on the Park in St. Paul that Capitol City would make cash payments in order to reimburse Gabes for the expense of a band in exchange for an exclusive distribution of A-B products for the event in question.” Arrell Affid. ¶6. The allegation in Arrell's affidavit appears to be hearsay. Assuming for the purposes of summary judgment that the allegation is true, it is an isolated incident and too speculative to defeat summary judgment.

Second, Arrell claimed that Zelinsky contacted T-Birds and that “the owner of T-Birds indicated to Mr. Zelinsky that he would be willing to put Budweiser on tap in exchange for some Budweiser pool table lights.” Arrell Affid. ¶6. The facts as alleged in the affidavit imply only that that the owner of T-Birds may have suggested that A-B engage in a transaction that might be illegal. The affidavit does not demonstrate that A-B agreed with the owner of T-Birds or did anything illegal in connection with this incident.

[8] The first misrepresentation that A-B cites is a statement made by A-B attorney Dan Kolditz on June 3, 1994 to Capitol City attorney Elliot Kaplan. Kolditz informed Kaplan that A-B had requested more information from Capitol City on May 11, 1994, giving A-B until June 10, 1994, to decide whether to approve or disapprove the sale of Capitol City. In fact, the request had been made to Paul Schnoebelen, who was not an employee of Capitol City. Plaintiffs claim this letter was a misrepresentation crafted to allow A-B enough time to decide whether or not it would induce Capitol City to breach its contract with RA. Plaintiffs have not offered any evidence to show that Kolditz' statement that the information had been requested of Capitol City was anything more than a minor misstatement.

The second misrepresentation cited by A-B is a telephone call made by A-B executive Green to Arrell on June 8, 1994. Green indicated that RA and Capitol City needed to re-execute their purchase agreement to complete its evaluation process. Plaintiffs claim this statement was an intentional misrepresentation meant to secure A-B's right to acquire Capitol City on the same terms that RA would have utilized in acquisition of Capitol City. However, plaintiffs offer no evidence to support the contention that this request was made out of an improper motive.

Siedare Associates, Inc. v. Amperex Sales Corp.

U.S. District Court, District of Minnesota, Fourth Division. No. 479 Civ. 398. Dated July 20, 1981.

Ordinary Business Expenses Did Not Constitute Franchise Fee

> **What Is a Franchise? —Fee Requirement —Business Expenses and Franchise Fee. —**Since expenses incurred by a sales representative for sending employees to sales meetings, mailing promotional material, and assisting in collecting delinquent accounts did not constitute a franchise fee within Minnesota's relationship/termination law, the sales representative was not a franchisee. Such expenditures were ordinary costs of conducting business as a sales representative. To hold otherwise would subject every sales representative relationship to requirements imposed on franchise relationships. Thus, the sales representative's claims based on Minnesota's franchise law were summarily dismissed.

Memordandum

[In full text]

Alsop, D.J.: When considering a motion for summary judgment, all facts must be viewed in the light most favorable to the party opposing the motion, and that party is entitled to the benefit of all reasonable inferences to be drawn from the facts. *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 501 (8th Cir. 1976). Also, the right to judgment must be shown with such clarity as to leave no room for controversy, and it must appear that the opposing party would not be entitled to recover under any discernible circumstances. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973).

Defendant Amperex Sales Corporation ("Amperex") seeks summary judgment as to plaintiff Siedare Associates, Inc.'s ("Siedare") claims for bad faith termination, anticipatory breach of contract, unjust enrichment, misrepresentations, and violations of the Minnesota Franchise Act alleged in Counts 1 through 4 and 6 through 13 of the Amended Complaint. Except for the alleged violations of the Minnesota Franchise Act, discussed hereafter, the court cannot say that plaintiff would not be entitled to recover under any discernible circumstances and therefore, summary judgment is not appropriate as to Counts 1, 4 and 6 through 13.

In Counts 2 and 3, Siedare alleges Amperex violated various provisions of the Minnesota Franchise Act. With regard to these allegations, plaintiff admits that "[i]f the relationship between Amperex and SAI were not a "franchise," the court would be obligated to dismiss Counts Two and Three" *Memorandum In Opposition to Motion for Partial Summary Judgment,* at 6.

Minn. Stat. §90C.01 subd. 4 provides in part:

"Franchise" means a contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:

> (a) by which a franchisee is granted the right to engage in the business of offering or distributing goods or services under the franchisor's trade name, trademark, service mark, logo type, advertising, or other commercial symbol or related-characteristic;

(b) in which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise; and

(c) for which the franchisee pays, directly or indirectly, a franchise fee.

Siedare agrees with Amperex's position that in order for a relationship to constitute a franchise under Minnesota law, all three statutory elements must be present. *Memorandum In Opposition to Motion for Partial Summary Judgment,* at 7. Amperex's position is also supported by the law. *See Martin Investors, Inc. v. Vander Bie,* 269 N.W.2d (Minn. 1978).

In support of their summary judgment motion, Amperex only addresses the third statutory element, arguing that Siedare "clearly paid no franchise fee either directly or indirectly to Amperex." *Defendant's Memorandum In Support of Motions for Summary Judgment,* at 10. Siedare, in opposition to the motion, contends that Siedare made the following payments and that such payments constituted a franchise fee under Minnesota law:

1. Charges for transportation, some meals and incidental expenses incurred in sending Siedare's employees to Amperex's sales meetings.

2. Amounts debited to Siedare's commission account for commissions previously paid and with respect to which Amperex has not received payment from the customer or with respect to which the products sold were returned by the customer.

3. Charges for the mailing of Amperex promotional literature.

4. Expenses incurred in assisting Amperex in collecting its delinquent accounts.

There is no factual dispute between the parties as to whether Siedare did in fact incur the above-itemized expenses. The issue is whether such expenses constitute a "franchise fee" as a matter of law. Thus, this issue is appropriate and ripe for summary judgment.

"Franchise fee" is defined by Minn. Stat. §80C.01, subd. 9 as:

... any fee or charge that a franchisee ... is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges; provided, however, that the following shall not be considered the payment of a franchise fee:

(a) The purchase of goods or agreement to purchase goods at a bona fide wholesale price;

(b) The purchase of goods or agreement to purchase goods on consignment, if the proceeds remitted by the franchisee from any such sale shall reflect only the bona fide wholesale price of such goods;

(c) The repayment of the franchisee of a bona fide loan made to the franchisee from the franchisor;

(d) The purchase of goods or agreement to purchase goods at a bona fide retail price subject to a bona fide commission or compensation plan that in substance reflects only a bona fide wholesale transaction;

> (e) The purchase, at the fair market value, of supplies or fixture or agreement to so purchase supplies or fixtures necessary to enter into the business or to continue the business under the franchise agreement;
>
> (f) The purchase or lease, at the fair market value, of real property or agreement to so purchase or lease real property necessary to enter into the business or to continue the business under the franchise agreement.

The relationship between Siedare and Amperex is clearly not that of a franchisor and franchisee. The various expenses incurred by Siedare are not within the definition of a “franchise fee” as defined by Minn. Stat. §80C.01, Subd. 9, but rather are merely ordinary business expenses necessarily incurred by Siedare in conducting its business as a sales representative. To adopt Siedare's interpretation would subject every sales representative relationship to all the requirements of the Franchise Act, a result which does not comport with the letter or the spirit of the Franchise Act.

In conclusion, the court finds that with respect to Counts 2 and 3 Siedare would not be entitled to recover under any discernible circumstances, and therefore, Amperex is entitled to judgment as a matter of law.