

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 04-1416

MINNESOTA SUPPLY COMPANY,
Plaintiff/Appellee/Cross Appellant,

v.

THE RAYMOND CORPORATION,
Defendant/Appellant/Cross Appellee.

*On Appeal from the United States District Court
for the District of Minnesota
Honorable John R. Tunheim, Presiding Judge
District Court No. 99-CV-832 JRT/FLN*

**BRIEF OF PLAINTIFF/APPELLEE/CROSS APPELLANT
MINNESOTA SUPPLY COMPANY**

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SUMMARY OF THE CASE

In addition to the matters stated in Raymond's Summary of the Case, Minnesota Supply is cross-appealing the District Court's conclusion that \$1,693,548 of the jury's verdict consisted of prejudgment interest, and the District Court's removal of that sum from the final judgment.

Minnesota Supply concurs that oral argument would assist the Court in resolving the issues on this appeal. Minnesota Supply requests 30 minutes (15 minutes per side) for those arguments due to the legal and economic significance of the issues presented on this appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1(a), Appellee-Cross Appellant, Minnesota Supply Company, hereby states that it is a Minnesota corporation, that it is not owned by a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a), in that there was complete diversity between the parties. Plaintiff, Minnesota Supply Company, is a Minnesota corporation with its principal place of business in Minnesota. Defendant, The Raymond Corporation, is a New York corporation with its principal place of business in New York. The amount in controversy exceeds \$75,000.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291, in that it is an appeal from a final judgment of the United States District Court for the District of Minnesota that was entered on January 7, 2004. Raymond timely filed a notice of appeal on February 4, 2004. Minnesota Supply timely filed its notice of cross-appeal, pursuant to F.R.App.P. 4(a)(3), on February 18, 2004.

STATEMENT OF ISSUES

A. Raymond's Appeal:

1. Whether Raymond's failure to renew its Rule 50 motion at the close of all the evidence resulted in a waiver of its arguments that the verdict was supported by insufficient evidence.

- *Pulla v. Amoco Oil Company*, 72 F.3d 648 (8th Cir. 1996)
- F.R.C.P. 50(b)

2. Whether, upon stipulated and uncontested facts, the district court erred in finding the Mutual Consent document an unenforceable contract due to Raymond's failure to deliver or communicate its acceptance of the document.

- *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407 (8th Cir. 1988)
- *Hartung v. Billmeier*, 66 N.W.2d 784 (Minn. 1954)
- *Pogreba v. O'Brien*, 27 N.W.2d 145 (Minn. 1947)
- *Peters v. Mutual Benefit Life Insurance Company*, 420 N.W.2d 908 (Minn.App. 1988).

3. Whether the district court abused its discretion when it refused to reconsider its pretrial order of partial summary judgment when Raymond , twenty-one months after entry of the summary judgment and on the eve of trial, offered "new" evidence that it had knowledge of since 1997.

- *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407 (8th Cir. 1988)

- *Alberty-Velez v. Corporacion de Puerto Rico Para la Difusion Publica*, 242 F.3d 418 (1st Cir. 2001)
- *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322 (8th Cir. 1985)
- F.R.C.P. 16(e)
- F.R.C.P. 56(d)

4. Whether the district court correctly placed the burden of proof on Raymond to establish it had good cause to substantially change the competitive circumstances of the dealership agreement and to terminate the dealership agreement.

- *Ross v. Garner Printing Company*, 285 F.3d 1106 (8th Cir. 2002)
- *Carlson Equipment Company v. International Harvester Company*, 710 F.2d 481 (8th Cir. 1983)
- *Wadena Implement Company v. Deere & Company, Inc.*, 480 N.W.2d 383 (Minn.App. 1992)
- *Midwest Great Dane Trailers, Inc. v. Great Dane Limited Partnership*, 977 F.Supp. 1386 (D.Minn. 1997)
- Minn.Stat. §325E.0681

5. Whether the district court erred in denying Raymond's Rule 50 motion for judgment as a matter of law on Minnesota Supply' first claim under Minn.Stat. §325E.0682, which makes it a violation of MHUEMDA for an

“equipment manufacturer to...coerce an equipment dealer into a refusal to purchase the equipment manufactured by another equipment manufacturer.”

- *Astleford Equipment Co., Inc. v. Navistar International Transportation Corp.*, 632 N.W.2d 182 (Minn. 2001)
- *Metro Motors LLC v. Nissan Motor Corporation in U.S.A.*, 2001 WL 1690060 (D.Minn. 2001), *aff'd* 339 F.3d 746 (8th Cir. 2003)
- Minn.Stat. §325E.0682(b)(2)
- Minn.Stat. §325E.0683
- Minn.Stat. §325E.0681

6. Whether the district court erred in denying Raymond’s Rule 50 motion for judgment as a matter of law on Minnesota Supply’s second claim under Minn.Stat. §325E.0681, which makes it a violation of MHUEMDA for a manufacturer to substantially change the competitive circumstances of a dealership agreement without good cause.

- *City National Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308 (8th Cir. 1991)
- Minn.Stat. §325E.0681

7. Whether the jury’s verdict award was clearly contrary to the evidence and reflected a manifest abuse of discretion.

- *Piotrowski v. Southworth Products Corporation*, 15 F.3d 748 (8th Cir. 1983)

- *Lowe v. E.I. DuPont de Nemours & Co.*, 802 F.3d 310 (8th Cir. 1986).

B. Minnesota Supply's Cross Appeal:

1. Whether the district court erred when it removed \$1,693,548 from the verdict award on the basis it was prejudgment interest.

STATEMENT OF THE CASE

The Raymond Corporation is a manufacturer of lift trucks. Minnesota Supply Company was an independent dealer of Raymond's lift trucks.

Raymond terminated Minnesota Supply, effective April 30, 1997.

Minnesota Supply initiated this case on May 28, 1999, alleging violations by Raymond of several sections of the Minnesota Heavy and Utility Manufacturers and Dealers Act (the "Act" or "MHUEMDA"). Minn.Stat. §325E.068 *et seq.* Specifically, Minnesota Supply alleged Raymond had, in violation of the Act, (1) wrongfully coerced Minnesota Supply into a refusal to carry a second line of lift trucks, (2) substantially changed the competitive circumstances of its dealership agreement without good cause, and (3) terminated the dealership agreement without good cause.

Very early in the case, the parties presented cross motions for summary judgment on the issue of whether or not a document entitled "Termination by Mutual Consent" was an enforceable contract. The document contained a

general release of Minnesota Supply's claims against Raymond, and Raymond asserted the release as an affirmative defense. Following discovery on the issue, the parties presented their cross motions upon a stipulated factual record. The United States District Court (Tunheim, J.) adopted the report and recommendation of the Magistrate Judge and entered an order denying Raymond's motion for summary judgment and granting Minnesota Supply's motion for partial summary judgment. Raymond's defense of release was dismissed.

Subsequent attempts by Raymond to circumvent the district court's order of partial summary judgment and to have it reconsidered were rejected by the district court.

The case was tried to a jury in May and June of 2003. The jury returned a verdict in favor of Minnesota Supply on all three claims in the amount of \$14,076,784.

Raymond presented a Rule 50 motion at the close of Minnesota Supply's case. However, Raymond neglected to renew its Rule 50 motion for judgment as a matter of law at the close of all the evidence.

Raymond's post-trial Rule 50 motion was denied, with one exception. The district court concluded that \$1,693,548 of the jury's award constituted prejudgment interest that should have been calculated by the court and not the

jury. Accordingly, on September 26, 2003, the district court entered judgment in favor of Minnesota Supply in the amount of the verdict, less the prejudgment interest portion - - i.e. \$12,383,236.

On Minnesota Supply's Rule 59(e) motion, the district court recalculated prejudgment interest in accordance with Minnesota's prejudgment interest statute and, on January 7, 2004, entered an amended judgment in favor of Minnesota Supply in the total amount of \$12,864,117.54.

Raymond appeals from the judgment. Minnesota Supply cross appeals that portion of the judgment which removed \$1,693,548 from the verdict award.

STATEMENT OF FACTS

The Raymond Corporation is a manufacturer of narrow-aisle lift trucks. Minnesota Supply Company was an independently owned dealer of Raymond lift trucks. It had been a Raymond dealer since 1947. Until 1989, the Raymond brand was its only line of lift trucks. Minnesota Supply is located in Eden Prairie, a suburb of Minneapolis, Minnesota. Minnesota Supply's territory as a Raymond dealer was comprised of Minnesota, North and South Dakota and the western counties of Wisconsin.

A classification system is used in the industry to identify different types of lift trucks. Counterbalance lift trucks, Classes I, IV and V, are the most

widely used type. Raymond does not make any Class IV or V lift trucks (i.e. internal combustion, counterbalance trucks). Raymond manufactures some trucks that fall within a small subgroup of Class I (electric, counterbalance trucks). Raymond is a premiere manufacturer, however, of what are known as “narrow-aisle” or Class II lift trucks. These electric powered machines are designed for use primarily in warehouses. Because of their design characteristics, they are able to maximize warehouse space and lift very heavy loads to great heights. Raymond’s Class II, narrow-aisle lift trucks are its bread and butter, and Minnesota Supply’s performance relating to sales of Class II trucks was the principal focus of the evidence at trial.

During the period of time pertinent to this suit, Raymond’s primary competitor in the narrow-aisle lift truck market was Crown. Between Raymond and Crown, they dominated the Class II market. Tr.(Koch) 242-243 (Aple.A. 182-183).¹

¹ The following abbreviations will be used throughout the brief: “Tr.” means the transcript of the trial proceedings. The name within the parenthesis is that of the witness whose testimony is being referenced. “Aplt.A.” means the Appellant’s Separate Appendix. “Aple.A.” means the Appellee’s Separate Appendix. “Stip.” means the stipulated facts and exhibits submitted by the parties in connection with their cross motions for summary judgment. The Stipulation is set out at Aplt.A. 0053-0166. “P.Ex.” means Plaintiff’s Trial Exhibit. “D.Ex.” means Defendant’s Trial Exhibit. “Dkt.” refers to the docket number assigned by the Clerk of the District Court.

Typically, the operator of a narrow-aisle piece of equipment stands and does not sit while operating the lift truck. On a Crown machine, the operator is in a so-called “side stance” position, looking to his left or right while moving the machine forward and back. Raymond utilizes a so-called “fore-aft” position, where the operator always faces the direction of travel. Whether the benefits of one position over the other are real or imagined, loyalties to one position or the other run deep in the industry and among operators. Warehouse operations rarely mix the two and, once one format is adopted, that format will typically prevail into the indefinite future. Tr.(Koch) 243-247, 990-991, 1018, 1203-1204 (Aple.A. 183-187, 249-250, 253, 268-269); Tr.(Olsen) 440-441.

The legal rights and duties between manufacturers and dealers of lift trucks is circumscribed by the Minnesota Heavy and Utility Equipment Dealers and Manufacturers Act (“MHUEMDA” or “the Act”), Minn.Stat. §325E.068 *et seq.*. Throughout its relationship with Raymond, Minnesota Supply was unaware of the Act. Tr.(Koch) 272, 293 (Aple.A. 198, 214); Tr.(Olsen) 439. As a result, Minnesota Supply was not aware that it is a violation of the Act for a manufacturer to “coerce an equipment dealer into a refusal to purchase the equipment manufactured by another equipment manufacturer.” Minn.Stat. §325E.0682(b)(2). Minnesota Supply was not aware the Act prohibits manufacturers from terminating, or substantially changing the competitive

circumstances of a dealership, without “good cause”. Minn.Stat. §325E.0681.

And, Minnesota Supply was not aware of the fact that any term of a dealership agreement that is inconsistent with the Act, or which purports to waive the manufacturer’s compliance with the Act, is “void and unenforceable”.

Minn.Stat. §325E.0683. Raymond, on the other hand, was well aware of the Act. Tr.(Koval) 659-660, 670-671.

Notwithstanding the prohibitions of the Act, Raymond’s dealership agreement gave Raymond the right to terminate Minnesota Supply without cause. P.Ex. 1 (Aplt.A. 362) at par.26(c). The dealership agreement also gave Raymond the right to terminate Minnesota Supply if it marketed any merchandise which competed with Raymond’s products. *Id.* at par.18(a).

In 1989, Mitsubishi Caterpillar Forklift America, Inc. (“MCFA” or “Caterpillar”) offered Minnesota Supply the opportunity to become the dealer for the Caterpillar brand of *counterbalance* lift trucks in Minnesota. At that time, the Caterpillar or “CAT” line of lift trucks did not include narrow-aisle or other equipment that was competitive with the Raymond line. Tr.(Koch) 239-240, 250-255, 1046-1047 (Aple.A. 180-181, 190-195, 254-255); Tr.(Stromsness) 50-52. Nonetheless, Raymond was not happy with Minnesota Supply’s decision to become a CAT dealer. When Minnesota Supply’s Chairman of the Board, John Stromsness, approached Raymond’s CEO and

Chairman, Ross Colquhoun, and informed him of the business opportunity that had presented itself, Mr. Colquhoun leaped from his seat and exclaimed “I’ll cut you off!”. Tr.(Stromsness) 53-54. Colquhoun’s temper cooled and Minnesota Supply ultimately went ahead with its representation of the Caterpillar line of counterbalance lift trucks, but Colquhoun’s initial response proved to be a succinct expression of Raymond’s animosity toward one of its dealers taking on a second line – even a non-competing one.

In 1992, Raymond entered into a joint venture agreement with MCFA. The name of the joint venture was Material Handling Associates or “MHA”. Pursuant to that joint venture, Raymond began to manufacturer narrow-aisle equipment for MHA. These Raymond-manufactured narrow-aisle trucks would be painted Caterpillar yellow (not Raymond orange), would be stenciled with the Caterpillar trademark, and would be sold through the Caterpillar dealer network. As a Caterpillar dealer, Minnesota Supply began selling this competitive equipment. Tr.(Koch) 273-276 (Aple.A. 199-202); Tr.(Koval) 645. Even though Raymond had created this “conflict”, Raymond immediately turned the heat up on Minnesota Supply. P.Ex. 31. Over the next several months, discussions ensued between Minnesota Supply and Raymond. Minnesota Supply was extremely concerned over the tone of Raymond’s correspondence and discussions. Minnesota Supply’s board members were all

commissioned Raymond salesmen and their livelihoods were dependent on a healthy and ongoing Raymond dealership. They knew if Minnesota Supply could not put a program together that would appease Raymond, the dealership would be lost. Tr.(Koch) 277-281 (Aple.A. 203-207).

Raymond told Minnesota Supply it did not want any of its dealers carrying competing lines., (Tr.(Koch) 287-288 (Aple.A. 210-211)) and, in the Fall of 1992, Stromsness and the president of Minnesota Supply, Bob Koch, were summoned to Greene, New York for an audience with Colquhoun and Raymond's vice president of sales and dealer development. That meeting was one of confrontation, hostility and intimidation by Raymond. Tr.(Koch) 288-290 (Aple.A. 211-213). Koch and Stromsness left the meeting in Greene, New York "with a very, very uncomfortable feeling." *Id.* 289 (Aple.A. 212). Koch summed it up: "The intent was to, in our opinion, make us real nervous and get us to either get in line, or there was going to be some real serious problems for us....We knew that if Raymond was unhappy, they would, we were very comfortable [sic.] with the fact that they were going to try to get rid of us as a Raymond dealer." *Id.* 290 (Aple.A. 213).

Because "we definitely felt...we had a gun to our head.", Minnesota Supply sought to appease Raymond by suggesting the radical step of completely separating the operations of the two lift truck dealerships: separate

buildings, separate offices, separate telephones, separate receptionists, etc.

P.Ex. 35 (Aple.A. 387). Minnesota Supply did not believe these costly steps were necessary and but for the pressures being applied by Raymond would not have been undertaken. Tr.(Koch) 285-286, 1053-1054 (Aple.A. 208-209, 256-257). Even this major concession did not satisfy Raymond. On April 22, 1993, Raymond wrote to Minnesota Supply and made it clear that Minnesota Supply's representation of the CAT narrow-aisle equipment was grounds for termination under paragraph 18 of the dealership agreement, and that Raymond was only "willing to allow this to occur on a trial basis" if Minnesota Supply complied with a series of conditions. P.Ex. 36. (Aple.A. 389). Raymond's letter states:

I am writing to confirm our prior discussions regarding Minnesota Supply's request that it be allowed to continue to represent Raymond in its Trading Area, even though it will also be representing the Caterpillar line of competitive equipment. Subject to certain limitations, we are willing to allow this to occur on a trial basis.

Paragraph 18 of the June 1, 1990 Dealer Sales Agreement between Raymond and Minnesota Supply gives Raymond the right to terminate the Agreement if Minnesota Supply begins to represent competitive equipment. Rather than sever our relationship, however, Raymond is willing to continue the existing Dealer Sales Agreement for a period of one year from June 1, 1993, upon the following conditions:

Id.

One of the stated conditions was the complete divisionalization of the two lines outlined above. Additionally, Raymond required Minnesota Supply

to meet or exceed certain “benchmark” market share performance criteria. Separate benchmarks were established for each of the three Classes of Raymond equipment sold by Minnesota Supply; Classes I, II and III. Further, minimum parts purchasing requirements were imposed upon Minnesota Supply. *Id.* Prior to receipt of this letter, Raymond had never imposed mandatory purchasing or market share requirements as a condition of continuing the dealership. Tr.(Koch) 266-267 (Aple.A. 196-197); Tr.(Stromsness) 60.

In addition to the divisionalization of the two dealerships and the imposition of performance criteria, Raymond’s letter of April 22, 1993 changed the term of the dealership agreement. The underlying dealership agreement had no fixed term, but continued indefinitely until terminated pursuant to some specific right of termination granted in the agreement. P.Ex. 1 (Aplt.A. 362) at par.1. The term would now be limited to a single year, and if any of the performance criteria were not met in any quarter Raymond could terminate the agreement. P.Ex. 36 (Aple.A. 389). Further, even if Minnesota Supply met or exceeded all of the conditions contained in the April 22 letter, Raymond was only committed to “consider” annual renewals. *Id.*

As of the date of Raymond’s April 22, 1993 letter, Raymond knew it would be impossible for Minnesota Supply to meet the all-important Class II benchmark being demanded. The benchmarks established in the April 1993

letter were based on Minnesota Supply's 1992 performance. *Id.* In each of the preceding three years, 1990 through 1992, Supervalu, a grocery distribution company, had been Minnesota Supply's single largest customer of Class II Raymond equipment. Supervalu's purchases constituted 36% of Minnesota Supply's sales in 1991, and 28% of its sales in 1992. P.Ex. 263, 264, 269, 270 (Aple.A. 456, 457, 462, 463). At the end of 1992, Supervalu had announced it was changing its purchasing procedures for its material handling needs. Rather than purchasing through local dealers, it would now purchase only directly from manufacturers. Furthermore, the manufacturers were required to respond to a request for proposal and outline the pricing concessions the manufacturers would extend to Supervalu. Supervalu would then purchase its equipment, pursuant to two-year contracts, only from manufacturers chosen through this process. Due to this change in Supervalu's purchasing procedures, Supervalu was designated a "national account" by Raymond and all sales efforts shifted from Minnesota Supply to national account salesmen at Raymond's headquarters. The Raymond national account salesmen failed to obtain a contract with Supervalu. As a result, Raymond was locked out of Supervalu for at least two years, commencing March 1, 1993, and Minnesota Supply's single largest customer ceased to be a component of its market share performance numbers. Tr.(Koch) 295-303 (Aple.A. 215-223).

While Minnesota Supply had sold 31 Class II trucks to Supervalu in both 1991 and 1992, that number dropped to 2 in 1993, on sales made before March 1. Another Supervalu order was never again placed in Minnesota Supply's territory. Tr.(Olsen) 417; P.Ex. 273, 274 (Aple.A. 464, 465). The loss of Supervalu, effective March 1, 1993, through the failure of Raymond to secure the account, meant it would be impossible for Minnesota Supply to meet the benchmark insisted upon by Raymond in its April 1993 letter.

A second known factor when Raymond established the benchmarks was Target Corporation. Target was a firmly established Crown customer. Despite years of effort, Raymond had been unable to crack the Target account. Prior to Raymond's April letter, Target had announced it would be aggressively expanding and annually opening new distribution centers. All Target orders for lift trucks are made from Minnesota Supply's territory. Target became the single largest consumer of narrow-aisle lift trucks in the territory, representing anywhere from 25% to 40% of the market. The parties knew this exponential growth in Target's orders of Crown equipment within Minnesota Supply's territory would have a tremendously negative impact on Minnesota Supply's market share. Even if Minnesota Supply continued to grow its total lift truck sales, its market share would shrink in the face of the huge Crown orders

projected for Target. Tr.(Koch) 247-250, 303, 329-331 (Aple.A. 187-190, 223, 228-230).

Minnesota Supply knew that compliance with the Class II market share benchmark that Raymond was demanding would be impossible. Tr.(Koch) 312, 316 (Aple.A. 224, 225). Signing the letter would be “signing our death warrant”. *Id.* at 316. Accordingly, Koch signed the letter but beside his signature he placed an asterisk with the words “Please see attached letter”. P.Ex. 36 (Aple.A. 389). Koch’s cover letter to Raymond, in turn, outlined the obvious impact of Supervalu and Target. P.Ex. 37 (Aple.A. 391).

Raymond refused to modify the benchmarks, and shot back a virtual copy of the original letter for Minnesota Supply to re-sign. P.Ex. 40 (Aple.A. 392). The new letter, dated October 27, 1993, acknowledged Minnesota Supply’s assessment of the dynamics of the territory, stating: “[C]ertain customers may begin to make purchases of competitive equipment on a national basis from their offices in your territory. Should this occur, your ITA market share will be affected...”. Regardless, the letter continued, Raymond was “not obligated to take this into account in determining whether you have complied with the market share criteria.” *Id.*

Worn out by the negotiations and having run out of options, Minnesota Supply signed the October letter (“the 1993 Letter Amendment”). P.Ex. 40 (Aple.A. 392); Tr.(Koch) 321-322 (Aple.A. 226-227).

Requests to have the Target purchases backed-out of its market share numbers in order to arrive at a more realistic performance number were refused by Raymond, even though Raymond did precisely that for its dealers in Arkansas, Georgia and Virginia who were faced with identical market share pressures in *their* territories with the presence, respectively, of Walmart, Home Depot and Circuit City. P.Ex. 146, 148 (Aple.A. 425, 426); Tr.(Koch) 981-982 (Aple.A. 246-247).

Over the next few years, Raymond participated in or caused two additional events to occur that guaranteed Minnesota Supply’s inability to achieve the Class II benchmark. One of Minnesota Supply’s oldest and largest customers was 3M Corporation. In 1995, 3M shifted some of its lift truck ordering to its repair facility in Iowa. P.Ex. 73 (Aple.A. 415). As a result, approximately two-thirds of the orders that had historically been placed through Minnesota Supply were now placed through Raymond’s Iowa dealer. While Raymond did not lose a single sale, the change in ordering by 3M caused a significant decrease in Minnesota Supply’s market share. Tr.(Koch) 238-239, 363-367 (Aple.A. 179-180, 234-238); Tr.(Olsen) 414-433; P.Ex. 265, 266, 273,

274 (Aple.A. 458, 459, 464, 465). 3M's decision to split orders between Minnesota Supply and the Iowa dealer had nothing to do with Minnesota Supply's performance. Tr.(Koch) 366-367, 1002-1003 (Aple.A. 237-238, 251-252).

Another major customer of Minnesota Supply, Nash Finch, historically comprised 20 to 25% of Minnesota Supply's total Class II sales. Tr.(Olsen) 432; P.Ex. 267, 268 (Aple.A. 460, 461). In 1994, Raymond's national account sales people alienated Nash Finch in connection with parts pricing. As a result, Nash Finch stopped all purchases of Raymond equipment. P.Ex. 273, 274 (Aple.A. 464, 465). Nash Finch remained a loyal service customer of Minnesota Supply and right up to the termination Minnesota Supply was pursuing efforts with Raymond to overcome the animosity between the two companies. Tr.(Koch) 367-369, 1193-1202 (Aple.A. 238-240, 258-267); P.Ex. 76, 77 (Aple.A. 416, 419).

From 1993 through 1996, Minnesota Supply continued to grow its Raymond business. In 1994 and 1995, for example, Minnesota Supply sold more Class II Raymond trucks than in any other years in its history. However, because of the impact of Supervalu and Target, Minnesota Supply's market share shrank - - precisely as Minnesota Supply and Raymond knew it would. Tr.(Koch) 361-362, 967-969 (Aple.A. 232-233, 243-245); P.Ex. 287, 288

(Aple.A. 477, 478). The further losses of the 3M and Nash Finch business only exacerbated the trend. P.Ex. 273, 274 (Aple.A. 464, 465).

In those same years, Minnesota Supply exceeded the Class I benchmark established in the 1993 Letter Amendment. P.Ex. 260 (Aple.A. 453). It also exceeded the parts purchasing benchmark and it fully effectuated the costly divisionalization of its Caterpillar and Raymond dealerships. P.Ex. 261 (Aple.A. 454); Tr.(Koch) 334, 983 (Aple.A. 231, 248).

On December 31, 1996, Raymond sent its letter of termination to Minnesota Supply. P.Ex. 94 (Aple.A. 421). Failure to achieve the 1993 Letter Amendment's performance criteria was the stated reason for termination. A follow-up letter, dated January 16, 1997, confirmed that the termination was final and that the effective date would be April 30, 1997. This letter concluded with Raymond's acknowledgement that the dealership agreement required Raymond to buy back equipment, and requested Minnesota Supply to submit a list of the parts and trucks being returned. P.Ex. 97 (Aple.A. 423).

Discussions between the parties continued apace to wind-up the numerous loose ends of their fifty-year relationship, including reaching agreement regarding ongoing warranty issues, parts repurchases, new equipment repurchases, cost reimbursements and the like Stip. (Aplt.A. 0053) at ¶15 and Exs. G,I,M,N and O.

Minnesota Supply's territory was turned over to a newly-formed dealership named Associated Material Handling of Minnesota. Stip. at Ex. L. This entity was a wholly-owned subsidiary of the Chicago based Raymond dealership, Associated Material Handling, Inc. ("Associated"). Associated owned several other dealerships: Allied Material Handling (the Iowa dealership which had snatched-up the 3M business), Air Mac (the dealership for the Pacific Northwest) and Associated of Indiana (the Indiana dealership). Raymond owned the controlling interest in Associated. P.Ex. 209 at 29, 32, 40 (Aple.A. 444); P.Ex. 212 at 47 (Aple.A. 449); Tr.(Koval) 594-596. Raymond's officers held the positions of chairman and the majority of seats on Associated's board. Associated's corporate secretary was Raymond's general counsel, Tim Koval. The newly established subsidiary in Minnesota was equally dominated by Raymond. The new dealership's board of directors was controlled by Raymond officers, including Koval. P.Ex. 158, 167 (Aple.A. 428, 429); Tr.(Koval) 644.

What clearly emerged over the three weeks of testimony in this case was that Raymond had systematically set Minnesota Supply up for termination and then handed over its valuable dealership and territory to Raymond's own subsidiary, Associated.

The evidence also revealed how Associated was rewarded with Minnesota Supply's territory even though Associated's performance, and the performance of its subsidiaries, had been no better than Minnesota Supply's supposed poor performance throughout the same time period. P.Ex. 262, 275-282 (Aple.A. 455, 466-473). The new Raymond-controlled dealership in Minnesota has *never* been able to achieve the 36.3% Class II market share benchmark that had been foisted on Minnesota Supply. P.Ex. 283 (Aple.A. 474). Indeed, except in 1999, the replacement dealer has performed below the levels achieved by Minnesota Supply between 1993 and 1996. Compare P.Ex. 283 and 288 (Aple.A. 474 and 478).

With less than two weeks before the termination date of April 30, 1997, Raymond drafted, and attempted to have Minnesota Supply sign, a document entitled "Termination by Mutual Consent" (the "Mutual Consent document"). Stip. at Ex. Q (Aplt.A. 0152). The document was a model of manufacturer abuse and overreaching. It attempted to cause Minnesota Supply to release all of its claims against Raymond, while preserving Raymond's. It also sought to replace Minnesota law with New York law, to force all actions to proceed in New York, and to modify or limit Raymond's pre-existing duty to indemnify Minnesota Supply from products liability claims. *Id.* The document was rejected by Minnesota Supply and completely rewritten. Stip. at Ex. R (Aplt.A.

0157). The rewritten document made the releases mutual, retained Minnesota law, required disputes to be resolved in Minnesota, and confirmed Raymond's pre-existing contractual obligation to indemnify Minnesota Supply from products liability claims. *Id.* The rewritten document was sent back to Raymond on April 23, 1997. *Id.* Raymond never returned an executed copy of the document (Aplt.A. 0192, ¶3; 0194, ¶4) and never informed Minnesota Supply that it agreed to any of the terms of the rewritten document (*id.*; Aple.A. 16, ¶3).

The termination took effect on April 30 and the new dealer took over on May 1, 1997. P.Ex. 101, 102.

After Minnesota Supply filed suit against Raymond for violations of MHUEMDA, a fully executed Mutual Consent document suddenly emerged from Raymond's files. Raymond asserted the release contained therein as a defense. At the suggestion of the parties, cross-motions for summary judgment were submitted to the district court, upon a fully developed and stipulated set of facts and exhibits, on the issue of whether the Mutual Consent document was enforceable. The district court ruled that the Mutual Consent document was not an enforceable contract because its acceptance by Raymond had never been delivered or communicated to Minnesota Supply. Minnesota Supply's cross-motion for partial summary judgment was granted. Raymond's motion for

summary judgment was denied and its defense of release was dismissed. Order of 9/18/00 (Aplt.A. 0219).

A jury trial was commenced on May 22, 2003. The jury returned a verdict in favor of Minnesota Supply on all of its claims and awarded damages of \$14,076,784. Aple.A. 153.

SUMMARY OF THE ARGUMENT

Raymond failed to renew its Rule 50 motion for judgment as matter of law at the close of the evidence and it cannot now argue on appeal that the verdict was supported by insufficient evidence. Pp. 26-31. The impact of this procedural error by Raymond precludes much of its appeal.

With regard to the parties' cross-motions for summary judgment presented early in this case, the district court correctly found, on the stipulated and uncontested factual record before it, that Raymond had never communicated its acceptance of the contractual document which contained a release. Pp. 31-42. Raymond's efforts on the eve of trial to have the district court reverse itself on this issue were untimely and would have been extremely prejudicial to Minnesota Supply. The district court's refusal to revisit the issues already decided in its partial summary judgment was a proper exercise of the court's discretion. Pp. 42-50.

Raymond had the burden of proving it had “good cause” to substantially change the competitive circumstances of Minnesota Supply’s dealership and, subsequently, to terminate the dealership agreement. Pp. 50-53.

Raymond’s coercive threats that it would terminate Minnesota Supply if it carried a competing line of lift trucks was in violation of the Act’s prohibition against coercing dealers into not carrying competing lines. The jury was properly instructed on the law and its verdict is supported by the record. Pp. 53-64. The jury’s verdict that Raymond substantially changed the competitive circumstances of the dealership agreement is also fully supported by the record. Pp. 65-66.

Whatever error there was in allowing the jury to hear evidence regarding so-called “prejudgment interest” was fully cured by the district court’s removal of that entire sum from its final judgment. Pp. 66-72. Upon proper analysis, however, the so-called “prejudgment interest” was an appropriate element of the discounted, present value calculation of Minnesota Supply’s damages and, as such, the jury properly considered it and included it in its verdict. Pp. 73-81.

ARGUMENT IN RESPONSE TO RAYMOND'S APPEAL

I. Raymond failed to renew its Rule 50 motion at the close of the evidence and has waived its right to argue the verdict was not supported by sufficient evidence.

At the close of plaintiff's case, Raymond moved for judgment as a matter of law under F.R.C.P. 50(a). Tr. 1424-1448. Raymond did not, however, renew its motion for judgment as a matter of law at the close of all of the evidence and before this matter was submitted to the jury. Raymond neglected to apprise this Court of this significant procedural defect.

“Under Rule 50(b), a litigant who fails to move for judgment as a matter of law at the close of the evidence cannot later argue - - either in a post-trial Rule 50 motion or on appeal - - that the verdict was supported by insufficient evidence.” *Pulla v. Amoco Oil Company*, 72 F.3d 648, 655 (8th Cir. 1996) (White J.) (internal citations omitted). This rule is strictly enforced in the Eighth Circuit and is subject only to two narrow exceptions. Only one of those exceptions is potentially apposite. Under this exception, “litigants can challenge a jury verdict without moving for judgment as a matter of law at the close of the evidence if their earlier Rule 50 motion (1) closely preceded the close of all of the evidence; and (2) the court somehow indicated that the

movant need not renew its motion in order to preserve its rights to challenge the verdict.” *Pulla*, 72 F.3d at 655.²

Minnesota Supply raised Raymond’s omission with the district court and objected to Raymond’s post-trial Rule 50 motion. Aple.A. 155-159. The district court overruled Minnesota Supply’s objection and found Raymond had not waived its ability to pursue its post-trial Rule 50 motion. Order of 9/26/03 at 3-6 (Aplt.A. 0332-0335). The district court equated the sequence of events in this case to those considered in *BE & K Construction Co. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 90 F.3d 1318, 1324-25 (8th Cir. 1996), stating: “The only difference between this case, and the *BE & K Construction* case, is that here, the Court did not take any portion of the motion under advisement. That distinction is not significant. In fact, given the Court’s unequivocal statement that plaintiff had presented issues that had to be determined by a jury, the exception is quite sensibly applied in this case.” *Id.* 5-6.

In fact, the differences between the instant case and *BE & K* are very significant and are dispositive. First, in *BE & K*, the plaintiff raised the issue of

² The second exception, not applicable here, “allows litigants to present sufficiency of the evidence challenges where not to do so would constitute plain error that would result in a manifest miscarriage of justice.” *Pulla*, 72 F.3d at 655.

defendant's waiver for the first time on appeal. 90 F.3d at 1324. Faced with the plaintiff's own procedural misstep, this Court concluded: "Both sides missed a procedural step, and it is appropriate to reach the merits under all the circumstances." *Id.* No comparable balancing of procedural missteps is called for in the instant case.

Second, the trial court in *BE & K* had reserved ruling on a significant portion of defendant's first Rule 50 motion. *Id.* Accordingly, the second prong of the exception articulated in *Pulla* was met. By taking the motion under advisement, the trial court had "somehow indicated that the movant need not renew its motion in order to preserve its rights to challenge the verdict." *Pulla*, 72 F.3d at 655. That critical factor is not present in the instant case. Judge Tunheim incorrectly likened his "unequivocal statement that plaintiff had presented issues that had to be determined by a jury" with an indication that Raymond need not renew its motion at the close of the evidence. The denial of a Rule 50 motion at the close of the plaintiff's case will *always* be based upon a finding by the trial court that the plaintiff has presented issues that have to be determined by the jury. That is precisely the standard by which Rule 50 motions are determined. If a finding by a district court that a plaintiff has presented issues that have to be determined by a jury is equivalent to the second

prong of the *Pulla* exception, then *every* denial of a Rule 50 motion will satisfy that prong.

Finally, the suggestion that only nominal proceedings followed the denial of Raymond's first Rule 50 motion is inaccurate. The first order of business the morning of June 16, 2003 was Raymond's Rule 50 motion for judgment as a matter of law following the close of plaintiff's case. Tr. 1424-1448. After denying Raymond's motion, the jury was brought into the courtroom at 10:07 a.m.. Tr. 1449. Raymond proceeded with redirect examination of its general counsel, Tim Koval. Koval is the individual who drafted the 1993 Letter Amendment and the 1997 Mutual Consent document. Raymond's defense is based largely on these two documents. Following Koval, Raymond called James Bennett. Tr. 1467. Bennett was Raymond's vice president of sales who enforced the 1993 Letter Amendment against Minnesota Supply, who terminated Minnesota Supply, who negotiated the winding-up of the dealership, who appointed the replacement dealer, and who purportedly signed the Mutual Consent document on April 29, 1997. Bennett's testimony continued until the end of the day on June 16. The morning of June 17 began with the formal jury instruction conference. Tr. 1591-1621. Bennett's testimony resumed at approximately 9:40 a.m. on June 17. Tr. 1621. After the lunch break, a further conference on jury instructions was conducted. Tr. 1693-1727. Following that,

Bennett's testimony resumed. Tr. 1728. Next, the deposition testimony of Ross Colquhoun was read to the jury. Colquhoun was the CEO and Chairman of the Board of Raymond throughout the period of time at issue. Tr. 1737. Commencing at approximately 2:00 p.m. on June 17, Raymond called their damage expert, Al Vondra. Tr. 1737. Obviously, Vondra was a critical element of Raymond's defense, and issues of damages play a major role in Raymond's present appeal. Vondra's testimony continued until approximately 4:17 p.m. on June 17. After Vondra, Raymond rested. Tr. 1801. A further jury instruction conference was then conducted before the judge stepped down from the bench for the day. Tr. 1802-1804. The morning of June 18, a further instruction conference was conducted. Tr. 1809-1817. Counsel formally offered additional documents into the record. Tr. 1817-1821. Then, before the jury was called in to hear closing arguments (a full 48 hours after Raymond's Rule 50 motion had been denied), Judge Tunheim concluded: "Anything else?" Tr. 1821. The record reflects silence from defense counsel. Finally, after closing arguments and after the jury instructions had been read, the district court gave Raymond one last chance to renew its motion before the jury was sent out to deliberate; asking the lawyers "if there are any additional suggestions or issues to raise?" Tr. 1917. The response of Raymond's counsel was: "No." *Id.*

Application of Rule 50(b) can be harsh and one can understand a court's sympathies for a party whose lawyer has failed to comply with the Rule. That natural sympathy, however, does not excuse or prevent the application of the Rule. If, as the district court concluded, the facts of this proceeding fall within the two-prong exception articulated in *Pulla*, then it would seem that the exception will have swallowed-up the Rule. *See Peerless Corporation v. United States of America*, 185 F.3d 922, 926-27 (8th Cir. 1990) (refusing to create further exceptions to Rule 50). Raymond is barred from arguing sufficiency of the evidence and barred from seeking judgment as a matter of law under Rule 50.³

- II. The district court did not err when it entered partial summary judgment and dismissed Raymond's defense of release, nor did the District Court abuse its discretion when it declined to reconsider or modify that order.**
 - A. On the parties' fully developed, stipulated and uncontested factual record, the district court correctly entered partial summary judgment against Raymond on its defense of release arising out of the Termination by Mutual Consent document.**
 - 1. Standard of review.**

³ This brief will identify and address Raymond's specific sufficiency of the evidence arguments in the course of addressing Raymond's arguments generally.

The review of the district court's grant of summary judgment is *de novo*. *Chism v. W.R. Grace & Company*, 158 F.3d 988, 990 (8th Cir. 1998). In conducting its review, the appellate court applies the same standard that the district court was to have applied. *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407, 409 (8th Cir. 1988). When reviewing a motion for summary judgment, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). The nonmoving party may not rest upon the allegations of its pleadings, but rather must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. *See* F.R.C.P. 56(e). When "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Appellant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.*; *accord. Chism*, 158 F.3d at 990. Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon

motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Critically, this Court's consideration of whether the district court erred in granting Minnesota Supply's motion for summary judgment is based upon the record before the district court at the time it ruled on the summary judgment motion. *Hagerman*, 839 F.2d at 413.

2. The parties jointly invited the district court's summary disposition on the validity and enforceability of the Mutual Consent document.

Raymond's answer to the complaint asserted as an affirmative defense the release found in the Mutual Consent document. The lawyers for both parties realized the obvious importance of the document. If the release was enforceable, such a finding would bring the case to a screeching halt.

Accordingly, at the initial Rule 16 pretrial conference, the parties submitted a Joint Rule 26(f) Report and advised the court as follows:

"The parties have identified a key, preliminary issue that they feel should be resolved by the Court before the parties launch into the full breadth of discovery on all of the issues raised by the pleading...."

Joint Report (Aple.A. 7) at par.(a)(2) (bold and underscore in original). The "preliminary issue" was the enforceability of the Mutual Consent document. *Id.*

To deal with that issue, the Joint Report recommended that discovery initially proceed only on the issues raised by the Mutual Consent document, and provided the court with specific discovery limitations and deadlines for that purpose. *Id.* at par.(c) and (d). The parties represented they were “currently exchanging and developing drafts of a lengthy stipulation of facts so that the issues raised by the above-described document can be submitted to the Court with little or no issues of material fact.” *Id.* at par.(a)(4). A briefing schedule was suggested. *Id.* at par.(f). At the conclusion of the pretrial conference, the magistrate judge entered a pretrial scheduling order in conformance with the parties’ suggested procedures. Dkt. 9 and 10.

Minnesota Supply initiated discovery and served Raymond with interrogatories and document requests. Aplt. A. 195, ¶5; Aple.A. 13-19. Raymond undertook no discovery whatsoever on the release issue. The parties jointly prepared and filed a detailed stipulation, containing uncontested statements of fact and numerous exhibits. Aplt.A. 0053-0166. The parties submitted their cross-motions for summary judgment, with supporting memoranda, on this agreed factual record. Aplt.A. 0036, 0038, 0167, 0169. In further support of its motion, Raymond filed the affidavit of its vice president of sales, James Bennett. Aplt.A. 0051. In further support of its cross-motion for partial summary judgment, Minnesota Supply submitted Raymond’s answers to

interrogatories (Aple.A. 13-19); the affidavits of its former president, Robert Koch, and its current general manager, Mark Olsen (Aplt.A. 192, 194); and several documents produced by Raymond in response to Minnesota Supply's document requests (Aplt.A. 196-201). Raymond never sought a continuance of the motions to enable it to obtain additional affidavits, to undertake additional discovery, or to obtain any other relief available under F.R.C.P. 56(f).⁴

Thus, at the parties' express suggestion and on a fully developed and uncontested factual record, cross-motions for summary judgment were submitted on the issue of whether the Mutual Consent document was an enforceable contract.

3. Raymond failed to present a genuine issue of material fact regarding its failure to communicate its acceptance of the Mutual Consent document.

The issue presented to the district court was whether Raymond had communicated its purported execution and acceptance of the Mutual Consent document to Minnesota Supply. Under Minnesota law, “[d]elivery is ordinarily an essential element of the execution of a written contract. Its purpose is to provide an overt objective manifestation of an intent to complete the

⁴ Rule 56(f) provides that if the opposing party “cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the Court may refuse the application of judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

transaction, analogous to the common law concept of livery of seisin.”

Nodland v. Chirpich, 240 N.W.2d 513, 517 (Minn. 1976) (internal citations omitted). *Accord. Pogreba v. O’Brien*, 27 N.W.2d 145, 146-47 (Minn. 1947) (“On the execution of a contract in writing, delivery is ordinarily an essential element.”); *Sawyer v. Mutual Life Insurance Co.*, 207 N.W. 307 (Minn. 1926) (“Delivery is significant...because it is the conventional method of expressing the final assent of the parties to become bound contractually.”). While delivery of the fully executed contract is the logical and preferred method of manifesting one’s acceptance of a contract, the “manifestation of mutual assent essential to the formation of a contract, may be inferred wholly or partly from words spoken or written or from the conduct of the parties or a combination thereof.”

Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 221 (Minn. 1962).

The manifestation of assent through words or conduct “must be judged objectively, not subjectively.” *Id.* A party’s subjective but uncommunicated assent is of no import. To be effective, “[a] party can accept a contract either by communicating directly to the offerer or by words or actions put into a form which is in fact communicated to the offerer before revocation.” 451

Corporation v. Pension System for Policemen and Firemen of The City of Detroit, 310 N.W.2d 922, 924 (Minn. 1981). There must be, in some objective form, notice to the offerer of an offeree’s acceptance. *Id.* A promisee may

accept an offer by performing the act or forbearance specified in the offer, “but such act or forbearance must differ from what the promisee is already obligated to do either by law or by existing contract.” *Hartung v. Billmeier*, 66 N.W.2d 784, 789 (Minn. 1954); *Peters v. Mutual Benefit Life Insurance Company*, 420 N.W.2d 908, 913 (Minn.App. 1988) (“[F]or performance to constitute an acceptance, it must differ from what the promisee is already contractually obligated to do.”). Where a party purposely fails to deliver the signed document or communicate an acceptance, that conduct should be interpreted as an intention not to be bound. In *Pogreba v. O’Brien, supra*, the Minnesota Supreme Court held: “‘There was neither delivery of it [the instrument] to plaintiff nor anything else to manifest the final assent of defendant to be bound.’ Instead, ‘There was such intentional non-delivery on its [defendant’s] part as to show no contract.’” 27 N.W.2d at 146, quoting *Noyes v. City of Fergus Falls*, 237 N.W. 189, 190 (Minn. 1931).

While Raymond claimed its vice president, Bennett, had executed the revised Mutual Consent document on April 29, 1997 (and then stuck the document in his files), Aplt.Brf. 21, the uncontested record established there had been no express communication of that execution to Minnesota Supply.⁵

⁵ Minnesota Supply did not stipulate that the document was executed by Bennett on April 29, 1997, but for purposes of the motions was willing to assume that fact as true. Stip. ¶23 (Aplt.A. 0056).

Raymond stipulated it “had no record to indicate whether or not a copy of the fully executed document was ever returned to Minnesota Supply.” Stip. ¶23 (Aplt.A. 0056). More definitively, Raymond confirmed in its answers to interrogatories that no one at Minnesota Supply “had knowledge, or was told, that the Termination By Mutual Consent Agreement had been signed” by Raymond. Def. Ans to Int. ¶3 (Aple.A. 16). The affidavits of Koch and Olsen established that no one at Minnesota Supply had ever seen an executed copy of the Mutual Consent document until it was produced by Raymond after the filing of the lawsuit, and that no one at Minnesota Supply had ever been told or had any knowledge the document had been signed by Raymond or that Raymond had agreed to or accepted its terms. Olsen Aff. ¶4 (Aplt.A. 0194); Koch Aff. ¶3 (Aplt.A. 0192). Raymond filed no affidavits to counter those of Koch and Olsen. Raymond never sought to take the depositions of Koch, Olsen or anyone else at Minnesota Supply in advance of the district court’s ruling on the motions.

Raymond’s principal argument below was that “it is irrelevant as to whether or not the fully executed document was ever returned to Minnesota Supply”: its acceptance was complete the moment it signed the document (Aplt.A. 0044, 0047). That argument clearly finds no support in the law and is

not urged by Raymond here. Then, in what almost seems an afterthought,

Raymond made this additional argument:

“Raymond also has accepted the offer by performance. As noted above, Minnesota Supply’s version of the Termination by Mutual Consent provides that ‘Raymond shall be free to appoint a successor Dealer....’ Raymond, in fact, appointed a successor Dealer effective May 1, 1997, when Associated Material Handling of Minnesota, Inc. became Raymond’s dealer.”

Aplt.A. 0047. That sole conduct - - the appointment of the successor dealer - - was the only outward manifestation of acceptance argued by Raymond in its motion for summary judgment.⁶

Upon the motions, the magistrate judge recommended denial of Raymond’s motion and the granting of Minnesota Supply’s. Aplt.A. 0208-0209. The district court adopted the magistrate’s report and recommendation. Aplt.A. 0219-0226.

The district court rejected Raymond’s argument that its conduct communicated its acceptance; finding that Raymond was already in the process of terminating its relationship with Minnesota Supply and that the repurchase of

⁶ A second argument made by Raymond in its motion was that Minnesota Supply should be estopped from denying the existence of the Mutual Consent document. Aplt.A. 0010-0012. In support of that particular argument, Raymond identified its repurchase of Minnesota Supply’s parts inventory in July of 1997, together with its appointment of the new dealer, as steps it took in detrimental reliance on Minnesota Supply’s purported promises. Raymond has not pursued its estoppel argument in this court and, accordingly, that argument has been waived.

unsold equipment was part of Raymond's contractual obligations under the original dealer sales agreement. Aplt.A. 0223. Raymond's actions after receiving the revised termination agreement on April 29, 1997, were not sufficiently different from its actions prior to receiving the revised termination agreement to put Minnesota Supply on notice of Raymond's alleged acceptance. *Id.* For those reasons and the further reasons set forth in the magistrate judge's report and recommendation, the court found that the Mutual Consent document was never effectuated due to insufficient acceptance. *Id.*⁷

Raymond continues to argue here that at the time the parties presented their cross-motions for summary judgment there existed a genuine issue of material fact regarding the communication of Raymond's acceptance. Just saying so, however, does not make it so. Raymond's "evidence" that it indirectly manifested acceptance through conduct is its appointment of a new dealer and its repurchase of Minnesota Supply's parts and equipment inventories. A brief recap of the stipulated and unrefuted facts submitted with

⁷ The court also rejected Raymond's promissory estoppel argument: "Raymond has provided no evidence that it acted any differently than it otherwise would have if it had not received the revised termination agreement. Raymond's continued action to terminate its dealership relationship with Minnesota Supply and repurchase Minnesota Supply's unsold inventory is irrelevant. Raymond was already following this course of conduct before the termination agreement was an issue. Continuing to perform these actions was not a change in position that would show any reliance by Raymond." Aplt.A. 0224.

the motions below, however, makes clear the lack of merit to the argument. The original draft of the Mutual Consent document was sent to Minnesota Supply on April 18, 1997, less than two weeks before the long established termination date. That draft document was rejected outright by Minnesota Supply. Before that first draft of the document even came into being, the dealership agreement *already* required the purchase of Minnesota Supply's equipment and parts (Stip. Ex. A, ¶26(d) (Aplt.A. 0076)); the Act *already* required Raymond to repurchase Minnesota Supply's equipment and parts (Minn.Stat. §325E.0681); Raymond's termination letter itself *already* established Raymond's intention to buy back Minnesota Supply's inventories (Stip. Ex. F (Aplt.A. 0123)); Minnesota Supply had *already* supplied Raymond with its definitive list of the trucks, parts, and miscellaneous items of inventory to be bought back by Raymond (Stip. Ex. J (Aplt.A. 0133)); and Raymond and Minnesota Supply had *already* reached agreement on exactly how, and under what terms, Raymond would repurchase Minnesota Supply's parts and truck inventory (Stip. Ex. N (Aplt.A. 0140-0143)). Further, Raymond had *already* fixed the termination date (Stip. Ex. F (Aplt.A. 0123)); Raymond had *already* announced the termination of Minnesota Supply *and* the appointment of Associated of Minnesota as the replacement dealer (Stip. Ex. L (Aplt.A. 0137,

0138)); and that replacement dealer was *already* actively advertising in local newspapers, seeking employees (Olsen Aff. Ex. 4 (Aplt.A. 0198-0200)).

On that uncontested and stipulated record, Raymond's argument that its purchase of Minnesota Supply's parts and equipment and its appointment of a new dealer created a genuine issue of material fact on the issue of acceptance is patently without merit. Raymond's "evidence" does not even raise "some metaphysical doubt". *Matsushita*, 475 U.S. at 586. Accordingly, the district court did not err when it found there was no genuine issue of material fact relating to acceptance and that Minnesota Supply was entitled to partial summary judgment as a matter of law.

B. The district court did not abuse its discretion when it declined to reconsider its order of partial summary judgment in favor of Minnesota Supply.

1. Standard of review.

A district court's decision not to modify a pretrial order is reviewed by the court of appeals for an abuse of discretion. *Anderson v. Genuine Parts Company, Inc.*, 128 F.3d 1267, 1271 (8th Cir. 1997); *Control Data Corporation Securities Litigation v. Control Data Corporation*, 933 F.2d 616, 622 (8th Cir. 1991); *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322, 1335 (8th Cir. 1985). Absent a showing of manifest injustice or abuse of discretion, a district court's ruling interpreting a pretrial order of partial summary judgment

will not be disturbed on appeal. *Alberty-Velez v. Corporacion de Puerto Rico Para la Difusion Publico*, 242 F.3d 418, 423 (1st Cir. 2001).

Following the grant of summary judgment, a motion for leave to file a motion to reconsider is treated as the functional equivalent of a motion to alter or amend the judgment under F.R.C.P. 59(e), and it is reviewed for an abuse of discretion. *Comsat Corporation v. St. Paul Fire & Marine Insurance Company*, 246 F.3d 1101, 1105 (8th Cir. 2001). The district court has broad discretion in determining whether to grant a motion to alter or amend a judgment, and the appellate court will not reverse absent a clear abuse of discretion by the district court. *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407, 413-14 (8th Cir. 1988). Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.* at 414.

- 2. Raymond never moved for reconsideration of the district court's pretrial order of partial summary judgment and, when Raymond attempted to circumvent that pretrial order, the district court properly exercised its discretion and refused to disturb its order.**

The district court entered its pretrial order of summary judgment on September 18, 2000. Raymond did not move for reconsideration of that order,

nor did Raymond seek leave to file a motion for reconsideration.⁸ Rather, Raymond simply chose to ignore the district court's order. With its pretrial submissions, Raymond filed proposed jury instructions which circumvented the court's order and reinserted the defenses of release and promissory estoppel. Aplt.A. 260-263. Simultaneously, Raymond filed its "Statement of the Case" and identified as issues for trial the defenses of release and promissory estoppel. Dkt. 92 at pp.19-21. These submissions were filed on June 24, 2002, twenty-one months after the order of partial summary judgment, nine months after the close of discovery, and on the eve of trial.⁹ In response to these submissions, Minnesota Supply filed a motion *in limine* seeking an order prohibiting the introduction into evidence of the Mutual Consent document and an order prohibiting witnesses and defense counsel from testifying about or arguing for the previously rejected defenses of release and estoppel.

⁸ Rule 7.1(g) of the Local Rules of the District Court of Minnesota provides: "Motion for Reconsideration. Motions to reconsider are prohibited except by express permission of the Court, which will be granted only upon a showing of compelling circumstances. Requests to make such a motion, and responses to such requests, shall be made by letter to the Court....".

⁹ The district court's scheduling order, entered June 28, 2001, established a discovery cut-off of October 1, 2001, and a "ready for trial" date of March 1, 2002. A trial date had been set for June 24, 2002. Dkt. 89. On June 6, 2002, a new trial date of October 15, 2002 was set, and the time for filing pretrial submissions was pushed to June 24, 2002. Dkt. 90.

Raymond argued “additional evidence of the communication of acceptance of the release has been discovered.” Dkt. 92 at p.19 n.3. This “newly discovered evidence” was that, in 1997, Raymond assumed the defense of and settled a products liability suit that had been brought against Raymond and Minnesota Supply by an individual injured while operating a Raymond lift truck sold through Minnesota Supply. Because the Mutual Consent document included a provision providing that Raymond would “hold Dealer harmless for defective product claims in accordance with section 9.0 of the Sales Policy Manual”, Raymond argued that its post-termination assumption of the defense in the products liability case in 1997 was proof of its acceptance of the Mutual Consent document as a whole. Raymond further argued that this “new” evidence “became apparent” only after taking the deposition of one of Minnesota Supply’s officers in April of 2001. Def’s. Opposition to Motion *in Limine*, pp.9-10 (Aplt.A. 0273-0274).

The district court rejected Raymond’s efforts to undue its pretrial order of partial summary judgment, and granted Minnesota Supply’s motion *in limine*. Order of 3/21/03 (Aplt.A. 0294). As the district court observed, Raymond’s assumption of the defense of the products liability suit occurred in 1997, and Raymond obviously had knowledge of its own actions in that regard. *Id.* Further, the district court ruled: “Even if the Court credits defendant’s

argument that it did not realize the impact of the indemnification until April of 2001 when it deposed the then president of Minnesota Supply, defendant's attempts to reintroduce this issue, brought at least fourteen months after the discovery of the evidence, is untimely. The question of the efficacy of the release was clearly settled in September of 2000, and the Court will not revisit its decision at this late date....At this late date...the risk of prejudice to plaintiff is too great to disrupt this long-settled issue." *Id.*¹⁰

The district court's refusal to revisit the motion for summary judgment was clearly within its discretion. *Anderson*, 128 F.3d at 1271; *Hale*, F.2d at 1355. Facts specified in a Rule 56(d) order of partial summary judgment "shall be deemed established, and the trial shall be conducted accordingly." F.R.C.P. 56(d). Rule 56(d) orders of partial summary judgment are akin to pretrial orders under Rule 16. *See* Advisory Committee Notes to Amendments (1946) to Rule 56(d) ("This adjudication is more nearly akin to the preliminary order

¹⁰ Raymond subsequently sought reconsideration of the district court's grant of Minnesota Supply's motion *in limine*. Aple.A. 98, 101. The district court denied this further request, stating: "[T]he Court will not take up this issue for a third time. Defendant has yet to offer a convincing explanation for its failure to realize, until after the summary judgment motion, that it 'had in fact defended and indemnified [plaintiff] in a personal injury action in late 1997.' In addition, the Court finds the timing of the request to be prejudicial. Even if the trial had not been delayed, defendant's attempt to reintroduce this issue would have been 'on the eve of trial' and disturbing this settled issue presents a significant risk of unfair prejudice to plaintiff." Order of 5/16/03 at 2-3 (Aple.A. 104).

under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.”); *Alberty-Velez Corporacion de Puerto Rico Para la Difusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001) v. (“[W]e draw on the law applicable to [Rule 16] orders to further guide our analysis [of Rule 56(d) orders].”); *Anixtar v. Home-Stake Production Company*, 977 F.2d 1533, 1548 (10th Cir. 1992); *Travelers Indemnity Company v. Erickson’s, Inc.*, 396 F.2d 134, 136 (5th Cir. 1968) (“[O]rder of the type described in Rule 56(d), specifying facts established without controversy, [is] analogous to a pre-trial order under Rule 16.”). Rule 16 pretrial orders control the subsequent course of the action and may be modified at trial only to prevent manifest injustice, and only if there is no substantial injury or prejudice to the opponent. *Hale*, 756 F.2d at 1335. A party may not offer evidence or advance theories during trial which violate the terms of a pretrial order. *Id.*; *Anderson*, 128 F.3d at 1271. Once a judge issues a pretrial summary judgment order removing certain claims from the case, the parties have a right to rely on the ruling by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims. *Alberty-Velez*, 242 F.3d at 424-25, quoting *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2nd Cir. 1989).

Raymond's efforts were nothing but an extremely late and unacceptable attempt to introduce evidence and raise arguments which clearly could have been tendered or raised prior to entry of the partial summary judgment.

Hagerman, 839 F.2d at 413-14. The district court correctly concluded that Raymond's efforts to reopen the issue of the efficacy of the release were untimely and created too great a risk of prejudice to Minnesota Supply.

3. The “new” evidence Raymond sought to introduce was, in any event, of no legal effect.

Even if the district court had heard the “new” evidence, it would have changed nothing. The defense of one of its dealers in products liability litigation was not a new obligation undertaken by Raymond as a result of the Mutual Consent document. The language in the Mutual Consent document itself makes this clear: the “agreement” to hold Minnesota Supply harmless for defective product claims was to be “in accordance with Section 9.0 of [Raymond's] Sales Policy Manual.” Raymond was obligating itself to do nothing it was not already bound to under its Sales Policy Manual.

Paragraph 23(c) of the parties' Dealer Sales Agreement (P.Ex. 1 (Aplt.A. 0061)) required Minnesota Supply's participation in Raymond's Products Liability Defense Program. Section 9 of Raymond's Sales Policy Manual (P.Ex. 16 (Aple.A. 373)), i.e. the instrument referenced in the Mutual Consent document, detailed the defense program, including: mandatory participation by

all dealers; Raymond's promise to provide a uniform defense; and Raymond's promise to pay all legal costs and to indemnify dealers to the fullest extent of the law. P.Ex. 16 at 9.1 (Aple.A. 382). The Manual further detailed the dealers' mandatory contributions to fund the program, and the use of those funds "to provide defense, indemnity and insurance..." Aple.A. 384.¹¹

Finally, completely apart from these pre-existing contractual undertakings, Raymond had an independent legal obligation to defend and indemnify Minnesota Supply in products liability suits whenever Minnesota Supply was sued as a link in the chain of distribution for one of Raymond's trucks. Tr.(Koval) 1461. *And see* Minn.Stat. §544.41 (requiring dismissal of non-manufacturer defendant from strict liability in tort claims unless the defendant played some part in creating the defect). Raymond never made an offer of any proof regarding the nature of the plaintiff's claims in the 1997 suit. The record simply does not support a conclusion that Raymond was not already required to defend and indemnify Minnesota Supply as a matter of law.

Raymond's defense and indemnification of Minnesota Supply in 1997 was nothing but the performance of its preexisting obligations at law and by

¹¹ *See also*, Raymond's Annual Reports which confirm a "policy of aggressively defending products liability lawsuits," and that "the Company's Dealers contribute to the funding of the Company's product liability program and, in turn, the Company indemnifies the Dealers against products liability expense and manages products liability claims." P.Ex. 208 at 20, 35 (Aple.A. 442, 443); P.Ex. 209 at 20, 37 (Aple.A. 445, 448).

contract. Even had it been considered, such conduct as a matter of law could not substitute for delivery of the signed Mutual Consent document. *Hartung*, 66 N.W.2d at 789; *Peters*, 420 N.W.2d at 913.

III. The jury instructions correctly placed the burden of proof regarding “good cause” on the terminating manufacturer, Raymond.

The underlying premise of Raymond’s argument is that the burden of proof on “good cause” would normally lie with the terminated dealer and that the district court improperly “shifted” that burden to Raymond, the terminating manufacturer. The premise is wrong. Under Minnesota common law the burden of proof lies with the manufacturer to establish “good cause” for the termination of a dealership contract. *Carlson Equipment Company v. International Harvester Company*, 710 F.2d 481, 483 (8th Cir. 1983) (common law action for wrongful termination of agricultural implement dealership contract). That burden is consistent with Minnesota law regarding proof of “good cause” in termination cases generally. See *Helsby v. St. Paul Hospital & Casualty Co.*, 195 F.Supp. 385, 394 (D.Minn. 1961) (Insurance company bears burden of proving “cause” for termination of insurance agent.), *aff’d*, 304 F.2d 758 (8th Cir. 1962); *Spurck v. Civil Service Board*, 42 N.W.2d 720, 727 (Minn. 1950) (“[B]urden of proof is upon employer to show that [employee] was discharged for cause...”); *Schenstrom v. Continental Machines, Inc.*, 85

F.Supp. 374, 380 (D.Minn. 1949) (In sales representative termination case, “[t]he burden to prove that cancellation was justified is upon the defendant.”). “[I]n a case arising under a ‘for cause’ employment contract, it is generally held that the employer has the burden of proving cause for termination.” *Ross v. Garner Printing Company*, 285 F.3d 1106, 1113 (8th Cir. 2002) (citing *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1059 (Colo. 1992) (collecting cases)).

Consistent with the Act’s purpose of protecting dealers, *Astleford Equipment Co., Inc. v. Navistar International Transportation Corp.*, 632 N.W.2d 182, 191 (Minn. 2001), MHUEMDA does not depart from this well established body of law regarding burden of proof in termination cases. The courts have specifically interpreted MHUEMDA and related legislation as placing the burden of proof for establishing “good cause” squarely on the manufacturer. In *Midwest Great Dane Trailers, Inc. v. Great Dane Limited Partnership*, 977 F.Supp. 1386 (D.Minn. 1997) the district court held: “A plaintiff still must show a substantial change in competitive circumstances, and *in defense, a manufacturer is permitted to show good cause. ...* Accordingly, under the MHUEMDA, *manufacturers must demonstrate good cause* for any ‘substantial change’ in the prevailing conditions...of a dealership agreement.” *Id.* at 1392, 1394 (emphasis added). In *Wadena Implement Company v. Deere*

& Company, Inc., 480 N.W.2d 383 (Minn.App. 1992), a case decided under the identical provisions of the Minnesota Agricultural Equipment Dealership Act (Minn.Stat. §325E.05 *et seq.*), the Minnesota appellate court clearly placed the burden of proof to establish “good cause” on the manufacturer. Affirming the trial court’s motion for summary judgment in favor of the terminated dealer, the appellate court held that the manufacturer had failed to meet its burden of establishing its termination was for good cause, stating: “Deere, on the facts presented, could not meet *its burden of proof* that Wadena Implement consistently failed to meet its reasonable market share requirements.” *Id.* at 388 (emphasis added).

Raymond argues that the express reference to the burden of proof in the Minnesota Motor Vehicle Sale and Distribution Act (placing the burden *on the manufacturer*), and the absence of such a direct reference to the burden in MHUEMDA, compels a conclusion that the legislature intended the burden not to rest upon the manufacturer in the latter Act. Raymond’s construction turns the law and the purpose of the Act on its head, placing a burden of proof on a terminated dealer under MHUEMDA that would be contrary to the burden placed on any other terminated dealer under any other Minnesota statute (including the Motor Vehicle statute) or at common law. Clearly, if the legislature had intended *that* anomaly, it would have said so. Courts should

construe statutes to avoid absurd and unjust consequences. *Astleford*, 632 N.W.2d at 188. In light of the established law in this area and the purpose of the Act to *protect* dealers, Raymond's proposed interpretation is both absurd and unjust.

The burden of proof properly rests on the terminating manufacturer, and the jury was correctly instructed on the burden in this case. Tr. 1909-1910 (Aple.A. 362-363).

IV. The jury instructions correctly stated the law and the jury reasonably found Raymond liable for wrongful coercion.

Raymond argues, at Section III to its brief, that a directed verdict should have been entered against Minnesota Supply on the first claim that went to the jury - - i.e. the wrongful coercion claim. Raymond's argument on this point is a mix of legal arguments addressing the scope of the Act and attacks on the sufficiency of the evidence. Raymond's arguments regarding the reach of the statute are without merit. Raymond has waived its further arguments that the verdict was not supported by the evidence.

A. Standard of review.

The standard of review for denial of motions for directed verdict and for judgment notwithstanding the verdict - - i.e. motions for judgment as a matter of law under F.R.C.P. 50 - - is the same, *Sunkyong International, Inc. v.*

Anderson Land & Livestock Co., 828 F.2d 1245, 1248 (8th Cir. 1987), and is quite stringent, *Doe By Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1425 (8th Cir. 1991). In reviewing the district court's denial of these motions, the Court must: (1) resolve direct factual conflicts in favor of the non-movant, (2) assume as true all facts supporting the non-movant which the evidence tended to prove, (3) give the non-movant the benefit of all reasonable inferences, and (4) affirm the denial of the motions if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn. *City National Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308, 1312 (8th Cir. 1991). Accordingly, the district court has not erred if there is substantial evidence - - more than a mere scintilla - - to support the verdict in favor of the party opposing the motions. *Hastings v. Boston Mutual Life Insurance Co.*, 975 F.2d 506, 509 (8th Cir. 1992).

B. Raymond does not have standing to argue the sufficiency of the factual record.

As discussed in Section I, *supra*, Raymond failed to present a Rule 50 motion for judgment as a matter of law at the close of all the evidence. Accordingly, it cannot now complain about the sufficiency of the evidence. In an apparent effort to avoid the impact of this Rule, Raymond has couched its argument at Section III of its brief as one based entirely on the law. Indeed, Raymond identifies only a *de novo* standard of review and, in support, cites

McKnight v. Johnson Controls, Inc., 36 F.3d 1396 (8th Cir. 1994). Raymond neglects to point out, however, that the “legal question” presented on review is: “whether there is *sufficient evidence* to support a jury verdict.” *McKnight*, 36 F.3d at 1400 (emphasis added). Intertwined throughout Raymond’s *legal* attack on Minnesota Supply’s first claim are sufficiency of the evidence arguments. *See e.g.* Aplt.Brf. at 47, 49-50. These arguments have been waived and should be stricken.

C. The jury was properly instructed on Minnesota Supply’s coercion claim under Minn.Stat. §325E.0628(b)(2).

The first claim that went to the jury arises out of the interplay of several sections of the Act. First, the Act provides that it is a violation for an equipment manufacturer to “coerce an equipment dealer into a refusal to purchase equipment manufactured by another equipment manufacturer.” Minn.Stat. §325E.0628(b)(2). Second, any “term of a dealership agreement...that is inconsistent with the terms of [the Act] or that purports to waive an equipment manufacturer’s compliance with [the Act] is void and unenforceable and does not waive any rights that are provided to a person by [the Act].” Minn.Stat. §325E.0683. Finally, the Act provides that manufacturers cannot terminate dealers without “good cause”. Minn.Stat. §325E.0681. Pertinent to this discussion, “good cause” is defined as the “failure by an equipment dealer to substantially comply with essential and

reasonable requirements imposed upon the dealer by the dealership agreement.”

Id.

Paragraph 18 of the Dealer Sales Agreement (P.Ex. 1 (Aplt.A. 0061)) runs afoul of these provisions. Paragraph 18 provides:

18. Competitive Products.

(a) If Dealer...shall, without Raymond’s prior written consent, promote or market any merchandise...which are [sic.] in the opinion of Raymond alone, directly or indirectly competitive with any Raymond Products, Raymond shall have the right...to terminate this agreement....

The obvious purpose, intent and effect of paragraph 18 is, through the threat of termination, to coerce Minnesota Supply into a refusal to purchase competing products. Paragraph 18 is inconsistent with section 325E.0682(b)(2) and, pursuant to section 325E.0683, is void and unenforceable.¹²

In light of its void and unlawful status, paragraph 18’s prohibition against selling competing equipment is not an “essential and reasonable requirement imposed upon the dealer” and, therefore, could not be a basis for a lawful termination for “good cause”. Minn.Stat. §325E.0681. Accordingly, in

¹² It is worth noting that MHUEMDA’s prohibition against exclusivity provisions is much broader and complete than that found in the Minnesota Motor Vehicle Sale and Distribution Act (Minn.Stat. §80E.01-80E.18), which this Court recently analyzed in *Metro Motors v. Nissan Motor Corporation in U.S.A.*, 339 F.3d 746 (8th Cir. 2003). The latter Act merely prohibits manufacturers from terminating dealers for violating an exclusivity provision. *Id.* at 752. MHUEMDA, by contrast, prohibits all coercion which might cause a dealer to refuse to sell competing equipment (with no distinction being made for on-site or off-site sales) and makes any contract provision that is inconsistent with that prohibition void and unenforceable.

addition to being in conflict with section 325E.0682, paragraph 18 of the Dealer Sales Agreement is in direct conflict with section 325E.0681 which limits terminations to those founded upon good cause. Stated differently, paragraph 18 “purports to waive an equipment manufacturer’s compliance” with the Act’s requirement that terminations be for good cause only. As a result of this further conflict with the Act, paragraph 18 is void and unenforceable.

In 1992, Raymond began manufacturing narrow-aisle lift trucks for Caterpillar and, as a Caterpillar dealer, Minnesota Supply started selling those lift trucks. In direct violation of the Act, Raymond declared Minnesota Supply’s sale of this competing equipment a violation of paragraph 18 of the dealership agreement and cause for termination. Faced with the termination of its 45-year old Raymond dealership, Minnesota Supply executed the 1993 Letter Amendment. That amendment severely restricted the term of the dealership agreement, forced a costly restructuring of Minnesota Supply’s business organization, and imposed performance criteria upon Minnesota Supply that Raymond knew could not reasonably be met. But for Raymond’s coercive threat of termination, the amendment would not have been signed.

Raymond argues that its conduct, as a matter of law, did not violate the Act. “Under the Act” Raymond states, “ ‘coercion’ requires some result - - the Act is violated when a dealer is coerced ‘into’ a refusal. A threat that is ignored

is not coercion.” Aplt.Brf. at 46. Thus, Raymond continues, even though the jury may have found Raymond’s conduct to be coercive, since Minnesota Supply did not actually refuse to purchase the competing CAT equipment, there was no violation of section 325E.0682. Raymond’s argument, then, is that it was at liberty to threaten or demand and extract anything it desired from Minnesota Supply, and so long as its demands and threats were kept below that threshold of pain where Minnesota Supply would finally buckle and stop selling CAT lift trucks (or as Raymond might say, so long as its “attempted” coercion was “unsuccessful”) Raymond’s conduct was not violative of the Act. We submit that to state Raymond’s argument is enough to require its rejection.

The Minnesota Supreme Court has recently made clear that the Act is to be interpreted so as to effectuate its purpose, and that purpose “is to protect the dealer, who is often in a weaker bargaining position than the grantor who inherently has superior economic power in the negotiation of dealerships.” *Astleford Equipment Co., Inc. v. Navistar International Transportation Corp.*, 632 N.W.2d 182, 191 (Minn. 2001). Raymond’s proposed application of section 325E.0682(b)(2) of the Act would completely defeat that purpose.

An argument similar to Raymond’s was made by the manufacturer in *Metro Motors LLC v. Nissan Motor Corporation in U.S.A.*, 2001 WL 1690060 (D.Minn. 2001), *aff’d* 339 F.3d 746 (8th Cir. 2003). There, the district court was

interpreting the Minnesota Motor Vehicle Sale and Distribution Regulations Act, Minn.Stat. §80E.01 *et seq.* The section of the Act in question made it unlawful for a manufacturer “to *require* a new motor vehicle dealer to...enter into an agreement with the manufacturer...by threatening to cancel a franchise or any contractual agreement existing between the dealer and the manufacturer.” *Id.* *2 (quoting §80E.12(c)) (emphasis added). Nissan argued, like Raymond, that it was entitled to judgment as a matter of law because it did not “require” Metro, the dealer, to enter into an amendment. Among other things, Nissan’s proposed amendment would have required Metro to stop selling Kia cars out of its Nissan dealership location. Nissan threatened termination if Metro did not sign the amendment, Metro refused. Thus, argued Nissan, since Metro refused to sign the amendment, Metro was not “required” to sign it and, therefore, the Act was not violated. *Id.*

The district court’s ruling is apposite to the case at bar:

Nissan parses the language of the statute too narrowly. The statute prohibits a manufacturer from requiring a dealer to do something “by threatening to cancel a franchise.” This is precisely what Nissan did. Nissan told Metro that, unless Metro assented to the Amendment, Nissan would pursue its remedies including termination. The fact that Nissan did not terminate the franchise is evidence of nothing, because under Minnesota law, Nissan was prohibited from terminating the franchise. The Act provides that a manufacturer may not terminate a franchise solely for violation of an exclusivity provision in the franchise agreement. Minn.Stat. §80E.07 subd. 1(c). Nissan’s conduct in this case is precisely what the statute intended to prevent: a manufacturer using

threats of termination to force a dealer to sign something not in the dealer's interest....

Id.

A slight reworking of the *Metro Motors* holding fits the instant case perfectly: Raymond parses the language of the Act too narrowly. The fact that Minnesota Supply took on the CAT line is evidence of nothing, because under Minnesota law Minnesota Supply had the absolute right to take on that line. The fact that Raymond's coercion to prevent Minnesota Supply from taking on the second line was ineffective, and the fact that Raymond did not terminate Minnesota Supply in 1993 for taking on that line, are evidence of nothing because, under Minnesota law, Raymond was prohibited from coercing Minnesota Supply not to carry the second line and was prohibited from terminating Minnesota Supply for taking on a second line. Raymond's conduct in this case is precisely what the Act is intended to prevent: a manufacturer using coercion and threats of termination in direct violation of the Act's prohibitions to force a dealer not to carry a competing line or to take other action not in the dealer's interest.

Judge Tunheim, in ruling on the post-verdict motions put it this way:

An alternate, and slightly broader, reading of the section [325E.0682] appropriately takes into account the inchoate nature of the term "coercion."...Unlike the other conduct prohibited in this section of the Act, "coercion" can fairly be read to encompass the attempt. In other words, the term "coerce" as used in the statute, does not require

success.... Given the clear intent of the statute, and the facts in this particular case, the slightly broader reading is more appropriate. Though plaintiff ultimately carried the CAT line, defendant coerced plaintiff, in violation of the statute, when defendant attempted to force plaintiff into a refusal to carry the CAT line. The violation of the Act was consummated when that threat was made. This coercion culminated in plaintiff being compelled to sign the 1993 Agreement, and ultimately resulted in defendant's wrongful termination of the dealership.

Order of 9/26/03 at 15-16 (Aplt.A. 0344-0345).

The Court's jury instructions fairly and accurately described the law under the Act and the conduct prohibited thereunder. In the court's instruction number 14, the jury was told that a termination or substantial change in the competitive circumstances of a dealership can only be made for "good cause". Aple.A. 141, 360-361. The jury was told that "[t]he Act also prohibits equipment manufacturers from coercing dealers into refusals to purchase equipment manufactured by another equipment manufacturer." *Id.* Finally, the jury was told that "the Act provides that if a term in a dealership agreement is inconsistent with either of the foregoing statements of the law, or if a term in a dealership agreement purports to waive a manufacturer's obligation to comply with these statements of the law, then that term in the dealership agreement is void and unenforceable and does not waive the manufacturer's obligation to comply with the law as has just been stated, nor does that term waive the dealer's right under the law as just stated." *Id.* Thus, the jury was instructed on the fundamental, underlying statutory provisions applying to this case.

The jury was then instructed specifically as to Minnesota Supply's first claim. Jury Inst. 15 (Aple.A. 142, 361-362). In pertinent part, the court's instructions were:

Coercion is conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.¹³

For plaintiff to prevail on the first claim, plaintiff must prove each of these elements by a preponderance of the evidence: *First*, that in 1993 defendant sought to coerce plaintiff into a refusal to carry the CAT narrow-aisle line; *Second*, that defendant threatened plaintiff with termination of the Dealership Agreement if plaintiff refused to comply with defendant's demand; *Third*, that defendant's threat coerced plaintiff into signing the October 1993 Amendment; and *Fourth*, that plaintiff was injured as a result of defendant's conduct.

Id.

Raymond's post-trial motion for judgment as a matter of law was properly denied. There is no error.

D. The factual record fully supports the jury's verdict.

In the event the Court addresses Raymond's sufficiency of the evidence arguments, the following observations are offered. Raymond's first argument is premised on the truly remarkable statement that "the evidence shows that Raymond never threatened to terminate Minnesota Supply if it carried the CAT narrow-aisle line." Aplt.Brf. at 49. First, section 325E.0682 prohibits coercing a dealer not to carry competing equipment. The threat of termination is just one

¹³ Black's Law Dictionary (7th Ed. 1999). Aple.A. 142.

manifestation of Raymond's coercive behavior. Further, and without detailing the overwhelming evidence that was presented to the contrary, the following examples from the record should suffice to counter Raymond's patently false assertion. First, the 1993 Letter Amendment itself specifically recites in its preface Raymond's "right" to terminate Minnesota Supply for taking on the competitive CAT product, and that Raymond would hold off exercising that "right" for one year *only* if Minnesota Supply met Raymond's unreasonable demands. P.Ex. 40 (Aple.A. 392). Second, the president of Minnesota Supply, Bob Koch, testified that he was expressly told by Raymond that it did not want its dealers carrying competing lines. Tr. 287-288 (Aple.A. 210-211). Third, in the Fall of 1992, Minnesota Supply's representatives were plainly bullied and intimidated by Raymond's CEO with the not-so-subtle threat of termination for the purpose of thwarting Minnesota Supply's plans to carry the CAT narrow-aisle line. *See e.g.* Tr. 288-290 (Aple.A. 211-213).

Another argument made by Raymond is that "Minnesota Supply offered no evidence that it suffered any damages as a result of" Raymond's threats of termination. Aplt.Brf. at 50. This statement, too, is patently false. The immediate result of Raymond's coercive conduct was the execution of the 1993 Letter Amendment. But for Raymond's coercion, Minnesota Supply would not have agreed to the terms contained in that letter, including agreeing to

undertake the costly, physical separation of its organization. Tr.(Koch) 285-286, 1053-1054 (Aple.A. 208-209, 256-257). In addition to the out-of-pocket expenses associated with that relocation, Minnesota Supply was forced to proceed under an amended dealership agreement that imposed performance standards that were impossible and which effectively gave Raymond the right to terminate at any time. Addressing a similar argument of “no injury”, the district court in *Metro Motors LLC v. Nissan Motor Corporation in U.S.A.*, 2001 WL 1690060, *3 (D.Minn. 2001), *aff’d* 339 F.3d 746 (8th Cir. 2003), ruled that “the injury to plaintiff lies in the mere violation of the Act as well as in the fact that Plaintiff is forced to operate with the proverbial ‘sword of Damocles’ hanging over its head, never knowing when, or if, Nissan will decide to terminate the Franchise Agreement.” Eventually, of course, in the instant case Damocles did let loose his sword and Minnesota Supply was terminated by Raymond for failing to achieve the impossible “benchmarks”.

Even if not already waived, Raymond’s sufficiency of the evidence arguments are without merit.

V. The jury’s verdict on Minnesota Supply’s second claim, that the 1993 Letter Amendment substantially changed the competitive circumstances of its dealership agreement, was fully supported by the evidence.

A. Standard of review.

The standard outlined in Section IV.A., *supra*, is applicable to this portion of Raymond’s appeal.

B. Raymond’s entire argument in connection with Minnesota Supply’s second claim has been waived.

The second claim that went to the jury was that Raymond caused a substantial change to the competitive circumstances of Minnesota Supply’s dealership agreement without good cause. Minn.Stat. §325E.0681. The jury returned a verdict in favor of Minnesota Supply on this claim. Raymond’s *entire* attack on the jury’s verdict is that the evidence did not support the verdict. Aplt.Brf. 51-53. Raymond does not assign any error in the law applied by the lower court. No objection is made to the jury instructions. Raymond’s arguments with regard to the sufficiency of the evidence have been waived, and Raymond should not now be heard on these arguments. F.R.C.P. 50(b); *Pulla*, 72 F.3d at 655.

If the Court should address Raymond’s factual arguments, they are two-fold: (1) the substantial changes effected by the 1993 Letter Amendment “all originated with Minnesota Supply,” and (2) Minnesota Supply did not offer any

evidence of damages. With regard to ideas originating in the heads of Minnesota Supply's officers and board members, Raymond ignores the evidence that Minnesota Supply "had a gun to [its] head," (Tr.(Koch) 292)) and was *coerced*. The jury certainly could, and did, reasonably conclude that the changes effected by the 1993 Letter Amendment were not voluntarily offered-up or agreed to by Minnesota Supply.

Raymond's "no damages" argument is the same as addressed in the preceding section regarding the coercion claim, and is without merit.

VI. The jury's verdict on damages, and the judgment entered on the verdict, are fully supported by the record.

A. Standard of review.

A jury's award will not be reversed except for a manifest abuse of discretion. *Piotrowski v. Southworth Products Corporation*, 15 F.3d 748, 754 (8th Cir. 1994). The law does not require mathematical precision in proof of a loss; proof to a reasonable certainty is sufficient. *Lowe v. E.I. DuPont de Nemours & Co.*, 802 F.3d 310, 311 (8th Cir. 1986). A jury verdict may not be overturned for insufficient evidence unless it is clearly contrary to the evidence. *Id.*

When evaluating the denial of a motion for judgment as a matter of law, the appellate court cannot disturb the jury's lost profits damage award unless

there is a complete absence of probative facts to support the conclusion reached. *BBSerCo., Inc. v. Metrix Co.*, 324 F.3d 955, 962 (8th Cir. 2003). Under Minnesota law, which applies in this diversity action, an appellate court will not interfere with a jury's award of damages unless there is "plain injustice or a monstrous or shocking result." *Piotrowski*, 15 F.3d at 754 (quoting *Schoenke v. Ronningen*, 315 N.W.2d 612, 614 (Minn. 1982)).

The trial court's admission of damage testimony is reviewed for abuse of discretion. *BBSerCo.*, 324 F.2d at 963. Once the testimony is admitted, it is axiomatic that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000)).

When it is apparent as a matter of law that certain identifiable sums included in a verdict should not have been there, the district court possesses the power to reduce the amount of the verdict accordingly. *C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d 592, 598 (8th Cir. 1996).

B. The district court's removal of approximately \$1.7 million in "prejudgment interest" from the verdict obviously caused no prejudice to Raymond.

Minnesota Supply's damage expert, Frederic Lieber, gave extensive testimony regarding the lost profits suffered by Minnesota Supply as a result of

the termination in 1997. Tr. 681-870; P.Ex. 300A-312 (Aple.A. 479-492). His ultimate conclusion was that Minnesota Supply's damages, present-valued as of May 31, 2003 (i.e. as of the trial), were \$14,076,784. Aple.A. 488. Profits occurring after the trial date were present-valued *back* to May 31, 2003. Profits that would have occurred prior to trial were present-valued *forward* to May 31, 2003. *Id.* The lost profits that occurred prior to trial totaled \$4,196,271. *Id.* After applying his present-value analyses, those lost profits, as of May 31, 2003, were calculated at \$5,886,819. *Id.* The difference between those two numbers, i.e. \$1,690,548, is the "prejudgment interest" at issue in this portion of Raymond's appeal.¹⁴

The district court and the lawyers held lengthy discussions regarding the nature of this portion of Mr. Lieber's damage calculations. Tr. 1718-1727, 1813-1816 (Aple.A. 326-335, 343-346). Raymond argued the approximate sum of \$1.7 million represented prejudgment interest that should only be calculated by the court under the Minnesota prejudgment interest statute. Minn.Stat. §549.09. Minnesota Supply argued it was not prejudgment interest but, rather, simply a component of a present-valuation of a lost income stream. The district court was not convinced the sum represented prejudgment interest and allowed

¹⁴ Minnesota Supply has cross-appealed this portion of the district court's judgment. To keep the issue of Raymond's appeal separate from those raised by Minnesota Supply's cross-appeal, the latter is addressed at Section VII of this brief.

Mr. Lieber's calculations regarding that sum to go to the jury. The district court concluded it would finally resolve the issue post-verdict. Tr. 1727 (Aple.A. 335).

In light of Raymond's objections, however, Minnesota Supply was concerned that if the district court, or this Court, ultimately determined that portion of Lieber's damage analysis to be prejudgment interest, it would be extremely difficult to correct the verdict absent the jury's identification of a specific interest amount within its total award. Tr. 1721-1724 (Aple.A. 329-332). Accordingly, Minnesota Supply submitted a special interrogatory (Aple.A. 127) that would have instructed the jury to identify which portion of its verdict was comprised of so-called prejudgment interest. Tr. 1813-1815 (Aple.A. 343-345). Raymond objected to the proposed interrogatory; arguing it was a ruse. Tr. 1813-1814 (Aple.A. 343-344). The district court elected to let the case go to the jury without the interrogatory. Tr. 1815-1816 (Aple.A. 345-346).

As it turned out, the jury returned a verdict for the precise amount calculated by Lieber as Minnesota Supply's damages: \$14,076,784. Accordingly, there was no difficulty knowing precisely what portion of the verdict was comprised of the so-called prejudgment interest. Neither Raymond's post-trial motion nor this appeal are premised upon any claim of

prejudice or confusion that might have arisen had the jury returned a verdict for some other dollar amount.¹⁵

Raymond's argument on appeal is: (1) the calculation of prejudgment interest is for the judge, not the jury; (2) since Lieber's analysis included prejudgment interest, the *entire* analysis should have been stricken and withheld from the jury; and (3), with the entire analysis stricken, there was no evidence of damage and, therefore, no case. Aplt.Brf. at 56. There is simply no authority, or logic, for such an argument.

In ruling on Raymond's post-trial motion, the district court noted that "[u]nfortunately, no Minnesota case thoroughly discusses the interplay between the prejudgment interest statute and the present value of future damages from lost income. Nonetheless," the district court concluded, "the disputed interest is best characterized as 'prejudgment interest.'" Order of 9/26/03 at 19 (Aplt.A. 0348). Having reached that conclusion, the district court appropriately removed all of the so-called prejudgment interest from the jury's verdict and entered judgment for the reduced sum. *See C.L. Maddox, Inc. v. Benham Group, Inc.*, 88 F.3d, 592, 603 (8th Cir. 1996) ("When it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there,

¹⁵ Nor would Raymond be in a position to argue prejudice since it objected to the special interrogatory that would have avoided the prejudice.

district courts possess the power to reduce the amount of the verdict accordingly.”); *Ross v. Kansas City Power & Light Company*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) (affirming district court’s power to reduce unconstitutionally excessive punitive damage award.).¹⁶

In support of its position on appeal, Raymond relies upon a single unpublished decision: *Security Protection Services, Ltd. v. Evenson*, 1993 WL 14338 (Minn.App. 1993). In particular, Raymond emphasizes the following sentence from *Security Protection*: “Permitting the jury to consider prejudgment interest as an element of damages is error.” *Id.* at *3. Raymond neglects to inform the Court, however, that the very next sentence reads: “Appellants are entitled to a new trial if they can establish that the admission of Stark’s testimony regarding prejudgment interest was prejudicial.” *Id.* *And see ZUMBERGE v. Northern States Power Company*, 481 N.W.2d 103, 110 (Minn.App. 1992) (“[T]he additional interest may be interpreted as prejudgment interest, in which case admission of the evidence was erroneous. However, in order to obtain a new trial, [appellant] must also show that the error was prejudicial.”) (citing, *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn.App. 1990)). Thus, Raymond’s argument evaporates. Even if the district court erred

¹⁶ Consistent with its conclusion, the district court judge subsequently recalculated prejudgment interest himself under Minnesota’s prejudgment interest statute. *See* Order of 1/07/04, awarding \$346,531.61 in statutory prejudgment interest to Minnesota Supply. Aple.A. 173.

in allowing the “interest” portion of Lieber’s damage calculation to go to the jury, there is no prejudice to Raymond because the questionable sum was entirely eliminated from the judgment. Raymond’s assignment of reversible error is without merit.

C. Raymond’s remaining arguments directed at the jury’s damage award go solely to issues of credibility, weight and legitimate inferences and, as such, are impermissible.

At sections “V. C.” and “V. D.” of its brief, Raymond questions Lieber’s assumptions regarding the length of time Raymond-related business would have continued at Minnesota Supply post-termination (Aplt.Brf. at 56-58), and his assumptions regarding the relationship of cash discounts and commissions to total sales of new Raymond equipment (*Id.* at 58-61). These arguments relate to the sufficiency of the evidence at trial and have been waived. Further, these arguments, even if heard, go solely to issues of fact and the credibility of the parties’ damage experts - - areas that are clearly the province of the jury and not the Court. The jury gave weight and credibility to the testimony of Lieber on these topics. They chose not to give credit to Raymond’s contrary analysis. The jury is not to be second guessed when, as here, there are probative facts in the record to support the verdict and there is no showing of manifest abuse of the jury’s discretion. *Piotrowski*, 15 F.3d at 754.

**ARGUMENT IN SUPPORT
OF
MINNESOTA SUPPLY'S CROSS APPEAL**

Minnesota Supply's damage analysis did not contain prejudgment interest and, accordingly, it was error for the district court to enter judgment for less than the full verdict award.

Minnesota Supply's damage expert calculated the present value, as of trial, of *all* of Minnesota Supply's lost profits. As discussed in the preceding section, the district court ultimately concluded that the "interest" component of his present value calculation for the lost profits that would have occurred prior to trial were best characterized as "prejudgment interest." Accordingly, the district court removed that sum from the judgment it entered on the verdict. The "prejudgment interest" that was removed was in the amount of \$1,693,548.

The question that presents itself on Minnesota Supply's cross-appeal is whether its expert's present value calculation of the pre-trial lost profits is or is not the equivalent of statutory prejudgment interest. If it is not, the district court erred when it removed \$1,693,548 from the verdict.

As the district court noted in its order, there is an unfortunate absence of guidance in the Minnesota decisions. Order of 9/26/03 at 19. As it turns out, there are very few cases anywhere that have addressed the issue of the interplay of present value calculations and prejudgment interest statutes. The issue has obvious economic importance to the parties here. It is also an issue of

importance, generally, to the lower courts, and the lawyers and damage experts laboring in those courts, and guidance from this Court would be of great value in future cases.

As a starting point, the concept of present valuing damages to the date of trial is not controversial. See e.g. *H.J., Inc. v. International Telephone & Telegraph Corp.*, 867 F.2d 1531, 1549 (8th Cir. 1989) (proper measure of damages for monopolization or tortious interference is the present value of lost profits as a result of the improper actions.); *Hughes v. Sinclair Marketing, Inc.*, 389 N.W.2d 194, 200 n.6 (Minn. 1986) (affirming jury verdict for damages under Minnesota Franchise Act, based in part on expert's present value calculations).

The Minnesota statute which governs prejudgment interest does not purport to preempt the use of present value calculations at trial. Minn.Stat. §549.09. Indeed, subd. 1(b)(5) of the statute provides that prejudgment interest “shall not be awarded on...that portion of any verdict...which is founded upon interest...”. This language acknowledges that verdicts may in fact contain a component of interest. And see *Livingston v. Elevator*, 1994 WL 385643 at *3 (Minn.App. 1994) (rejecting defendant's claim that “interest” included in the damages award constituted “prejudgment interest” but finding that prejudgment interest should be awarded only on the portion of the damage award that did not

include interest). Unfortunately, the statute does not articulate the exact nature of the “interest” to which it is referring. It does not seem illogical, however, to conclude that the interest component of a present value calculation is exactly the type of interest anticipated by the statute.

Decisions from other jurisdictions that have directly addressed the issue presented here have all concluded that the interest component in a present value calculation is something other than “prejudgment interest” which, as in Minnesota, is typically controlled by statute. These decisions stand for the proposition that the verdict in the instant case should not have been reduced. The leading decision is *In Re Air Crash Disaster Near Chicago*, 644 F.2d 633 (7th Cir. 1981). That case involved the interpretation of the Illinois wrongful death statute. Specifically, it addressed the issue of how a future income stream - - an income stream that would have occurred before, and would have continued after, trial - - should be present valued and how that present value calculation interplays with statutory prejudgment interest. At the trial court, the parties and the trial judge caused damage to be calculated with a “present value” as of the date of the death of the decedent. “Interest” was then added to that present-valued damage amount up through the date of the judgment. The defendant complained this was an unlawful award of prejudgment interest. The Seventh Circuit agreed that under Illinois law prejudgment interest was not an

appropriate element of damages in a wrongful death action. The Court concluded, however,

that, in this particular case, there actually was no prejudgment interest awarded. Rather, the district court merely allowed a proper adjustment to arrive at the ‘present value’ of plaintiff’s loss, which is the correct measure of damages under Illinois law.

In Re Air Crash Disaster, 644 F.2d at 637. The court cautioned against confusing “prejudgment interest” with “interest” which is a necessary component in a present value calculation.

Despite the foregoing discussion rejecting prejudgment interest as a separate element of damages, the measure of compensatory damages in wrongful death cases unquestionably does involve some form of interest in the determination of ‘present value.’ Prejudgment interest per se is not allowable as a separate element of a wrongful death damages award, but use of interest is implicit in the calculation of the present value of plaintiff’s pecuniary loss as of the date of trial.

Id. at 641. The court concluded that the preferred manner of calculating the present value of damages was to do so as of the date of the trial, not as of the date of death. *Id.* at 643. In any event, and “regardless of the numbers [i.e. the “interest” rate] used, the end result is that in order to adequately compensate plaintiffs, the decedent’s projected stream of future earning must be either (1) discounted to trial or (2) discounted to death, with an adjustment to bring the ‘death value’ to ‘present value.’”

Id. at 644. The fact that interest, as a concept, is part and parcel of a present value calculation does not convert a present value calculation of pre-verdict income into “prejudgment interest.”

We realize that the district court characterized the adjustment award as interest rather than adjustment of the ‘present value at death’ calculation. But it seems clear from the instructions themselves that full compensation was what was intended.... In other words, the \$250,000 represents the ‘present value at death’ of plaintiff’s compensation, and the total award of \$277,500 represents the ‘present value at trial.’ As we have discussed, this ‘present value at trial’ represents the true compensatory damages figure. The so-called ‘prejudgment interest’ is just an element of the formula for calculation of the compensatory damages.

...The mechanism of the adjustment to present value is simply common sense and some mathematics. The difficulty comes in supplying appropriate dollar amounts for the lost income flow and an appropriate adjustment factor. This task, of course, is left to the jury, which can be guided by the testimony of experts. But the formula should be clearly spelled out by the court in terms of present value, not prejudgment interest. Once this calculation is done for present value at trial of both past and future losses, plaintiffs’ arguments for prejudgment interest as a separate element of damages disappear.

Id., at 645-46.

The Seventh Circuit also emphasized that the discount rate or “adjustment factor” utilized in calculating the present value must be the

same for both post and pre-trial income streams, *id.* at 643-44, precisely as was done by Minnesota Supply's expert.

... We find that the reasons for augmenting these "past losses" are exactly the same as those for discounting "future losses." As stated in *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 US 989 (1962), ... "[i]f it be only fair to discount sums paid now on account of future losses which would not be due until some years in the future, ... it is, by the same token, inequitable not to make appropriate compensation for delay in discharging the obligation. 295 F.2d at 594. In *Moore-McCormack* the future damages had been discounted to the trial date. Consequently, the allowance of "interest" was just a symmetrical treatment of past and future losses in order to calculate the present value.

644 F.2d at 644.

The Seventh Circuit's decision in *In Re Air Crash Disaster* has been followed by the Eleventh Circuit, *Deakle v. John E. Graham & Sons*, 756 F.2d 821 (11th Cir. 1985), and the Court of the Appeals for the District of Columbia, *Consumers United Insurance v. Smith*, 644 A.2d 1328 (D.C. App. 1994) (applying concepts in a breach of contract action). These decisions, like *In Re Air Crash Disaster*, emphasize the need to use a consistent discount rate to the lost income streams occurring both before and after trial. *Deakle*, 756 F.2d at 832-34; *Consumers United Insurance*, 644 A.2d at 1341-43. The number that is arrived at when the discount rate is applied to damages occurring before

trial is *not* prejudgment interest. “[T]his pretrial interest imputed to offset a discount, under the terms of the lease, to the date of the breach is part of the damages computation solely for the period before trial; *it is not a recognition of statutory prejudgment interest*, which is not at issue here.” *Consumers United Insurance*, 644 A.2d at 1342 n.18 (emphasis added).

Minnesota Supply’s damage expert, Lieber, calculated the present value of Minnesota Supply’s lost profits precisely as articulated in these decisions. Lieber’s damage analysis projected Minnesota Supply’s lost profits from the date of its termination in 1997 through the end of 2003. Additionally, using the 2003 projection, Lieber calculated a “terminal value” for Minnesota Supply’s lost profits in the years beyond 2003. All of these projections were then present valued to the date of the trial. P.Ex. 306 (Aple.A. 488). In arriving at a present value calculation for all of these lost income streams, Lieber used a consistent discount rate of 17.92%. *See* P.Ex. 312 (Aple.A. 492). This discount rate reflected the weighted average cost of capital for Minnesota Supply. *Id.* Lieber arrived at this weighted average cost of capital by determining Minnesota Supply’s cost of capital for both equity and borrowed debt. *Id.* The equity component took fully into account all of the risks associated with a

company of the size and nature of Minnesota Supply Company. The final discount rate utilized by Mr. Lieber reflected, in effect, the return an outside investor would expect on an investment in Minnesota Supply, taking fully into account the risks and nature of that particular enterprise.

Id.

Lieber consistently applied his derived discount rate to all lost profits: both those that would have been realized after trial as well as for those that would have been realized between the date of termination and the date of the trial. P.Ex. 306. There was no testimony or argument by Raymond at trial that Lieber did not correctly perform his present value calculations. After performing his calculations, Lieber arrived at the present value of *all* of Minnesota Supply's lost profits. That number was \$14,076,784. The jury returned its verdict for precisely this sum.

Any questions Raymond may have regarding Lieber's discount rate and his computations using that rate (as with all of his assumptions and calculations) were appropriate subjects for cross examination and rebuttal. Alternative discount rates, growth assumptions and methodologies could have been put forward by Raymond through its own damage expert. The weight and credibility to be assigned to the experts' testimony and their ultimate opinions was for the jury to decide.

The present value calculation utilized by Lieber was appropriate under the law. While it necessarily utilized concepts of interest, it was not a calculation of statutory prejudgment interest and it was appropriate for the jury to consider Lieber's testimony and conclusions on this subject. The verdict was fully supported by the evidence, and that verdict - - in the full amount of \$14,076.784 - - should not have been reduced by the district court.¹⁷

¹⁷ If this Court returns the \$1,693,548 to the judgment, Minnesota Supply would not be entitled to also retain the \$346,531.61 in statutory prejudgment interest awarded by the district court. Per the statute, Minnesota Supply is not entitled to interest on interest.

CONCLUSION

WHEREFORE, Appellee-Cross Appellant, Minnesota Supply Company, requests that this Court (1) reverse the district court's judgment order wherein it reduced the verdict by \$1,693,548, and (2) affirm the district court's judgment order in all other respects.

Dated: May 27, 2004

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CERTIFICATE OF COMPLIANCE

I, Gary W. Leydig, an attorney, certify that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B) and this Court's order, dated May 19, 2004, wherein the type-volume limitation was enlarged to 17,500 words. This brief was prepared using Microsoft Word, and contains 17,143 words (Jurisdictional Statement through and including the signature block) according to the MS Word word count.

I further certify that the accompanying CD has been scanned for viruses and is virus-free, in compliance with 8th Cir. R. 28(A)(d).

Gary W. Leydig

ADDENDUM