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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20110025

Benz Farm, LLP,

Appellant,

vs.

Cavendish Farms, Inc.,

Appellee.

On Appeal from Judgment and Order of the District Court
Southeast Judicial District
Stutsman County, North Dakota
Stutsman County Case No. 47-09-C-46

The Honorable Daniel D. Narum

****

BRIEF OF APPELLEE

****

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INTRODUCTION

The District Court was presented with a straightforward factual scenario on the motion for summary judgment brought by Cavendish Farms, Inc. ("Cavendish"). The District Court accepted and based its decision on the testimony of the principal of Benz Farm, LLP ("Benz"), Monte Benz, and the written contracts that he acknowledged to govern the relationship. Mr. Benz admitted that the potatoes at issue failed to meet contractual quality specifications and that, though he alleged certain oral modifications to the contracts, the quality specifications remained intact. Given those undisputed facts, the case was ripe for decision as a matter of law, and the District Court correctly dismissed Benz's claims.

Moreover, Benz's claims were dismissed for a host of alternative reasons – Benz presented no evidence of a breach of the alleged oral modifications, presented no evidence of admissible damages, and wrongly sought relief under North Dakota's Unlawful Sales or Advertising Practices Act (N.D.C.C. Ch. 51-15), which provides a cause of action only to the buyer of merchandise and not to a seller like Benz. The District Court also properly denied Benz's untimely motion to amend its pleading and awarded Cavendish the attorneys' fees it incurred in defending the case. The award of attorneys' fees, the amount of which Benz acknowledged to be reasonable, was required under the contractual fee provisions. Thus Cavendish respectfully requests that the District Court's Judgment be affirmed.

STATEMENT OF THE CASE

As to the straightforward procedural information that properly should be included in a statement of the case, Cavendish does not object to the information presented by Benz. To the legal argument improperly contained in Benz's statement, and to the

implication that Cavendish violated the discovery rules, Cavendish vigorously objects. Those matters are addressed below.

Additionally, Cavendish notes that Benz's Amended Complaint alleged claims only for the following:

- Breach of contract in 2006.
- Breach of contract in 2007.
- Promissory estoppel.
- Violations of North Dakota's State Anti-Trust Act (N.D.C.C. Ch. 51-08.1).
- Violations of North Dakota's Unlawful Sales or Advertising Practices Act (N.D.C.C. Ch. 51-15).

Benz has not appealed the District Court's dismissal of the promissory estoppel claim or the anti-trust claim. Thus, the only claims at issue in this appeal are for breach of contract in 2006 and 2007 and for the alleged violation of North Dakota's Unlawful Sales or Advertising Practices Act.

STATEMENT OF THE FACTS

I. Benz's Statement of Facts Carefully Avoids Citing a Single Word From the Testimony of its Key Witness – Mr. Benz.

Benz's Statement of the Facts neither cites nor quotes a word from the deposition of Benz's principal, Monte Benz, on which the District Court heavily relied in its Order dismissing Benz's claims. Similarly, not a single page of Mr. Benz's deposition transcript found its way into Benz's Appendix. In one sense, this is shocking because Mr. Benz is Benz's managing partner, was authorized to testify on behalf of the partnership, and was directly involved in the matters giving rise to this lawsuit. (Supp.

App. 14, Benz Dep. 18:2-15.) In another sense, this comes as no surprise because Mr. Benz's testimony, as the District Court determined, is fatal to Benz's claims.

Benz instead cited (and included in its Appendix) the "Affidavit of Monte Benz In Opposition to Defendant's Motion for Summary Judgment." (App. 160-70.) This document was prepared by Mr. Benz and his counsel nearly three months after he was deposed and, as the title suggests, after Cavendish moved for summary judgment on the basis of Mr. Benz's deposition testimony. As discussed below, Mr. Benz's Affidavit contradicted and attempted to change Mr. Benz's deposition testimony on key points, without offering any explanation for doing so. The District Court, as explained below, thus rightly rejected parts of Mr. Benz's Affidavit under the "sham affidavit" doctrine.

II. The District Court Accurately Set Forth the Undisputed Facts.

The facts material to this appeal were carefully set out by the District Court in 24 numbered paragraphs in its Conclusions of Law and Order (1) Granting Defendant's Motion for Summary Judgment; and (2) Denying Plaintiff's Motion to Amend (the "Order") dated May 5, 2010. (App. 263-300.) The District Court meticulously cited the factual record. Virtually every citation – and each citation to a matter of consequence – was to Mr. Benz's deposition testimony or to the written contracts between Benz and Cavendish. Cavendish incorporates the District Court's recitation of the undisputed facts here and gives a summary below.

A. From 2002 through 2005, Benz had no complaints with the parties' contractual relationship.

In or about 2002, Benz, which farmed potatoes as well as other crops, began selling potatoes to Cavendish, a company based in Canada which operates a potato-processing facility in Jamestown, North Dakota. (Supp. App. 70-71, Benz Dep. Ex. 1;

Supp. App. 174, Urquhart Aff. ¶ 2; Supp. App. 23, Benz Dep. 55:19-25.) From the beginning of the parties' relationship through 2005, Benz sold potatoes to Cavendish under the terms of a series of written contracts. (Supp. App. 23, Benz Dep. 55:19-56:7.) In 2005, the parties also entered into a Credit Agreement, under which Cavendish provided Benz with financing for its farming operations. (Supp. App. 26, Benz Dep. 65:8-19; Supp. App. 66, Benz Dep. 227:17-228:5; Supp. App. 163-173, Benz Dep. Ex. 15.) Through 2005 Benz did not have any problems or complaints concerning its dealings with Cavendish, nor did Benz raise a complaint with the 2005 Credit Agreement. (Supp. App. 25 and 30, Benz Dep. 64:24-65:5, 81:9-13.)

B. The 2006 contractual relationship.

In 2006, the parties again entered into a Credit Agreement under which Cavendish provided financing for Benz's farming operations. (Supp. App. 26, Benz Dep. 65:8-19; Supp. App. 108-118, Benz Dep. Ex. 6.) As they had in the past, Benz and Cavendish entered into a 2006 Grower Storage Agreement, under which Benz, as the grower, would store potatoes until Cavendish took delivery of them, and a 2006 Company Storage Agreement, under which Cavendish would store potatoes after harvest. (Supp. App. 30, Benz Dep. 81:25-82:12; Supp. App. 119-149, Benz Dep. Exs. 7, 8.)

The contracts were negotiated through the MinnDak Bargaining Association, an organization that represents growers from Minnesota and North Dakota, and on whose board Mr. Benz had served for four years. (Supp. App. 25, Benz Dep. 61:6-64:23.) The Association gave the growers more bargaining power which, according to Mr. Benz, resulted in "extremely hot" negotiations. (Id.)

The 2006 Company and Grower Storage Agreements state, "Cavendish Farms agrees to buy potatoes from Grower according to the terms of this Agreement and

Grower agrees to grow and sell potatoes to Cavendish Farms according to the terms of this Agreement." (Supp. App. 119-149, Benz Dep. Exs. 7, 8.) Although both Agreements state that the "potatoes will be grown on the fields designated in Exhibit A," Mr. Benz admitted that, at the time of signing, there was no "Exhibit A" and the parties did not otherwise contractually designate which fields' potatoes would be stored by Cavendish and which would be stored by Benz. (Supp. App. 30-31 and 66, Benz Dep. 83:20-85:6, 225:20-23; Supp. App. 119-149, Benz Dep. Exs. 7, 8.)

The Agreements set a "base price," subject to price incentives and disincentives in accordance with specified quality standards. (Supp. App. 119-149, Benz Dep. Exs. 7, 8.) Under the Agreements, Cavendish was not required to purchase any potatoes that failed to meet specified quality standards. (Id.) In 2006 (as in 2007), Benz admitted that Cavendish fully paid for all potatoes that were delivered and accepted in accordance with the Agreements' pricing formula. (Supp. App. 23, Benz Dep. 54:20-55:2.)

The Agreements contain several other provisions that are material to this case, including the following:

- Benz was required to deliver all potatoes "as directed" by Cavendish and "title to the potatoes" remained with Benz until Cavendish accepted them. (§ III, ¶ 1.)
- All "grading and inspecting" of the potatoes was to be performed by "an independent grading service." (§ IV, ¶ 7.)
- Cavendish had the right "at any time" to refuse to accept potatoes if they contained more than 3% (in the case of Grower storage) or more than 0.5% (in the case of Company storage) of "rots such as . . . pink eye, pink rot [or] soft rot . . . ." (§ V.)
- Time was of the essence in the performance of the Agreements. (§ VI, ¶ 1.)

- The Agreements contained "the entire contract of the parties" and superseded "all prior written or oral arguments regarding the same." (§ XI, ¶ 5.)

- The Agreements specifically precluded oral modifications, stating, "Any modification to this contract shall be in writing signed by a duly authorized Cavendish Farms Inc. representative." (§ XI, ¶ 6.)

- The Agreements provided that Cavendish "shall not waive" any of its rights by not exercising them on other occasions. (§ XI, ¶ 9.)

- The Grower Storage Agreement specifically contemplated that Benz would be required to store the potatoes through July of the year following harvest. (§ III, ¶ 5.)

(Supp. App. 119-149, Benz Dep., Exs. 7, 8.)

As in 2005, in 2006 Cavendish and Benz also entered into a Credit Agreement. (Supp. App. 26, Benz Dep. 65:8-66:6; Supp. App. 108-118, Benz Dep. Ex. 6.) The Credit Agreement set forth the terms under which Cavendish agreed "to provide financing for crop inputs to be incurred by Benz Farm LLP in growing potatoes." (Id.) The Credit Agreement further confirmed that the relationship it created was solely that of debtor and creditor, stating as follows:

> Relationship of the Parties. This Agreement shall not render the Parties to be an employee, partner, agent of, or joint venturer with each other for any purpose.

(Supp. App. 113, Benz Dep. Ex. 6, p. 6, ¶ 11.)

C. The 2006 potatoes fell below contractual qualify specifications.

With the written contracts in place, the parties proceeded into the 2006 crop year with Benz growing potatoes to be sold to Cavendish under the Company and Grower Storage Agreements. On September 13 and 14, 2006, the independent quality grading service referenced in the Agreements, AgWorld Support Systems ("AgWorld"), graded

Benz-grown potatoes that were being sent to Cavendish for storage. (Supp. App. 174-175 and 178-182, Urquhart Aff. ¶¶ 3-4, Ex. A.)

AgWorld's independent reports showed that between 5.0% and 5.6% of the potatoes were affected by "soft rot" and between 3.9% and 6.7% were affected by other rots (late blight, pink rot, and pink eye). (Id.) These levels of rot not only exceeded that permitted under the Company Storage Agreement (.5%), but also exceeded that allowed under the Grower Storage Agreement (3%). (Id.) Benz has not challenged AgWorld's findings and, in fact, concedes that the potatoes were infected with the rots. (Supp. App. 32 and 34, Benz Dep. 89:22-93:2, 97:12-98:10.) Accordingly, it is undisputed that the potatoes failed to meet the quality specifications provided by the written Agreements.

D. The alleged 2006 oral modification to the written Agreement.

During a discussion in one of the fields on or about September 15, 2006, Mark Urquhart, of Cavendish, told Mr. Benz that Cavendish would not accept the potatoes into Cavendish's storage facility. (Supp. App. 31, Benz Dep. 88:12-96:17.) According to Mr. Benz, Mr. Benz "suggested [to Mr. Urquhart] that maybe we could possibly put them into our [Benz's] storage." (Supp. App. 32, Benz Dep. 91:2-5.) Mr. Urquhart then responded, "Well, if you're willing to do it [store the infected potatoes] it sounds good to me." (Supp. App. 33, Benz Dep. 93:5-7.)

At his deposition, Mr. Benz claimed that the parties orally modified the written Agreement in accordance with the following alleged statements made by Mr. Urquhart:

- Cavendish's "goal" would be to begin taking delivery of the Benz-stored potatoes in "about 30 days." (Supp. App. 33-34 and 42, Benz Dep. 95:13-96:23, 100:8-12, 130:15-131:2.)

- Cavendish would call for delivery of the potatoes "as soon as possible" after processing certain other potatoes (which were being processed

directly from harvest rather than put in storage). (Supp. App. 36, Benz Dep. 105:20-106:9.)

Apart from the allegations discussed above (and a change in how storage payments were calculated, which is not at issue in this appeal), Mr. Benz conceded that there were no further modifications to the written contracts. (Supp. App. 35-36, Benz Dep. 104:25-106:9.) Specifically, Mr. Benz testified that, although he expected Cavendish to take delivery of all the potatoes by October 15, 2006, he and Mr. Urquhart did not even discuss a deadline by which Cavendish would take the potatoes. (Supp. App. 33, Benz Dep. 95:23-96:23.) Moreover, at his deposition Mr. Benz testified that the quality requirements set forth in the written contracts remained in effect. (Supp. App. 43-44, Benz Dep. 136:6-137:19.) Indeed, Mr. Benz went so far as to testify that a prior, contrary allegation made in answer to written discovery was "not correct." (Id.)

E. Cavendish is able to use over half of the rotting potatoes.

Benz then put the potatoes in its storage facility. Consistent with its "goal," Cavendish accepted delivery of over half of the potatoes. (Supp. App. 81-84, Benz Dep. Ex. 3, Answer to Interrog. 4.) According to Mr. Benz, however, by mid-December 2006 the potatoes were in a "very advanced stage" of rot and Benz later disposed of them as "hog feed." (Supp. App. 34, 36 and 42, Benz Dep. 98:8-100:7, 107:1-108:1, 130:21-23.) In this action, Benz seeks payment and storage costs for the rotten potatoes. (Supp. App. 36, Benz Dep. 108:2-6.)

F. The 2007 written Agreement was not modified.

In 2007, Benz and Cavendish entered into a Company Storage Agreement having the same terms as the 2006 Agreement discussed above. (Supp. App. 51, Benz Dep. 166:24-167:11, Supp. App. 150-162, Benz Dep. Ex. 13.) At his deposition, Mr. Benz

conceded that the 2007 Agreement was not amended. (Supp. App. 45, Benz Dep. 141:12-21.) Concerning the 2007 crop year, however, Benz alleges that "scheduling discussions" between Mr. Benz and Warren Wahl, of Cavendish, resulted in Cavendish refusing "to accept timely delivery" of the potatoes and causing "inefficiencies" in the harvest. (Supp. App. 51-53, Benz Dep. 167:12-168:10, 170:22-171-18, 174:23-176:4.) In this action, Benz seeks damages relating to these allegations. (Id.)

III. Benz's Brief Distorts the Undisputed Facts.

In its "Statement of Facts," Benz misrepresents both the straightforward, factual record before the District Court (which was based on Mr. Benz's own testimony and written contracts) and the nature of the allegations in Benz's Amended Complaint. These misrepresentations are further addressed in the Legal Argument section below and are summarized as follows:

- The following pages of Benz's Appendix were not submitted to the District Court at or before the March 17, 2010, hearing on Benz's summary judgment motion: App. 226-302, 324-332, 336, 338-56, 357-61, 378-82, 393-407.
- The following pages of Benz's Appendix are not in the record: App. 226-62, 393-98.
- Benz's trial court briefs should not be included in the Appendix under N.D.R. App. P. 30(a)(2), as Benz has not established any "independent relevance."
- Benz's Amended Complaint did not allege a "joint venture" (Benz Br. at 4). This allegation relates to Benz's claim under N.D.C.C. Ch. 51-15,

which in the Amended Complaint is premised on the parties' contracts, not an extra-contractual joint venture. (App. 12-14.)

- Cavendish did not assert that it owned 50% of the potatoes before they were sold, nor did it acknowledge a joint venture (Benz Br. at 4). Notwithstanding the colloquial use of legal jargon such as "joint venture" and "partnership," all witnesses – including Mr. Benz – confirmed that the written contracts governed the parties' relationship. (App. 181, Urquhart Dep. 29:9-24; Supp. App. 60, Benz Dep. 202:20-203:8.)
- Benz distorted Mr. Urquhart's testimony concerning ownership of the potatoes prior to sale. Mr. Urquhart did not affirm that Cavendish "owned" the potatoes prior to sale (Benz Br. at 5), but that Cavendish had "an interest" in the potatoes "as per the credit agreement" – testimony which Benz omitted from the quotation in its brief. (App. 193, Urquhart Dep. 79:6-23.)
- Benz distorted Mr. Urquhart's testimony concerning whether "field reports" or "Field Detail Forms" contractually designated which party was to store the potatoes from specific fields (Benz Br. at 7). Consistent with Mr. Benz's testimony, Mr. Urquhart testified that there never was an "Exhibit A," that the forms were nothing but "a tentative harvest plan" which "change every single year," and that all field designations were "informal." (App. 187 and 197, Urquhart Dep. 53:4-54:15, 92:10-93:11.)
- Benz's brief erroneously claims that it could have made a crop insurance claim on the rotten potatoes (Benz Br. at 10), when Mr. Benz testified that

there was, in fact, no "covered peril." (Supp. App. 44, Benz Dep. 138:22-24, 140:16-19.)

- Mr. Benz himself testified that the allegation that "Cavendish would take all the crop . . . despite . . . concerns about the quality" (Benz Br. at 10) was false. (Supp. App. 43-44, Benz Dep. 136:6-137:19.)
- Benz's "Statement of Facts" improperly and without support makes the legal argument that Cavendish "waived" the contractual quality specifications (Benz Br. at 11). Benz never raised this argument to the District Court. Indeed, Benz's brief opposing summary judgment did not even use the term "waive," let alone cite authority concerning the waiver of a contractual term or any evidence purporting to support an alleged "waiver." "It is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment." Rutherford v. BNSF Railway Co., 2009 ND 88, ¶ 13, 765 N.W.2d 705 (citations and quotations omitted). Nor would such an argument have been successful in light of the anti-waiver clauses and Mr. Benz's testimony that the quality specifications remained intact.
- Benz's "sham affidavit" assertion that Cavendish agreed to take the potatoes "immediately" if further deterioration was detected (Benz Br. at 11-12) contradicted his prior deposition testimony and was rejected by the District Court. (App. 279.)
- Mr. Urquhart did not testify that Cavendish intended to "call for delivery" or "take" all the potatoes by mid-October 2006 (Benz Br. at 13), but that

Cavendish's "intent . . . was to *start* delivery as soon as harvest was complete." (App. 191, Urquhart Dep. 69:18-23, emphasis added.)

- Mr. Urquhart did not testify that the "Wendy's recall" prevented Cavendish from taking some of Benz's potatoes, but that it was the "[v]ery poor quality" of the potatoes, including the "specific gravity" and the high "sugar ends" as well as the rot. (App. 191 and 195, Urquhart Dep. 69:24-70:7, 85:23-86:3.)
- Benz's assertion that the parties "agreed" to a potato-delivery schedule in light of Benz's intended onion harvest (Benz Br. at 14) relates to a supposed "onion claim" that was not pleaded in the Amended Complaint.
- Benz's allegation that Cavendish "refused to release Benz from Benz's contractual and JV obligation to deliver the crop" and allow it to sell the crop elsewhere (Benz Br. at 16) is not relevant to any of the claims pleaded in the Amended Complaint. Although Benz attempted to add this claim in the proposed Second Amended Complaint (Supp. App. 183-197), it would have had no merit, as Mr. Benz testified there was no alternative market. (Supp. App. 34, Benz Dep. 98:11-100:7.)
- Benz's allegation that in 2007 the "parties had a series of oral agreements" concerning the delivery schedule which Cavendish breached (Benz Br. at 16) is contradicted by Mr. Benz's prior deposition testimony that there were no amendments to the 2007 written agreement. (Supp. App. 45, Benz Dep. 141:12-21.)

THE STANDARD OF REVIEW

The District Court's decision granting Cavendish's motion for summary judgment is reviewed under the following standard of review:

> Whether summary judgment was properly granted is a question of law which we review de novo on the entire record. On appeal[,] this Court decides if the information available to the trial court precluded the existence of a genuine issue of material fact and entitled the moving party to summary judgment as a matter of law. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial. [Citations omitted.]

Rutherford, 2009 ND 88, ¶ 9, 764 N.W.2d 705.

The District Court's decision denying Benz's motion to amend its Amended Complaint is reviewed for an abuse of discretion:

> A decision on a motion to amend a pleading under N.D.R.Civ.P. 15(a) is within the sound discretion of the district court and will not be overturned on appeal in the absence of an abuse of discretion. [Citation omitted.] A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination. [Citation omitted.]

Bernabucci v. Huber, 2006 ND 71, ¶ 28, 712 N.W.2d 323.

The District Court's decision denying Benz's motion for reconsideration is also reviewed for an abuse of discretion. See Woodworth v. Chillemi, 1999 ND 43, ¶ 7, 590 N.W.2d 446.

LEGAL ARGUMENT

I. The District Court Properly Dismissed the 2006 Breach of Contract Claim.

Benz's claim for breach of contract in 2006 alleges that Cavendish failed to take "timely" delivery – that is, that Cavendish was obligated to accept all the potatoes by mid-October 2006 and that it failed to do so. The trial court properly dismissed the claim because (a) the claim could not be supported by the 2006 written contracts; (b) the

written contracts did not allow for oral modifications; (c) even in the absence of a no-oral modification clause (or if such a clause were not enforceable), Benz could not establish "an executed oral agreement" under N.D.C.C. § 9-09-06; (d) even if the alleged oral agreement were enforceable, Benz produced no evidence that it was breached; and (e) even if there were a breach, Benz could not prove damages as a matter of law.

A. Benz's 2006 breach of contract claim cannot be supported under the written Agreements.

The 2006 Grower and Company Storage Agreements provided that Benz was required to deliver all potatoes "as directed" by Cavendish. They further provided that time was of the essence in the performance of the Agreements. Additionally, the Grower Storage Agreement contemplated that Benz would be required to store potatoes into July of the year following harvest, well beyond the date that Benz acknowledged that the potatoes had no value and were disposed of "as hog feed." The unambiguous contractual language, which was properly interpreted by the District Court, could not support Benz's allegation that Cavendish failed to accept "timely" delivery. See Bernabucci, 2006 ND 71 ¶ 15, 712 N.W.2d 323 ("An unambiguous contract is particularly amenable to summary judgment").

B. Benz cannot establish an enforceable oral modification.

Benz argued to the District Court that the Grower Storage Agreement had been modified to require Cavendish to accept delivery of all potatoes "as soon as possible," which Benz apparently understood to be by mid-October 2006. The Grower Storage Agreement, however, provides that it "is the entire contract of the parties" and that "[a]ny modification to this contract shall be in writing signed by a duly authorized Cavendish Farms Inc. representative."

Though Mr. Benz acknowledged that the parties made written and signed modifications on some occasions, he admitted that none of the alleged oral modifications at issue in this case were put in writing and that Cavendish never signed any alleged contractual modifications. (Supp. App. 66, Benz Dep. 225:12-226:24.) As the District Court noted, this Court's precedent gives effect to no-oral modification clauses. See Dalan v. Paracelsus Healthcare Corp. of North Dakota, Inc., 2002 ND 46, ¶¶ 9, 13, 640 N.W.2d 726.[1] Given the admitted absence of a written contractual modification signed by Cavendish, the Court need not consider the 2006 breach of contract claim further. It was properly dismissed.

C. Even in the absence of the no-oral modification clauses, Benz cannot establish an enforceable oral modification.

As the District Court explained, even if the written contracts did not contain no-oral modification clauses (or if they were unenforceable), Benz's claim of an oral modification would still fail. Under North Dakota law, a "contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise." N.D.C.C. § 9-09-06. An "executed oral agreement" is one in which "the party performing has incurred a detriment which that party was not obligated by the original contract to incur." Id.

Thus, the party seeking to enforce the alleged oral modification must have surrendered "a legal right" it had under the contract, Texaco, Inc., v. Mercury Exploration

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[1] This Court has indicated that a "prior written agreement providing it could be modified only in writing did not prevent the parties from entering into a new oral agreement." Forster v. West Dakota Veterinary Clinic, Inc., 2004 ND 207, ¶ 60, 689 N.W.2d 366 (emphasis added). Prior to this appeal, however, Benz never alleged "new" agreements but rather the modification of existing written contracts. Thus the holding in Dalan rather than the discussion in Forster should apply.

Co., 994 F.2d 463, 465 (8th Cir. 1993) (applying North Dakota law), and thereby "changed its relative position with [the other party] as a result of the alleged oral agreement," Cargill, Inc., v. Kavanaugh, 228 N.W.2d 133, 138 (N.D. 1975).

Benz argued that it incurred a "detriment," thus making the oral agreement "executed," by agreeing to "swap fields." In other words, Benz argued that it suffered a "detriment" because it agreed to store the sub-standard potatoes that it intended to send to Cavendish for storage. These allegations, however, cannot establish an "executed oral agreement" within the meaning of N.D.C.C. § 9-09-06.

As the District Court correctly determined, the undisputed facts showed that the parties' written contracts did not contractually designate which party would store the potatoes from specific fields. When executed, the written contracts did not include the "Exhibit A" which might have made such a contractual designation. Thus they did not give either party the right to store potatoes from specific fields. See Bernabucci, 2006 ND 71, ¶ 15, 712 N.W.2d 323 ("A contract must be interpreted to give effect to the mutual intentions of the parties as it existed at the time of contracting"). Any subsequent informal designation was not reduced to a signed writing (although the parties made other signed modifications) and thus does not have the force of contract. (Supp. App. 66, Benz Dep. 225:12-226:24.) Without such a provision in the written contracts, Benz did not surrender "a legal right" or otherwise suffer a detriment in agreeing to the alleged field swap.

Even if Cavendish had contracted to store potatoes from particular fields, the undisputed facts still would establish that Benz did not "change its relative position" with Cavendish by "swapping fields" because the potatoes did not meet contractual quality

specifications. AgWorld's undisputed inspection reports show that the potatoes did not meet the minimum quality standards required under both the Company and the Grower Storage Agreements. Thus the potatoes did not meet contractual specifications regardless of which party was designated (whether by contract or informally) to store them. In other words, Benz did not have the right to require Cavendish to store potatoes that failed to meet contractual standards, so Benz had no right to surrender in connection with the "field swap."

D. Benz produced no evidence of a breach.

Even if the oral agreement alleged by Benz were legally enforceable, Benz's 2006 breach of contract claim still would not survive summary judgment because Benz produced no evidence of a breach. The oral modification alleged by Benz would have required Cavendish to begin calling for delivery of the potatoes "as soon as possible" after Cavendish finished processing other potatoes. Mr. Benz conceded that he and Mr. Urquhart did not even discuss a date by which Cavendish would call for the delivery of the potatoes.

Benz acknowledges that Cavendish accepted and fully paid for over half of the potatoes. In light of this, it is not surprising that at his deposition Mr. Benz twice admitted that he had no information or knowledge of any facts that would lead him to believe that Cavendish failed to call for delivery of the potatoes "as soon as it possibly could under all the circumstances." (Supp. App. 35-36, Benz Dep. 102:6-9, 106:4-9.) Thus, even without the other grounds for dismissal, Benz's claim for breach of contract in 2006 would be dismissed for lack of any proof of a breach.

In response to Cavendish's motion for summary judgment below, and on appeal, Benz attempted to establish a breach by claiming that Cavendish promised to take

delivery "immediately." (App. 164, Benz Aff. ¶ 12.) This allegation, which was made for the first time after Mr. Benz was deposed and after Cavendish moved for summary judgment, was rightly rejected by the District Court. At his deposition, Mr. Benz testified that Cavendish promised to call for delivery of the potatoes "as soon as possible." He never remotely suggested that Mr. Urquhart promised that Cavendish would take the potatoes "immediately when requested," despite extensive questioning about the conversation. Mr. Benz made no effort to explain that discrepancy. The District Court thus rightly rejected the contradictory allegation under the "sham affidavit" doctrine. See, e.g., Smith v. Johnson and Johnson, 593 F.3d 280, 285 n. 3. (3rd Cir. 2010).

In addition to the above, Benz could not establish a breach of the alleged oral agreement because, again, the undisputed evidence shows that potatoes fell below the contractual quality specifications set forth in both the Company and the Grower Storage Agreements. Even if Benz could establish that Cavendish failed to call for delivery of the potatoes "as soon as possible" under the circumstances, or if Cavendish had agreed to take the potatoes "immediately when requested," Benz still could not establish a breach, as Cavendish was not required to accept any potatoes below the minimum contractual quality specifications.[2]

As it did concerning the alleged delivery terms, in response to Cavendish's motion for summary judgment, and in this appeal, Benz has attempted to salvage its claim by changing Mr. Benz's testimony. After he was deposed and after Cavendish moved for summary judgment, Mr. Benz asserted in an affidavit that Mr. Urquhart

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[2] On appeal, Benz makes the unsupported argument that "Cavendish assumed the risk of the crop deteriorating." (Benz Br. 23.) Benz did not raise that issue below and thus it should not be considered. See Rutherford, 2009 ND 88, ¶ 13, 765 N.W.2d 705.

"assured Benz that Cavendish would take all the crop . . . despite . . . concerns about the quality of the crop." (App. 163, Benz Aff. ¶ 10.) This assertion is directly contrary to Mr. Benz's deposition testimony that the quality specifications remained intact and, in fact, that a contrary assertion made in written discovery was "not correct." Mr. Benz made no effort to explain the contradiction. The District Court thus correctly rejected the assertion under the "sham affidavit" doctrine. See Smith, 593 F.3d at 285 n. 3.

E. Benz produced no proof of damages.

Even if Benz could establish an enforceable oral modification to the 2006 Grower Storage Agreement and a breach, the claim still could not survive summary judgment because Benz produced no admissible evidence of damages. As the District Court noted, "No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin." N.D.C.C. § 32-03-09. Thus a party can only recover for damages that are proved with "reasonable certainty" and that are "not speculative." Leingang v. City of Mandan Weed Board, 468 N.W.2d 397, 398 (N.D. 1991).

As damages, Benz claimed it was entitled to $183,090 for the rotten potatoes, as well as an additional $108,090 for storing them until they were disposed of as "hog feed." (Supp. App. 81-84, Benz Dep. Ex. 3, Answer to Interrog. 4.) To arrive at those figures, Benz engaged in an elaborate calculation that was premised on the assumption that there was a "normal" amount (2%) of "unusable" potatoes.

The obvious flaw in Benz's calculation is the assumption that only 2% of the potatoes were unusable. At his deposition, Mr. Benz testified that he could give nothing but a "sheer guess" as to whether any of the potatoes were usable at the time of the alleged breach. (Supp. App. 42-43, Benz Dep. 131:11-132:2, 133:20-23, 134:8-20,

135:15-136:5.) Furthermore, when asked what percentage were still usable, Mr. Benz testified "you could ask anybody that question and they couldn't answer it." (Supp. App. 43, Benz Dep. 134:15-20.) Thus the undisputed evidence is that the potatoes did not meet contractual quality specifications and no one could give more than a "sheer guess" as to whether any were usable at the time of the alleged breach. As the District Court correctly held, contract damages cannot be based on such speculation.

As with the alleged oral contract modifications discussed above, Mr. Benz attempted to change his deposition testimony on this point. After Mr. Benz was deposed and Cavendish had moved for summary judgment, Mr. Benz apparently was willing to make a "sheer guess." In his affidavit, he stated that if Cavendish had taken all of the potatoes by mid-October "most of, not all of, the crop could have been used." (App. 168, Benz Aff., ¶ 34.) Mr. Benz made no effort to explain the change in his testimony. The District Court thus correctly rejected the "sham affidavit" assertion. See Smith, 593 F.3d at 285 n. 3.

Finally, the District Court correctly ruled that with no evidence that there were any "useable" potatoes, Benz was not entitled to the $108,090 in alleged storage costs. This Court has held as much in interpreting a substantially identical contract between Cavendish and other growers: "The contract clearly conditions Cavendish's obligation to pay storage costs upon the potatoes ultimately being accepted and "useable" under the contract. The Growers did not provide "acceptable" or "useable" potatoes meeting the quality standards under the contract, and Cavendish did not owe storage costs for the unacceptable potatoes." Cavendish Farms, Inc., v. Mathiason Farms, Inc., 2010 ND 236, ¶ 29, 792 N.D. 500.

II. The District Court Properly Dismissed Benz's 2007 Breach of Contract Claim.

As with its 2006 claim, Benz's 2007 breach of contract claim alleges that Cavendish failed to accept "timely" delivery from Benz. Benz asserted that Cavendish's delivery instructions caused "inefficiencies" in the harvest, thus increasing harvest expenses. Benz also asserted that Cavendish should have called for delivery sooner, before the potatoes' quality had allegedly started to deteriorate, which allegedly would have resulted in a higher price for Benz under the contractual pricing formula. The District Court properly dismissed the 2007 breach of contract claim because (a) the claim could not be supported by the written contract; (b) Mr. Benz testified the written contract was not modified; and (c) Benz refused to support its alleged damages despite the District Court's Order to Compel.

A. The 2007 breach of contract claim cannot be supported by the written Agreement.

The District Court correctly determined that, as with the 2006 claim, Benz's 2007 breach of contract claim could not be supported by the written Agreement's text. Specifically, the Agreement provided that the potatoes must be delivered "as directed by" Cavendish and also provided that time was of the essence, thus making Cavendish's delivery instructions central to the contract. The written Agreement simply did not require Cavendish to give delivery instructions that Benz's deemed "timely" or "efficient." The District Court thus correctly determined that Benz's 2007 breach of contract claim could not be supported under the text of the written Agreement.

B. Benz admitted the 2007 written Agreement was not modified.

In response to written discovery, Benz asserted that in 2007 Cavendish orally agreed that its delivery instructions would involve "a sufficiently large quantity [of

potatoes] so that it was economical for Benz to assemble workers and equipment to deliver the potatoes requested." (Supp. App. 74-78, Benz Dep. Ex. 3, Answer to Interrog. 2.) The District Court correctly ruled that such an alleged modification would not be enforceable in light of the no-oral modification clause; Dalan, 2002 ND 46 ¶¶ 9, 13, 640 N.W.2d 726; and § 9-09-06, as explained above.

More fundamentally, however, at his deposition Mr. Benz admitted that the 2007 Company Storage Agreement was not amended and that the oral agreements referenced in Benz's interrogatory answers were actually just "scheduling discussions," as follows:

Q. So this is not – you're not alleging that this conversation about economical harvesting was something that amended the written contracts, are you?

A. No.

Q. So written contracts are what they are, right?

A. Yes.

Q. This is just scheduling discussions.

A. Correct.

(Supp. App. 45, Benz Dep. 141:12-21.)

In response to Cavendish's motion for summary judgment, Benz again changed his position and asserted that there were "daily agreements" that Cavendish would take 30 to 35 truckloads of potatoes per day and that Cavendish breached "many" of those agreements. As the District Court explained, however, changing the alleged oral agreement from "economical harvesting" to "30 to 35 truckloads" per day does not save the claim from summary dismissal. The fact remains that Mr. Benz plainly testified that

the alleged "agreements" were simply "scheduling discussions" that did not modify the 2007 Company Storage Agreement.

As with Mr. Benz's other attempts to change his deposition testimony, the District Court explained why Mr. Benz's affidavit was not sufficient to avoid summary judgment, as follows:

> . . . To the extent that Benz now claims the contract was modified as described in Mr. Benz's affidavit in opposition to summary judgment, the "sham affidavit" doctrine would preclude the new claim. Smith, 539 F.3d at 285 n. 3 ("Under the sham affidavit doctrine a court will disregard an affidavit inconsistent with an affiant's prior deposition testimony when a party moves for summary judgment on the basis of the deposition. . . .").
>
> As do all deponents, Mr. Benz had the right to read his deposition transcript, note any "changes in form or substance which the witness desires to make," and sign the transcript. N.D.R. Civ. P. 30(e). (Supp. App. 69, Benz Dep. 237:23-238:10.) Mr. Benz did not make any changes to his transcript, nor did he attempt to explain why his affidavit contradicts his prior deposition testimony, and the sham affidavit doctrine precludes him from later attempting to change his testimony in an effort to defeat Cavendish's motion for summary judgment. Were the law otherwise, Rule 56 could be easily circumvented by any litigant who submitted an affidavit contrary to his prior deposition testimony. As the federal courts have held, that is not an acceptable result. See 11 Moore's Federal Practice § 56.14[1][f] (Matthew Bender 3d ed.).

C. Benz refused to support its alleged damages on its 2007 breach of contract claim, despite the Court's Order to Compel.

As damages for its 2007 breach of contract claim, Benz asserted that its 2007 harvesting expenses were 50%, or $51,875, "higher than they should have been." (Supp. App. 81-84, Benz Dep. Ex. 3, Answer to Interrog. 4.) Benz also claimed that, as a result of an "extended harvest," Benz's 2007 crop degraded such that the potatoes were worth $34,000 less under the Company Storage Agreement's pricing formula than they should have been. (Id.)

Benz, however, failed to produce any documents substantiating those alleged damages, although Mr. Benz admitted he arrived at the figures based on documents in his possession. As the District Court ruled,

> In the absence of such documents, neither the Court nor a jury could calculate the damages without engaging in outright speculation. Economic damages cannot be awarded when the party seeking them cannot, or refuses to, verify them with the underlying business documents. Keller v. Bolding, 2004 ND 80, ¶ 19, 678 N.W.2d 578 ("Because Keller had no written records from his hunting operation, the court found profits too speculative, and did not award any damages for lost hunting income.").

(App. 286.)

Moreover, Benz's failure to produce the documents was in direct violation of the Court's October 5, 2009, Order to Compel, which, among other things, required Benz to produce within 10 days all documents "within its possession, custody or control" that "support [Benz's] claim for damages or other relief in this case." (App. 103, Order to Compel; Supp. App. 96, Benz Dep. Ex. 3, Response to Doc. Request 8.)[3] At his deposition, Mr. Benz admitted that Benz failed to comply with the Court's Order to Compel:

> Q. Where are the documents and where is the itemization that would show these expenses? This is all I have, I believe. And I'll tell you, I mean, between Exhibit 3, Exhibit 10, and Exhibit 12 you have in front of you all the documents that you've produced in this case. And I want to know where this 50 percent number [regarding increased harvest expenses] comes from.
>
> A. Okay. I can't answer that at this time.

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[3] The October 5, 2009, Order to Compel required Benz to produce documents responsive to certain of "Plaintiff's" document requests. This is obviously a typographical error and should have stated "Defendant's" requests. Mr. Benz's testimony, however, shows there was no confusion on this point.

Q. Is that because you haven't produced the documents?

A. I can't answer – I don't know. I don't know if I didn't produce them, if they're in here.

Q. Would you want to look through the documents in those three exhibits?

A. I glanced through, and you're absolutely right. There's nothing in here.

Q. Okay.

A. But I know I do have – I didn't just pull a number out of my butt. I do have it someplace.

Q. And, of course, you recall that since October of this year you've had a court order outstanding requiring you to produce all documents that support your claim for damages or other relief in this case, correct?

A. Yes.

Q. So it sounds like you've not produced those documents, correct?

A. I thought I had, but apparently not.

Q. So is it safe to say that the 50 percent figure is a guess?

A. It's an estimate.

Q. Who came up with the estimate?

A. I did.

Q. Okay. What did you do to come up with the estimate?

A. Just as I previously said.

Q. Which is what? I mean, were you looking at calendar entries?

A. Yes.

Q. Were you looking at –

A. Daytimer that says how many trucks were paid for and how many we actually delivered. I've got all that.

Q. Okay.

A. How many actual hours we worked, how many actual hours we paid people for.

Q. You have all those records?

A. Yes, I do.

Q. But they weren't produced despite the court order.

A. Apparently you're right.

(Supp. App. 53-54, Benz Dep. 176:24-179:2, emphasis added.)

In addition to the grounds stated above, the District Court ruled that Benz's on-going violation of its Order to Compel gave alternative grounds for the dismissal of the 2007 breach of contract claim, as follows:

> Having testified that he used the documents to arrive at Benz's damages calculation in March, 2009 (the date of the interrogatory answers), Benz cannot claim it did not know that they were responsive to Cavendish's request for all documents "that support your claim for damages or other relief in this case." Thus, Benz's failure to produce the documents within 10 days of the Court's October 5, 2009, Order, as directed, and even by the date of oral argument (March 17, 2010), is inexcusable.
>
> North Dakota Rule of Civil Procedure 37 provides that the Court may sanction a party's "failure to obey an order to provide . . . discovery" by, among other things, "refusing to allow the disobedient party to support . . . designated claims . . . or prohibiting that party from introducing designated matters in evidence." N.D. Rule Civ. P. 37(b)(2). Here, even if the claim could otherwise survive summary judgment (which, as explained above, it cannot), the Court would not permit Benz to advance its 2007 breach-of-contract claim because of its admitted failure, at every step, to produce the documents supporting its alleged damages in disregard of the Court's Order.

(App. 26.)

III. The District Court Properly Dismissed Benz's Claim Under N.D.C.C. Ch. 51-15 (Unlawful Sales or Advertising Practices).

Benz asserted a claim under N.D.C.C. Ch. 51-15, which governs unlawful sales or advertising practices. (App. 12-14, Amend. Compl. ¶¶ 57-67.) When asked the factual basis of the claim in an interrogatory, Benz referred to its breach-of-contract and promissory estoppel allegations and never referred to a supposed "joint venture." (Supp. App. 93-94, Benz Dep. Ex. 3, Answer to Interrog. 19.)

Section 51-15-02 makes it unlawful to engage in various deceptive practices "with the intent that others rely thereon in connection with the sale or advertisement of any merchandise." Section 51-15-09 addresses remedies against any person who has acquired any consideration "by means" of such a sale. The Act defines a "sale" as ". . . any sale, offer for sale, or attempt to sell any merchandise for any consideration." N.D.C.C. § 51-15-01(5). Notably, the Act does not include any purchase, offer to purchase, or attempt to purchase merchandise within the definition of "sale." This Court's cases construing the Act involve claims that sellers engaged in unlawful sales or advertising practices. See Jorgenson v. Agway, Inc., 2001 ND 104, ¶ 1, 627 N.W.2d 391, 394 (claims against company that "marketed and sold" seed); State ex. rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 902 (N.D. 1986) (claims against advertiser and seller of furniture). Thus the Act creates a cause of action only against a seller.

Cavendish neither advertised nor sold the potatoes at issue. Benz was the seller, and the plain language of Ch. 51-15 and the cases construing it do not warrant application here. An Act governing unlawful sales and advertising practices simply does not create a cause of action against the buyer of potatoes.

Before the District Court, Benz argued that Ch. 51-15 provides a cause of action against a buyer. Benz has abandoned this argument on appeal, contending that "Cavendish was both buyer and seller" in an effort to make out a potential claim under Ch. 51-15. Benz claims that it and Cavendish were partners, or joint venturers, during their 2006 relationship and that Cavendish owned 50% of the Benz-grown potatoes even before Benz sold them to Cavendish.

As an initial matter, this claim should be rejected out-of-hand because Benz did not plead a "joint venture" or "partnership" claim in its Amended Complaint. Nor did it premise its Unlawful Sales Practices claim on the notion of a joint venture or partnership, but instead on the parties' written Agreements. (App. 12-14.) If there were any doubt whether Benz pleaded the claim as a partnership or joint venture claim, its proposed Second Amended Complaint settles the matter, as Benz attempted to recast the claim as a "joint venture" claim. (Supp. App. 185-197.)

Had the Unlawful Sales Practices claim been pleaded as a "joint venture," moreover, it would have failed under the plain language of the governing Agreements. First, the 2006 Credit Agreement expressly provided that the parties were neither partners nor joint venturers. Rather, the Credit Agreement, as the name suggests, established a relationship of creditor and debtor, stating that "Cavendish Farms, Inc., pursuant to the provisions of this Agreement, agrees to provide financing for crop inputs to be incurred by Benz Farm LLP in growing potatoes . . . ."

Second, the 2006 Company Storage and Grower Storage Agreements provide that "Cavendish Farms agrees to buy potatoes from Grower according to the terms of this agreement and Grower agrees to grow and sell potatoes to Cavendish Farms according to

the terms of this Agreement." Moreover, both Agreements provide that "[u]pon acceptance of the potatoes by Cavendish Farms, Inc., title to the potatoes passes to Cavendish Farms, Inc." (Emphasis added.) As Mr. Benz testified, the written contracts governed the relationship of the parties. (Supp. App. 60, Benz Dep. 202:20-203:8.) Those written contracts demonstrate that Benz was the seller and debtor, Cavendish was the buyer and creditor, and Benz retained title until Cavendish accepted the potatoes. By no means was Cavendish a "50% seller."

Finally, there is no evidence that Cavendish engaged in an act prohibited by N.D.C.C. § 51-15-02. The only statutory criteria that Benz relied on was a "deceptive act." Benz argued to the District Court "if the Cavendish participation and control in the Cavendish/Benz joint venture rises to the level of partnership, then there was deception." (App. 294.) There was nothing deceptive, however, about the relationship created by the Credit Agreement or any of the parties' other written contracts. The relationship was legally defined in the contracts which were signed and available to both parties, not hidden in some "deception." Benz consulted with an attorney, who could have explained the terms to Benz, before entering into the Credit Agreement, further undercutting the notion that there was some "deception." (Supp. App. 58, Benz Dep. 194:16-195:24.)

On appeal, Benz argues that, by virtue of Cavendish's "partnership" or "joint venture" with Benz, Cavendish violated N.D.C.C. § 10-06.1-02, which in turn could be a "deceptive act" under § 51-15-02. This argument fails. First, as explained above there is no partnership or joint venture. Second, Benz did not plead the alleged violation of § 10-06.1-02, which surfaced only in Benz's proposed Second Amended Compliant. Third,

the allegation still asserts nothing in the nature of deceit. For the reasons stated above, the District Court properly dismissed Benz's claim under § 51-15-02.

IV. The District Court Properly Determined that Benz Pleaded No Claim for "Bad Faith."

The District Court properly analyzed Benz's "bad faith" allegation under N.D.C.C. § 41-08-18, noted that that provision "does not support an independent claim for relief," and held that all claims "must arise from" or "be rooted in the terms of" the parties' contracts. (App. 295.) The District Court's ruling was correct and, in fact, consistent with this Court's subsequent ruling in Mathiason Farms, 2010 ND 236, 729 N.W.2d 500.

Benz claims that the Mathiason Farms case suggests that the District Court erred because the "underlying basis of both Mathiason and the case at bar is that Cavendish failed to call for delivery of potatoes when they were still useable." Benz's argument is in error. In fact, in Mathiason Farms the Court affirmed that Cavendish did not carry out the terms of the written contracts in good faith because it failed to notify the growers of its decision to reject unusable potatoes for over a month after the decision was made. Mathiason Farms, 2010 ND 236, ¶¶ 15-16, 792 N.W.2d 500. The evidence in Mathiason Farms further showed that there was an alternative market for the growers' potatoes and that Cavendish's delay in giving notice of its rejection (thus releasing the potatoes for sale elsewhere) allowed the potatoes to further deteriorate, causing the growers to lose the ability to sell into the alternative market. Id.

In contrast, though Benz makes the bare allegation that Cavendish "refused to release" (Benz Br. at 16) the crop, it provides no supporting evidence and, in fact, Mr. Benz testified there was no alterative market. More fundamentally, Benz *did not*

plead such a claim in its Amended Complaint, only seeking to add it after Cavendish had moved for summary judgment and the District Court made its ruling in Mathiason Farms. This is a plain instance of a party (Benz) seeking to leapfrog on another party's (Mathiason's) successful claim. The problem for Benz, however, is that, though the contracts are substantially identical, the facts underlying the two cases are very different.

Turning to the facts of this case, and the claims Benz actually asserted, it is clear that the U.C.C.'s obligation of "good faith" was not implicated – and certainly there is no evidence it was violated. Benz's breach of contract claims are premised on alleged oral modifications to the parties' contracts, which either are or are not enforceable and, if enforceable, either were or were not breached. As explained above, Mr. Benz's testimony does not establish enforceable oral modifications, nor does it support a breach (or damages). In any case, the black-or-white issue of whether alleged oral modifications to written contracts were breached is very different from the "discretionary decision without defined standards" that implicated the duty of good in Mathiason Farms, 2010 ND 236, ¶ 14, 792 N.W.2d 500. The District Court thus made the correct decision.

V. The District Court Properly Denied Benz's Motion to Serve and File its Proposed Second Amended Complaint.

Benz's proposed Second Amended Complaint sought to add (a) a partnership or joint venture claim, (b) a claim that Cavendish allegedly partnered with Benz and thus violated N.D.C.C. § 10-06.1-02, (c) a $1 million dollar breach of contract claim relating to Benz's 2006 onion crop, and (d) a claim that Cavendish allegedly failed to release the Benz crop for sale elsewhere after Cavendish determined it could not process the crop. (Supp. App. 185-197.) Benz filed its motion to amend on March 4, 2010, more than 10 months after the Rule 16 Order's deadline for such motions, over one month after

Cavendish moved for summary judgment, and just two-and-a-half months before trial. (Supp. App. 5-6, Amended Rule 16 Order.) Benz did not seek a continuance of the trial date, which had been once continued at Benz's request.

The District Court, whose decision is reviewed for abuse of discretion, denied the motion because it was untimely; the amended pleadings would have unfairly prejudiced Cavendish; the proposed new claims were not supported by "substantial evidence," as required by Darby v. Swenson, Inc., 2009 ND 103, ¶ 12, 767 N.W.2d 147; and because some of the proposed claims were futile. (App. 296-98.) The District Court's decision is well-reasoned and shows that there was no abuse of discretion.

On appeal, Benz argues that it was error for the District Court to deny the motion because "[i]t was only after Benz received the transcripts of the February 18, 2010, depositions of Wahl and Urquhart that Benz had sufficient information to request leave to amend its pleading." Though Benz does not explain why this is allegedly so, it certainly does not suggest that the District Court abused its discretion.

Benz commenced this case in December 2008. Cavendish produced written discovery and documents in the summer of 2009. (App. 85-98.) Benz has provided no explanation as to why it waited until February 2010 – after the summary judgment motion deadline had passed – to depose representatives of Cavendish. Benz's lack of diligence in conducting discovery does not establish an abuse of discretion by the District Court.

VI. The District Court Properly Awarded Cavendish Attorneys' Fees.

The District Court awarded Cavendish reasonable attorneys' fees under the contractual fee provisions. (App. 399-403.) The amount of the fees were set forth in a detailed affidavit. (App. 357-61.) In the alternative, the District Court noted that

Cavendish would also be entitled to fees under N.D.C.C. § 28-26-01(2) on the frivolous anti-trust and sales act claims, as well as under Rule 37 for being forced to bring a motion to compel. Id.[4] The District Court correctly determined that there was no need to attempt to allocate which part of the fees were incurred in defending certain claims because "the contractual attorney fee and costs provision encompasses the entire case." (App. 401.) The District Court did not hold a hearing on the matter because it did not believe one was necessary and because neither party requested one until Benz made an untimely request – 27 days after Rule 3.2 required such a request and well after the District Court made its ruling. (App. 378-79, 404)[5]

Neither before the District Court nor before this Court has Benz claimed the attorneys' fees incurred by Cavendish were unreasonable. Nor could it. As the District Court explained:

> Notably, Benz has not asserted that the fees are unreasonable, and the Court is of the opinion that, given the magnitude of the damages Benz was seeking, the fees are reasonable. Considering the statutory treble damages provisions Cavendish was faced with along with the compensatory damages Benz was seeking, Cavendish's financial risk was in excess of $4 million, which does not include the attorney fee award Benz might have been entitled to under its statutory claims if it had prevailed. Without doubt, it is reasonable – and, indeed, economical – to incur less than $100,000 in fees and costs to obtain the dismissal of such claims.

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[4] In its order granting Cavendish's attorney's fees, the District Court indicated that Benz's anti-trust and Sales Act Claims were frivolous "[f]or the reasons set forth by Cavendish." (App. 401.) Cavendish's briefing and supporting affidavits thus have independent significance and are included in the Supp. App. 198-235. These filings – and particularly the Second Affidavit of Benjamin J. Hasbrouck in Support of Motion for Attorney's Fees and Costs – show that Benz's claim that it reasonably thought Cavendish owned Sea View Farm, LLP, until deposing Urquhart in February 2010 is without merit. Publicly filed documents showed otherwise.

[5] Cavendish's motion stated, "Pursuant to N.D.R.Ct. 3.2, this motion will be decided on briefs unless oral argument is timely requested." (Supp. App. 198.)

On appeal, Benz argues that the contractual fee provisions do not apply because the alleged oral modifications "were so extensive [that the written contract] was rescinded by mutual agreement." (Benz Br. at 31.) Apparently in the alternative, Benz argues that Cavendish "terminated" the written contract by rejecting certain potatoes. There is no merit to these claims, which Benz has made for the first time on appeal and thus should be disregarded out-of-hand. See Rutherford, 2009 ND 88, ¶ 13, 765 N.W.2d 705.

As for the rescission claim, even the alleged modifications were limited and discreet. Mr. Benz's testimony, moreover, acknowledged that the parties' written contracts governed the relationship and claimed modifications – not rescission. Moreover, 17 separate paragraphs of the Amended Complaint rely on the contracts, yet there is not one mention of rescission. (App. 6, 8, 11-14, Amend. Compl. ¶¶ 9-11, 23, 27, 47, 50, 58-65, 69, and 72.) Likewise, the notion that Cavendish's exercise of a contractual right (rejecting non-conforming potatoes) "terminates" the contract is utter nonsense. The District Court thus properly awarded Cavendish its fees.

VII. The District Court Properly Denied Benz's Motion for Reconsideration.

The District Court properly denied Benz's motion to "amend the Judgment." Because the Judgment had not yet been entered, the motion was actually one asking the District Court to reconsider its summary judgment order. In any case, this Court has ruled that such a motion should be considered under the standards for a motion to alter or amend a judgment, under North Dakota Rule of Civil Procedure 59, or a motion for relief from judgment, under Rule 60. See Woodworth, 1999 ND 43, ¶ 7, 590 N.W.2d 446 (Rule 59); Follman v. Upper Valley Special Education Unit, 2000 ND 72, ¶¶ 5-11, 609

N.W.2d 90 (Rule 60). Accordingly, the decision on the motion was one that "rests in the trial court's sound discretion and will not be reversed on appeal unless there is a manifest abuse of discretion." Woodworth, 1999 ND 43, ¶ 7, 590 N.W.2d 446. In its motion for reconsideration, Benz did not demonstrate "exceptional circumstances justifying relief," Follman, 2000 ND 72, ¶ 11, 609 N.W.2d 90, and thus the District Court did not abuse its discretion in denying the motion.

Benz cited Rule 59 in its motion and submitted documents to the District Court that it did not submit on summary judgment, thus suggesting that Benz was attempting to establish the grounds provided in Rule 59(b)(4). That rule provides that a "verdict or other decision may be vacated" if the aggrieved party proves that there is "[n]ewly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial," or in this case at the summary judgment hearing.

Benz could have submitted to the District Court on summary judgment all of the new documents that it submitted in support of its motion for reconsideration (which were Bates numbered CAV 285-86, 489-493, 513, 520, 545, 575, 603, and 715). Indeed, Benz acknowledged that all of the documents were produced by Cavendish in a supplemental document production that was received by Benz one week before the March 17, 2010, hearing. (App. 324.) Although Benz submitted a supplemental legal memorandum at the hearing, which the District Court accepted, Benz did not submit the documents. Nor did Benz submit a request under Rule 56(f) for a continuance to enable further discovery to

be taken concerning Cavendish's supplemental document production.[6] Thus the District Court correctly ruled that "Benz's submission of additional evidence with its motion is improper because it could have been timely submitted. Jaskoviak v. Gruver, 2002 ND 1, ¶ 10, 638 N.W.2d 1."

It is not surprising that Benz failed to make a Rule 56(f) request in light of the nature of Cavendish's supplemental document production. As the District Court ruled, "even this untimely evidence would not have changed the Court's decision." (App. 394.) Benz argued that the supplemental documents were material because they loosely referred to the parties' debtor-creditor relationship as a "joint venture." Such documents were not material to the Court's decision because Benz did not plead a "joint venture" claim. They also were not material because other documents and testimony in the record on Cavendish's motion for summary judgment made similar statements, for example, using the term "joint venture" in a colloquial sense. As the District Court correctly ruled, such documents did not actually create a "joint venture," and a few more, similar documents would not change that decision. Beyond the untimely submitted additional documents, Benz sought only "to reargue Summary Judgment in its Motion to Amend Judgment." (App. 378.) Thus the District Court acted within its discretion in denying Benz's motion.

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[6] Throughout its brief, Benz implies – and sometimes directly alleges – that Cavendish violated the discovery rules, including by its March 2010 supplemental document production. There is nothing in the record (except for Benz's after-the-fact argument) suggesting that Benz raised a complaint about Cavendish's discovery responses and document production. The only discovery motion was made by Cavendish, which the District Court granted.

CONCLUSION

For the reasons stated above, the Judgment of the District Court should be affirmed. Cavendish respectfully requests oral argument on this appeal.

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