

STATE OF MINNESOTA  
IN SUPREME COURT

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**In re Source Code Evidentiary Hearings  
in Implied Consent Matters.**

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**BRIEF AND APPENDIX OF AMICUS CURIAE CMI OF KENTUCKY,  
INC.**

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## INTRODUCTION

Amicus Curiae CMI of Kentucky, Inc. (“CMI”), respectfully submits its Brief of Amicus Curiae to this Court.<sup>1</sup> For over half a decade, defendants and implied consent petitioners have repeated the mantra, “Source Code, Source Code, Source Code,” and to remarkable effect. This shibboleth became a near-magical incantation capable of forestalling thousands of prosecutions and revocations for, quite literally, years. Now, through this consolidated proceeding, the phrase has finally been stripped of its talismanic powers and shown to be not unlike the emperor’s new clothes.

It has always been CMI’s position that the Intoxilyzer 5000EN provides valid, reliable breath alcohol test results that are unaffected by alleged errors or problems in the Source Code. CMI has worked with outside parties for several years to establish a protocol that would allow reasonable access to the Source Code for responsible and meaningful review while also affording sufficient protections for CMI’s valuable trade secrets and confidential, proprietary information. The federal Consent Judgment (CMIA14-33, hereafter, “federal Consent Judgment”)<sup>2</sup>

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<sup>1</sup> Pursuant to Rule 129.03 of the Minnesota Rules of Appellate Procedure, Amicus Curiae CMI certifies that no party or its counsel authored any part of this brief. Further, no other person or entity made any monetary contribution to its preparation or submission.

<sup>2</sup> “CMIA” refers to the Appendix of Amicus Curiae CMI of Kentucky, Inc.

jointly crafted by CMI and the Commissioner of Public Safety, with the assistance of U.S Magistrate Judge Arthur Boylan, ultimately accomplished that goal.

The process established in the federal Consent Judgment has now been tested, and it unquestionably provides Authorized Minnesota Litigants with sufficient access to perform thorough and meaningful Source Code review. With respect to access under the federal Consent Judgment, Judge Abrams commented:

Judge Frank concluded that this level of access was “reasonable and, in fact, [provided] unprecedented access to the Source Code for the Intoxilyzer.” Judge Frank further concluded the access ordered was “in the public interest, as well as in the interests of justice,” and properly balanced CMI’s “intellectual property rights” with implied consent petitioners’ and criminal defendants’ need for access. After hearing testimony during the evidentiary hearing from three of the experts who reviewed the Source Code that they had sufficient access to what was needed to perform their analysis, *this Court shares Judge Frank’s conclusion that the access provided was reasonable, in the public interest, and served the interests of justice.*

(Mar. 7, 2011 Order 20 – Order and Mem. Following Final Evid. Hearing at 18-19 (emphasis added) (internal citations omitted) (A1-122,<sup>3</sup> hereafter “Order 20”)) As a result of that unprecedented access, the Source Code has now been rigorously analyzed by its harshest critics and withstood the adversarial adjudicative process.

#### **AMICUS CURIAE CMI’S POSITION WITH RESPECT TO THE APPEAL**

Amicus Curiae CMI supports Respondents and opposes Appellants’ appeal. Amicus Curiae CMI’s brief responds only to Appellants’ first basis for appeal, as

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<sup>3</sup> “A” refers to Appellants’ Appendix, as enumerated therein.

its argument differs in some respects from those of Respondents. With respect to Appellants' second and third bases for appeal, Amicus Curiae CMI joins in and incorporates Respondents' arguments, as further briefing is unnecessary.

### **LEGAL ISSUE**

Whether the district court clearly abused its discretion when it determined admissibility under Minnesota Rule of Evidence 104(a) and overruled Appellants' motion to exclude Intoxilyzer 5000EN test results.

The district court applied the preponderance of the evidence standard to the entirety of the evidence and held that: "The results of breath alcohol testing conducted on the Intoxilyzer 5000EN . . . are reliable and unaffected by actual or alleged problems with the Source Code of the instrument."

Most apposite authority: Minn. R. Evid. 104(a) and Advisory Comm. Cmt.  
*State v. Anderson*, 789 N.W.2d 227 (Minn. 2010)  
*State v. Zabawa*, 787 N.W.2d 177 (Minn. 2010)  
*Bourjaily v. U.S.*, 483 U.S. 171 (1987)  
11 Peter N. Thompson, Minn. Prac. § 104.2, at 55  
11A Thompson & Herr, Minn. Prac. at 18

### **PROCEDURAL HISTORY**

- 2005-2006 Defendants in DWI cases and petitioners in implied consent revocation proceedings in which Intoxilyzer 5000EN breath alcohol test results will be offered in evidence begin seeking discovery of the Source Code for the instrument. District courts routinely deny motions seeking to compel the State to produce the Source Code.
- May 2, 2006 Minnesota District Court Judge Richard G. Spicer issues the first order compelling the Commissioner of Public Safety to produce the Source Code in an implied consent revocation hearing.
- July 26, 2007 The Minnesota Supreme Court denies the State's Petition for a Writ of Prohibition of Judge Spicer's order for production of the Source Code, holding that the State may be able to

obtain possession, custody, or control over the Source Code by seeking judicial enforcement the State's original Request for Proposal ("RFP"). *In re Comm'r of Pub. Safety v. Underdahl*, 735 N.W.2d 706, 713 (Minn. 2007) ("*Underdahl I*").

March 3, 2008

The State of Minnesota, by its Commissioner of Public Safety, sues CMI, manufacturer of the Intoxilyzer 5000EN, in the United States District Court for the District of Minnesota, on the contract and copyright theories discussed by the Minnesota Supreme Court in *Underdahl I*. *State of Minnesota v. CMI of Ky., Inc.*, No. 08-CV-603 (DWF/AJB).

July 16, 2009

U.S. District Court Judge Donovan Frank rules that the State of Minnesota and individual litigants do not have any contractual rights to access CMI's Source Code under the RFP. (July 16, 2009 Mem. Op. and Order, Frank, J., Doc. No. 205), *State of Minnesota v. CMI of Ky., Inc.*, No. 08-CV-603 (DWF/AJB). (CMIA1-13)

July 16, 2009

Judge Frank approves a settlement and enters a Consent Judgment jointly crafted by CMI and the Commissioner of Public Safety. The Consent Judgment provides mechanisms through which Authorized Minnesota Litigants may obtain access to a written version of CMI's Source Code in Minnesota and the "native" electronic version of the Source Code at CMI's headquarters in Kentucky, subject to specific, mandatory protective orders and non-disclosure agreements. (July 16, 2009 Order Approving Consent J. and Permanent Inj. and Mem., Frank, J., Doc. No. 206), *State of Minnesota v. CMI of Ky., Inc.*, No. 08-CV-603 (DWF/AJB). (CMIA14-33) Judge Frank describes the level of access afforded under the Consent Judgment as both "reasonable" and "unprecedented."

August 9-10, 2009

Timothy Black, a consultant retained by Minnesota Attorney Derek Patrin on behalf of certain Authorized Minnesota Litigants, reviews the Source Code for approximately six hours over two days at CMI's headquarters in Kentucky,

subject to the protective order and non-disclosure agreement specified in the federal Consent Judgment.

August 13, 2009 Minnesota District Court Judge Richard G. Spicer issues an Order finding that access to the Source Code as provided for in the federal Consent Judgment will “reasonably satisfy” an implied consent petitioner’s Source Code request. (Aug. 13, 2009 Order, Spicer, J.), *Malmgren v. Comm’r of Pub. Safety*, No. 19-HA-CV-09-2371, at \*1. (CMIA34-35)

September 25, 2009 An organization of attorneys representing Authorized Minnesota Litigants referred to as the “Source Code Coalition” (“Coalition”) retains Computer Forensic Services, Inc. (“CFS”) to perform a comprehensive review and analysis of the Source Code. Between September 2009 and September 2010, CFS would spend over 2,080 hours reviewing the Source Code, the hardware, software, and documentation for the Intoxilyzer 5000EN, subject to the protective order and non-disclosure agreement specified in the federal Consent Judgment.

January 11, 2010 The Minnesota Supreme Court issues an Order consolidating for pretrial purposes all pending implied consent cases in which Intoxilyzer 5000EN test results have been challenged on Source Code grounds and all criminal DWI cases in which Intoxilyzer 5000EN test results have been challenged on Source Code grounds and in which both the prosecuting authority and the defendant consent in writing to consolidation. (Jan. 11, 2010 Order, Magnuson, J.), *In re Minn. Intoxilyzer 5000EN Source Code Litig.*, No. A09-2109 at 3-4 (“Consolidation Order”). (RA1-5)<sup>4</sup> The Court assigns the Honorable Jerome B. Abrams of the First Judicial District to “administer, hear, and decide such pretrial matters as he deems appropriate concerning challenges to the reliability of the Intoxilyzer 5000EN results based on the source code of the instrument.”

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<sup>4</sup> “RA” refers to the Appendix of Respondent State of Minnesota Prosecutors, as enumerated therein.

- May 3, 2010 Subject to the protective order and non-disclosure agreement specified in the federal Consent Judgment, CFS begins approximately five months of intensive, on-site review of the Source Code, hardware, software, and documentation for the Intoxilyzer 5000EN at CMI's headquarters in Kentucky.
- September 30, 2010 The Coalition files and serves CFS's expert report. CFS reports that after spending over 2,080 hours analyzing the Source Code and the instrument, it has "determined that the Intoxilyzer 5000EN instrument[] in use in Minnesota provides valid BrAC measurements and functions as designed."
- October 1, 2010 Mr. Patrin files and serves Mr. Black's report, in which he admits that he opted not to perform an in-depth analysis of the Source Code, relying on others, such as CFS, to do so.
- October 18, 2010 Stephen J. Nuspl, Ph.D., of Mitrin, Inc., a Source Code expert retained by the State, makes the first of two week-long trips to CMI's headquarters to review the Source Code. Dr. Nuspl would spend over eighty hours analyzing the Source Code.
- November 12, 2010 The State serves and files Dr. Nuspl's report, in which he reports that, "[a]ll the expert witnesses concur that no . . . source code errors were found in their reviews," and "[t]here is no basis for using the 'Source Code' issue as a reason for disputing BrAC readings already reported or for barring future use of the Intoxilyzer 5000EN."
- December 8-23, 2011 Pursuant to this Court's Order, Judge Abrams holds an evidentiary hearing to "administer, hear, and decide such pretrial matters as he deem[ed] appropriate concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument."
- March 8, 2011 The district court files its Mar. 7, 2011 Order 20 – Order and Mem. Following Final Evidentiary Hr'g, Abrams, J., *In re: Source Code Evidentiary Hr'gs in Implied Consent Matters*, Master File No. 70-CV-09-19459 and *In re: Source Code*

*Evidentiary Hr'gs in Criminal Matters, Master File No. 70-CR-09-19749. (A1-122) Judge Abrams rules that "[t]he results of breath alcohol testing conducted on the Intoxilyzer 5000EN which express a numerical value for measured breath alcohol are reliable and unaffected by actual or alleged problems with the Source Code of the instrument."*

- March 28, 2011      DWI defendants and implied consent petitioners whose cases were consolidated for pretrial purposes by this Court petition for discretionary review of Order 20 by the Minnesota Court of Appeals.
- April 28, 2011      The Minnesota Court of Appeals grants Appellants' petition for discretionary review of Order 20.
- May 12, 2011      State prosecutors and the Commissioner of Public Safety petition the Minnesota Supreme Court for accelerated review.
- June 28, 2011      This Court grants the State prosecutors' and Commissioner's petition for accelerated review.
- July 7, 2011      CMI requests leave of the Minnesota Supreme Court to appear as Amicus Curiae.
- July 14, 2011      This Court grants CMI's request for leave to appear as Amicus Curiae.

### **STATEMENT OF THE CASE**

Since at least 2005, DWI defendants and implied consent petitioners confronted by Intoxilyzer 5000EN test result evidence have clamored for access to the instrument's Source Code, asserting that it *might* contain errors that would discredit their test results. Following entry of the federal Consent Judgment in July 2009, defendants and petitioners obtained access to the Source Code, subject to the

protective order and non-disclosure agreement specified in the federal Consent Judgment, and review began in August 2009.

As of January 2010, however, there were literally thousands of pending criminal DWI and civil implied consent cases stalled in the district courts awaiting a resolution of the so-called "Source Code issue." Recognizing the likelihood of duplicative litigation, inconsistent rulings, wasted resources, and further delay of the resolution of the pending cases if the "Source Code issue" was litigated in every individual case, this Court ordered that the cases be consolidated for a pretrial resolution of the Source Code issue. (RA1-5, hereafter, "Consolidation Order") The Court found that the "interests of the parties and the judiciary will be furthered by assignment of civil Intoxilyzer 5000EN source code challenge cases to a single judge for administration and determination of those cases," and that criminal cases would similarly benefit, provided the defendant and prosecuting authority consented to consolidation. (Consolidation Order 3-4) Accordingly, this Court ordered Judge Abrams to "administer, hear, and decide all pretrial matters as he deems appropriate concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument." (*Id.* at 4) The issue presented to, and ultimately decided by the district court, was defined in this Court's Consolidation Order. In short, the district court was to determine whether

actual or alleged problems with the Source Code rendered the results of tests administered with the Intoxilyzer 5000EN invalid or unreliable.

What followed was a full year of pre-hearing discovery, exhaustive Source Code analysis, numerous expert reports, expert depositions, and motion practice, culminating in an eleven-day evidentiary hearing in which testimony was taken from eleven witnesses and hundreds of exhibits were offered and admitted. In March 2011, the district court issued Order 20—a 122-page Order and Memorandum that included an Executive Summary, Introduction, Definitions, History of the Proceedings, Technical Description of the Operation of the Source Code in the Intoxilyzer 5000EN, and a thorough discussion of the court’s findings and conclusions regarding the evidence presented at the consolidated evidentiary hearing. (*See generally* Order 20)

The district court, having heard all of the testimony, reviewed all of the evidence, and received all the arguments of counsel, ruled as follows:

The results of breath alcohol testing conducted on the Intoxilyzer 5000EN which express a numerical value for measured breath alcohol are reliable and unaffected by actual or alleged problems with the Source Code of the instrument. To the extent challenges to test results are premised upon problems with the Source Code, such challenges are overruled, and evidence of the same should not be allowed.

(Order 20 at ii—iii)

Appellants bring the instant appeal, challenging the district court’s findings and conclusions in Order 20.

## STATEMENT OF FACTS

The relevant facts are sufficiently set forth in the district court's Order 20 and the Respondents' briefs.

## ARGUMENT

**I. THE DISTRICT COURT CORRECTLY FOLLOWED MINNESOTA RULE OF EVIDENCE 104(A) AND THIS COURT'S MANDATE, APPLIED THE PREPONDERANCE STANDARD, AND DETERMINED THAT NEITHER ALLEGED NOR ACTUAL PROBLEMS IN THE SOURCE CODE RENDER THE RESULTS OF A TEST ADMINISTERED WITH THE INTOXILYZER 5000EN UNRELIABLE OR OTHERWISE INADMISSIBLE.**

Appellants' first challenge asserts that the district court failed to identify and apply the correct evidentiary standard to Appellants' Source Code challenge. (Appellants' Br. 3, 17, 21-22) Curiously, Appellants themselves never identify which evidentiary standard it is that they contend the court should have applied. More importantly, Appellants' challenge fails *ab initio* because the district court did not abuse its discretion and it correctly applied the preponderance of the evidence standard to the factual findings it made in connection with its pretrial determination of admissibility.

Appellants also assert that the district court failed to apply the traditional three-step, burden shifting analysis described in *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 235-36 (Minn. Ct. App. 2005). Particularly, Appellants contend that the district court failed to conclude that the State had made its prima facie showing of reliability, or whether Appellants had produced evidence challenging

that prima facie showing, or that the court's "ultimate determination of admissibility was based on the evidence as a whole, in light of the correct standard." (Appellants' Br. 22) These arguments fail because the State's prima facie showing is reserved for the individual trials and hearings, and the record amply reflects that the district court's admissibility determination was based on a review of all the evidence under the correct standard—the preponderance standard.

Appellants also contend that the district court over-stepped its authority by ruling that Appellants' evidence of Source Code errors or issues, such as it was, may not be reintroduced or admitted in their individual trials or hearings. (Appellants' Br. 23) However, the district court's ruling was entirely consistent with Rule 104(a) of the Minnesota Rules of Evidence and this Court's Consolidation Order, which specifically instructed the district court to "decide such pretrial matters as he deems appropriate." (Consolidation Order 4)

Each of these arguments is addressed in turn, below.

**A. Standard of Review.**

It is well-settled that determinations of admissibility are questions of law left to the sound discretion of the trial court and will be reversed only for a clear abuse of discretion. *State v. Gutierrez*, 667 N.W.2d 426, 436 (Minn. 2003); *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997); *State v. Johnson*, 568 N.W.2d 426, 432 (Minn. 1997); *State v. Glaze*, 452 N.W.2d 655, 660 (Minn. 1990); *State v. Ture*,

353 N.W.2d 502, 515-16 (Minn. 1984). This deference is particularly appropriate where, as here, this Court has expressly instructed and empowered the district court make a pretrial determination of admissibility on a specific evidentiary issue. (See Consolidation Order 3-4)

**B. The District Court Correctly Exercised Its Discretion In Ruling On A Preliminary Question Of Admissibility Under Minnesota Rule of Evidence 104(a).**

Appellants' argument begins with the assertion that the district court did not apply "a particular standard to determine whether the breath alcohol tests were unreliable based on the intimation learned from the experts' analysis of the Intoxilyzer 5000EN's source code." (Appellants' Br. 17) Yet remarkably, it was *Appellants' own experts* who, after spending over 2,080 hours critically analyzing the Source Code, opined that, "*the Intoxilyzer 5000EN instrument[] in use in Minnesota provides valid BrAC measurements and functions as designed.*" (Order 20 at 73, *quoting* Appellants' expert's report) It is clear that the district court carefully considered all the information "learned from the experts" and, based on that information, concluded that "problems and limitations, especially in the Source Code when fully understood, do not materially impair accuracy, validity, or reliability of the results." (Order 20 at 115; *see also id.* at 74-114 (thoroughly reviewing testimony and evidence presented by experts and other witnesses)) It is equally clear that the district court correctly applied the preponderance of the

evidence standard to the facts it considered in making its admissibility ruling. (*See generally* Order 20 at 74-116)

1. *The district court correctly applied the preponderance standard to factual findings required for a preliminary determination of admissibility.*

Appellants assert that “[t]he chief problem with the district court’s order denying appellants’ motion to exclude the test results is that the court did not articulate in its order the applicable standard or show that its conclusions were based on an analysis of the evidence under that standard.” (Appellants’ Br. 21)

However, as the district court carefully explained:

Throughout the proceedings of these assigned cases, this Court has made it clear that the inquiry being conducted is pursuant to Rule 104 of the Minnesota Rules of Evidence, which provides that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . .

(Order 20 at 36)

When considering admissibility, it is often necessary for the district court to make findings as to certain factual matters and, “to that extent the court acts as a trier of fact.” Minn. R. Evid. 104(a), Advisory Comm. Cmt. When the trial court considers factual matters in these circumstances, “[a] preponderance of the evidence standard is applicable to [the] determination.”<sup>5</sup> 11 Peter N. Thompson,

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<sup>5</sup> An exception to this general rule applies to Rule 404(b), or so-called “*Spreigl*” evidence, and “reverse-*Spreigl*” evidence. *Spreigl* evidence is admissible only upon the court’s finding, by clear and convincing evidence, that

Minn. Prac. § 104.2, at 55; *see also* 11A Peter N. Thompson and David F. Herr, Minn. Prac. at 18 (“trial judge should use a preponderance of the evidence standard” under Rule 104(a)); *and see State v. Anderson*, 789 N.W.2d 227, 223 (Minn. 2010) (court must find by preponderance that defendant waived *Miranda* rights); *State v. Zabawa*, 787 N.W.2d 177, 182 (Minn. 2010) (court must find by preponderance that defendant’s statement was voluntary) *State v. Clark*, 738 N.W.2d 316, 332 (Minn. 2007) (court must find by preponderance that defendant waived right to counsel); *State v. Wright*, 726 N.W.2d 464, 482 (Minn. 2007) (court must find by preponderance that defendant waived right of confrontation by causing witness to be unavailable); *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (court must find by preponderance that improperly seized evidence would have inevitably been discovered by lawful means); *see also Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987) (affirming lower court’s use of preponderance test to factual findings in preliminary determination of admissibility). As the U.S. Supreme Court said in *Bourjaily*:

We have traditionally required that these matters [of preliminary admissibility] be established by a preponderance of proof.

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the defendant committed the wrongful act, and reverse-*Spreigl* evidence is admissible only upon the court’s finding, again upon clear and convincing evidence, that the other person committed the wrongful act. *See State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997); *State v. Valentine*, 630 N.W.2d 429, 432 (Minn. Ct. App. 2001), *rev. denied* (Minn. Aug. 22, 2001).

Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case, *see In re Winship*, 397 U.S. 358 (1970), or a civil case. *See generally Colorado v. Connelly*, 479 U.S. 157, 167-169 (1986). The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.

*Bourjaily*, 483 U.S. at 175. Thus, the U.S. Supreme Court has also approved the application of the preponderance standard to questions of preliminary admissibility in numerous contexts. *See id.* at 176.

Here, the district court was instructed to make a determination regarding the admissibility of Intoxilyzer 5000EN test results in the narrowly defined context of alleged Source Code errors. (Consolidation Order 3-4) And, as the district court noted, that process:

enable[d] a critical analysis and review of the Source Code by those who made a prima facie showing of the need to do so. This Consolidated Source Code proceeding was an opportunity to litigate these [Source Code] challenges on a pretrial basis in all of the cases assigned to the Court by Justice Magnuson.

(Order 20 at 72) Thus, in keeping with this Court's Consolidation Order, the district court appropriately proceeded under Rule 104(a), received Appellants' evidence (as well as Respondents' evidence) and ruled on the impact, or lack thereof, of alleged errors in the Source Code on the reliability, and ultimately, the admissibility, of Intoxilyzer 5000EN test results.

As the record reflects, the district court received and considered a great deal of evidence from both sides. It is also clear that the district court correctly applied the preponderance standard to the evidence it considered. *Compare*, Order 20 at 74-86, 93-95, with Order 20 at 108-113 (reflecting the court's weighing of the evidence). In so doing, the district court complied in all respects with Rule 104(a) and this Court's mandate and, therefore, it cannot be said to have "abused its discretion." Absent an abuse of discretion, the evidentiary decisions of the district court will not be disturbed. *See Gutierrez*, 667 N.W.2d at 436; *Johnson*, 568 N.W.2d at 432.

**2. *There is no basis for a remand.***

Appellants suggest, *ipse dixit*, that where the district court does not describe the standard it applied to factual findings in connection with an admissibility ruling, that ruling deserves no deference. (Appellants' Br. 21) This unsupported assertion fails for several reasons. First, whether the district court "announced" that it applied the preponderance standard to its factual findings or not, it clearly, and appropriately, did so. (*See, e.g.*, Order 20 at iii, 3, 74-113, 114, 116 (reflecting the court's application of the preponderance standard to the evidence).

Second, the district court repeatedly informed the parties, before and during the hearing, and in its Order (*see* Order 20 at 25), that it was considering Appellants' Source Code challenges under Rule 104(a), which in turn incorporates

the preponderance standard. *See* 11 Minn. Prac. § 104.2; 11A Minn. Prac. at 18; *Anderson*, 789 N.W.2d at 233; *Zabawa*, 787 N.W.2d at 182; *Bourjaily*, 483 U.S. at 175. Accordingly, the district court did not abuse its discretion in any way.

Third, the cases Appellants cite are inapposite and do not support reversal or remand. For example, *State v. Jones* merely held that a trial court abused its discretion when it misidentified evidence as reverse-*Spreigl* evidence and improperly excluded it after holding it to the incorrect (and *higher*) clear and convincing standard. *See* 678 N.W.2d 1, 18 (Minn. 2004). Here, Appellants cannot assert that the district court held their evidence to too high a standard. Indeed, they have not identified a single specific fact to which the district court applied the wrong evidentiary standard. Appellants do not even suggest what different evidentiary standard should have been applied. In short, Appellants have not pointed to a single instance in which the district court abused its discretion.

Appellants also cite *State v. Pollard*, 370 N.W.2d 426, 427 (Minn. Ct. App. 1985) and *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 400 (Minn. Ct. App. 2001), which do not even address evidentiary standards. (Appellants' Br. 21) In *Pollard*, the Minnesota Court of Appeals remanded because the district court had erroneously ruled that a police officer lacked "probable cause to make an investigative stop." *Pollard*, 370 N.W.2d at 427. Probable cause and reasonable suspicion are not evidentiary standards, but rather,

Constitutional standards reflecting limitations on the government's authority to interfere with citizens' liberty by arrest or detention. *See State v. Engholm*, 290 N.W.2d 780, 783 (Minn. 1980); *Terry v. Ohio*, 392 U.S. 1, 21 (1986). In *Walser Auto Sales*, the Minnesota Court of Appeals remanded after the district court had applied the wrong *legal* standard in analyzing the "public purpose" aspects of a Tax Increment Financing district. *See* 635 N.W.2d at 399-400. A legal standard (in this case, "primary purpose," as opposed to "purpose"), is not the same as an evidentiary standard. Accordingly, these cases are inapposite.

Because the district court correctly applied the preponderance standard to factual findings made in determining the admissibility of evidence under Rule 104(a) of the Minnesota Rules of Evidence, Order 20 should be affirmed.

**C. The District Court's Application of Rule 104(a) Must Be Considered in the Context of Existing Statutory Presumptions, Controlling Precedents, and Pretrial Consolidation.**

Appellants also complain that the district court: i) "did not . . . make a conclusion that the government met its burden of proving a prima facie case of reliability," or ii) "make any conclusions about whether appellants had met their burden of producing evidence that challenged the prima facie case," or iii) "indicate that it had made its ultimate determination of admissibility was [sic] based on a review of the evidence as a whole, in light of the appropriate standard." (Appellants' Br. 22) These concerns refer to the three-step, burden-shirking

analysis of challenges to infrared breath alcohol test results that has evolved under Minnesota's statutory and case law framework. Minn. Stat. § 634.16; *and see Kramer*, 706 N.W.2d at 235 (describing the three-step process for challenges to Intoxilyzer test result evidence). But Appellants overlook the consolidated, pretrial nature of the proceeding and the district court's responsibilities under this Court's Consolidation Order. Due to the consolidated and pretrial nature of the proceeding, the district court could not have applied the traditional three-step, burden shifting analysis in the typical fashion.<sup>6</sup>

To understand why this is so, it is necessary to begin with the existing statutory presumption of admissibility of Intoxilyzer 5000EN test results. The legislature has determined that:

In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument, as defined in section 169A.03, subdivision 11, pursuant to training given or approved by the commissioner of public safety or the commissioner's acting agent, are admissible in evidence without antecedent expert testimony that an infrared other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the blood.

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<sup>6</sup> It is here that Amicus Curiae CMI's analysis differs somewhat from that of the Respondents, who appear to assert that the lower court fully, if perhaps only implicitly, applied the three-step, burden shifting analysis. (Resp't State Prosecutors' Br. at 29-30; Resp't Comm'r of Pub. Safety Br. at 21-22, 24) Amicus Curiae CMI believes that the district court appropriately reserved a part of the State's prima facie showing for the individual DWI trials and implied consent hearings and, therefore, did not, and was not required to, fully apply the traditional three-step analysis.

Minn. Stat. § 634.16; *and see State v. Birk*, 687 N.W.2d 634, 639 (Minn. Ct. App. 2004) (holding that, “the standard of proof beyond a reasonable doubt by itself does not require the state to present expert testimony on the reliability of the test method used by the Intoxilyzer 5000”). The statute creates a presumption of admissibility without foundational testimony on the reliability of the science of infrared spectroscopy, provided that the State demonstrates that the test was administered by a trained operator. Minn. Stat. § 634.16.

Here, the district court’s purpose was not to reconsider the presumptive admissibility of Intoxilyzer 5000EN test results in some general sense—as the court noted, this was not “a collateral attack” on the statutory presumption. (Order 20 at 72) Rather, the court’s purpose was far narrower. Its responsibility was to determine whether alleged problems relating to the Source Code could be shown to call into question the reliability of Intoxilyzer 5000EN test results. (*See* Consolidation Order 3-4; Order 20 at 29 & 72)

The statutory presumption of admissibility led to the evolution of the three-step, burden shifting process mentioned above, which, in a typical challenge to Intoxilyzer 5000EN test results, operates as follows: The government “must make a prima facie showing that the test is reliable and ‘that its administration in the particular instance conformed to the procedure necessary to ensure reliability.’” *Kramer* 706 N.W.2d at 235; *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977).

This prima facie showing requires only that the test was administered by a properly trained operator. Minn. Stat. § 634.16; *and see Bond v. Comm'r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. Ct. App. 1997). To challenge the test result, the defendant or petitioner must present actual evidence “disputing [its] validity and trustworthiness.” *Kramer*, 706 N.W.2d at 235 (*quoting Falaas v. Comm'r of Pub. Safety*, 388 N.W.2d 40, 42 (Minn. Ct. App. 1986)). Finally, “[i]f the prima facie showing of a test’s reliability is challenged, the judge must rule upon the admissibility in light of the entire evidence.” *Kramer*, 706 N.W.2d at 235-36 (*quoting Bond*, 570 N.W.2d at 806).

Here, while the statutory presumption of admissibility still looms in the background, the government has not yet made its prima facie showing that each individual test was administered by a trained operator. That is because in order to do so, it must show “that [the test’s] administration *in the particular instance* conformed to the procedure necessary to ensure reliability.” *Kramer*, 706 N.W.2d at 235 (emphasis added). It was neither necessary, nor even possible, for the government to make that showing in the consolidated pretrial proceeding below, or for the district court to consider that question. Notably, the district court appropriately reserved certain matters for the individual trials and hearings to follow, stating:

As preliminary proceedings pursuant to Rule 104, the outcome reached by this Court is not immediately dispositive of any single case

that has been assigned. These proceedings instead provide resolution of a single narrow issue: the admissibility or inadmissibility of results reported by Minnesota's Intoxilyzer 5000EN fleet as a result of the Source Code of the instrument.

(Order 20 at 37) The government will, as always, be required to show in each case that a trained operator performed the test, so Appellants' complaint that the district court failed to rule on the prima facie showing in the consolidated pretrial hearing is a red herring.

Appellants also complain that the district court failed to conclude whether Appellants had produced evidence that challenged the government's prima facie case. (Appellants' Br. 22) This is another red herring. Again, in the typical case, after the government has made its prima facie showing, the defendant or petitioner may present evidence disputing the validity of the test. *See Kramer*, 706 N.W.2d 235. Here, of course, the district court's consideration of Appellants' evidence was the entire *raison d'être* for the consolidated proceeding—to allow Appellants to present whatever evidence they could muster of alleged Source Code errors that they believe call into question the reliability of Intoxilyzer 5000EN test results, and to do so in a single, consolidated pretrial proceeding, rather than in thousands of individual cases. (*See Consolidation Order 3-4; Order 20 at 72*)

The district court heard the testimony of each of Appellants' witnesses, admitted into evidence Appellants' experts' reports, and received and considered hundreds of pages of documents. (*See Order 20 at iii, 3, 114, 116*) Of course, the

district court appropriately received and considered testimony and other evidence to the contrary, as well. (See Order 20 at 95-113) While Appellants couch their complaint that the district court did not expressly find whether they “had met their burden of producing evidence that challenged the prima facie case” in the language of the three-step, burden shifting analysis (Appellants’ Br. 22), what matters is that the court did, in fact, make numerous findings concerning the evidence Appellants adduced.

Specifically, the district court expressly found Appellants’ principal expert report credible. (See Order 20 at 73, 90) Of course, to Appellants’ disappointment, that report concluded that *there are no material errors in the Source Code* that cast doubt upon the test results. (Order 20 at 90) As for the rest of Appellants’ evidence, the court expressly found that it lacked credibility or persuasive effect. (See Order 20 at 74-75, 77, 85, 90, 93-95) Appellate courts defer to the trial court’s ability to evaluate witness credibility firsthand and will only reverse factual findings if clearly erroneous. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

Again citing the traditional burden shifting analysis, Appellants argue that when a defendant or petitioner presents actual evidence challenging the test result, the trial court must consider all the evidence in determining the test’s admissibility. (Appellants’ Br. 22) Appellants complain that the district court failed to indicate

that its “ultimate determination of admissibility was based on a review of the evidence as a whole.” (*Id.*)

Appellants’ complaint is entirely misplaced, because that is exactly what was done in this case. As the district court repeatedly noted:

- “Based upon *thorough analysis of the Source Code, and exhaustive presentations* made by or on behalf of the parties. . . .” (Order 20 at iii (emphasis added))
- “The vast implications and the tenor of the litigation require an *in-depth analysis of the claims and evidence. . . .*” (Order 20 at 3 (emphasis added))
- “This Court has endured *every claim, defense, and position* that can be advanced for or against the Source Code having an impact on test results of the Intoxilyzer 5000EN. These assertions have been made *in writing, through arguments of counsel, testimony of witnesses, exhibits covering a wide spectrum of information, and even video recordings* of the work of expert witnesses. *Through an accumulation and assimilation of the vast amount of information*, the court has been able to glean several key components from this litigation.” (Order 20 at 114 (emphasis added))
- “*All issues, evidence, and arguments submitted have been considered.*” (Order 20 at 116 (emphasis added))

In addition to these specific expressions, the very substance of the 122-page Order and the depth of the district court’s analysis show that the ultimate ruling was based on a thoughtful review of *all* of the evidence and information. (*See generally* Order 20) Appellants’ assertion that the district court failed to show that its ruling on admissibility was “based on a review of the evidence as a whole” is completely belied by the record.

**D. The District Court Properly Laid “The Source Code Issue” To Rest.**

Finally, Appellants complain that the district court exceeded its mandate by holding, in effect, that “Intoxilyzer 5000EN results would be unassailable at trial.” (Appellants’ Br. 23) This is simply untrue. Consistent with this Court’s instructions, the district court properly limited the inquiry to issues relating to the Source Code. (See Order 20 at 37, 72) Indeed, the district court expressly indicated that its decision is “limited to challenges of breath alcohol test results based upon the Source Code of the Intoxilyzer 5000EN and is not intended to impair other defenses or challenges as may be permitted.” (Order 20 at iii) Nothing in Order 20 changes, or purports to change, Minnesota Statutes section 634.16, Minnesota Statutes section 169A.53, subdivision 3, or any other precedent.

Of course, what Appellants really want is another bite, or several thousand bites, at the Source Code apple. Despite the district court’s conclusion that Appellants’ evidence of Source Code errors affecting the reliability of the instrument was neither credible nor persuasive, and despite *their own experts’* conclusion that the instrument is reliable and functions as designed, Appellants want to resurrect “the Source Code issue” in each of their individual cases through the same evidence the district court found incredible and unpersuasive. And who could blame them? The “Source Code issue” has been DWI defendants’ and

implied consent petitioners' best friend for more than five years. The problem for Appellants, however, is that it is now clear that *there is no "Source Code issue."*

After an exhaustive review of all the evidence presented, the district court concluded that Intoxilyzer 5000EN breath alcohol measurements are "reliable and unaffected by actual or alleged problems with the Source Code of the instrument." (Order 20 at iii) The district court continued, "[t]o the extent challenges to test results are premised upon problems with the Source Code, such challenges are overruled, and evidence of the same should not be allowed," and "this Court will consider new challenges to the Source Code of the Intoxilyzer 5000EN only upon a showing of newly discovered evidence or that a substantial new analysis has been performed which supports position(s) not previously asserted." (*Id.*) "[U]nless there is new evidence or new supportable arguments for questioning the impact of the Source Code which operates the Intoxilyzer 5000EN, the issue should be resolved as a final matter in Minnesota." (*Id.* at 2) "The problems and limitations, especially in the Source Code when fully understood, do not materially impair accuracy, validity, or reliability of the results." (*Id.* at 115) This ruling was not an abuse of discretion; it was entirely consistent with the district court's evidentiary gate-keeping role under Rule 104(a) and this Court's Consolidation Order.

The mandate given the district court was, "to administer, hear, *and decide such pretrial matters as he deems appropriate* concerning challenges to the

reliability of Intoxilyzer 5000EN results based on the source code of the instrument. . . .” (Consolidation Order 4 (emphasis added)) The district court’s determination that “[t]o the extent challenges to test results are premised upon problems with the Source Code, such challenges are overruled, and evidence of the same should not be allowed” (Order 20 at iii), was well within its discretion in carrying out this Court’s instructions. Indeed, to allow Appellants to reintroduce evidence that has already been found unhelpful, without foundation, and lacking in persuasive force, would result in exactly the kind of “duplicative litigation,” “inconsistent rulings” and waste of resources that this Court chose to avoid through pretrial consolidation of the approximately 4,000 cases. (Consolidation Order 3)

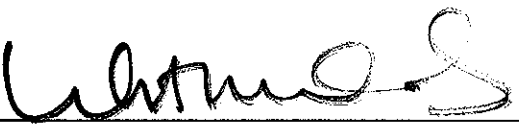
For each of these reasons, Appellants’ appeal with respect to their Issue I must fail, and Order 20 should be affirmed.

### CONCLUSION

For more than five years, DWI defendants and implied consent petitioners in Minnesota have demanded the opportunity to have their own experts review the Source Code. They have now had that opportunity. Even after Appellants’ principal experts determined that there were no errors in the Source Code that called the instrument’s reliability into question, the district court steadfastly and determinedly plowed ahead, receiving eleven days of testimony and hundreds of pages of documentary evidence into the record. The court then laboriously poured

over, analyzed, digested, and synthesized that evidence and produced a remarkably thorough 122-page Order and Memorandum that left no stone unturned, and which, by all rights, should be the last word on Source Code. The district court should be commended, not criticized, for its commitment to seeing this monumental undertaking through to the end and bringing closure to the "Source Code issue" once and for all.

Dated: October 10, 2011

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**CERTIFICATION PURSUANT TO MINN. R. APP. P. 132.01, SUBD. 3**

Pursuant to Rule 132.01 subd. 3(c)(1), Amicus Curiae CMI certifies that this amicus curiae brief was prepared using Microsoft Word 2000 and according to its word count tool, contains 6,821 words exclusive of Table of Contents, Table of Authorities, and Appendix.

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STATE OF MINNESOTA  
IN SUPREME COURT

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**In re Source Code Evidentiary Hearings  
in Implied Consent Matters.**

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APPENDIX OF AMICUS CURIAE CMI OF KENTUCKY, INC.

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

State of Minnesota,  
by Michael Campion, its  
Commissioner of Public Safety,

Civil No. 08-603 (DWF/AJB)

Plaintiff,

and

**MEMORANDUM  
OPINION AND ORDER**

Robert J. Bergstrom, Craig A. Zenobian,  
Shane M. Steffensen, and Christopher D.  
Jacobsen,

Plaintiff-Intervenors,

v.

CMI of Kentucky, Inc.,

Defendant.

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David M. Aafedt, Esq., Jessica Slattery Karich, Esq., Erin A. Oglesbay, Esq., and William A. McNab, Esq., Winthrop & Weinstine, PA, counsel for Defendant.

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**INTRODUCTION**

This matter is before the Court upon a motion to dismiss brought by Defendant CMI of Kentucky, Inc. ("CMI") which seeks dismissal of the complaint of Plaintiff-Intervenor Christopher D. Jacobsen ("Jacobsen"). Jacobsen opposes the motion.

Plaintiff State of Minnesota, by Michael Campion, its Commissioner of Public Safety (the "State") did not submit a brief, but appeared at the hearing held in this matter in support of Jacobsen.<sup>1</sup> For the reasons set forth below, the Court grants CMI's motion.

### BACKGROUND

CMI manufactures and sells the Intoxilyzer 5000EN (the "Intoxilyzer"), a breath-testing device used to measure a driver's alcohol consumption. The results of testing performed utilizing the Intoxilyzer are used in criminal prosecutions for drunken driving offenses in Minnesota, as well as in civil driver's license revocation actions. Some criminal defendants and civil revocation petitioners have asserted a right to examine the Intoxilyzer's source code ("Source Code") which is the computer program that runs the device. A number of defendants and petitioners have obtained court orders from Minnesota state courts ordering the production of the Source Code.<sup>2</sup> The State, for

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<sup>1</sup> Though the State did not submit a brief and had an opportunity to be heard at the hearing, the Court received a request from the State after the hearing asking that the Court delay its decision on CMI's motion until other motions filed by the State and CMI could be heard. Generally, this Court issues orders within 30 days after a hearing. The Court agreed to delay its ruling in this matter, however, because of the concern that the issues raised by the other motions could bear on the Court's consideration of CMI's motion. The State and CMI subsequently entered into a settlement agreement and the additional motions were not heard, but the settlement agreement did not resolve the issues presented by this motion. Therefore, the Court now issues this order to dispose of the remaining issues.

<sup>2</sup> Robert J. Bergstrom, Craig A. Zenobian, Shane M. Steffensen, and Jacobsen (the "Plaintiff-Intervenors") are litigants who have obtained such a court order. The Court permitted their intervention in this matter because it determined that the State was unable to represent their interests adequately, given that the State had taken the position in numerous cases that such parties are not entitled to examine the Source Code and that the Source Code has no relevance to their cases. (Doc. No. 58.)

the most part, has asserted that it is unable to provide the Source Code to these litigants, and CMI has refused to provide the Source Code in the majority of cases. This conflict has resulted in the dismissal of a number of cases and has caused disruption in the state court system.

Unable to resolve these issues in state court litigation, the State sued CMI to obtain access to the Source Code for litigants in Minnesota. The State asserted claims against CMI for access to the Source Code pursuant to the contract between the Minnesota Department of Public Safety and CMI, under which the Intoxilyzers were sold to the State. At issue is a provision in the contract requiring CMI to provide “information to attorneys supplied directly from the manufacturer . . . to be used by attorneys representing individuals charged with crimes in which a test with the [Intoxilyzer] is part of the evidence.” (Aff. of William A. McNab in Supp. of Def.’s Mtn. to Dismiss the Compl. in Intervention of Pl.-Intervenor Christopher D. Jacobsen (“McNab Aff.”) ¶ 7, Ex. 6 at ¶ 12.) This is the provision upon which the Plaintiff-Intervenors, as third-party beneficiaries, rest their right to the Source Code. CMI contends that the term “information” in the contract does not include the Source Code.<sup>3</sup>

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<sup>3</sup> CMI’s motion also argued that that it has no obligation to provide any information to Jacobsen because he did not obtain a court order for production of the Source Code until after the contract expired on January 31, 2008. The Court concludes that this issue is now moot, because CMI has agreed to provide the Source Code to litigants regardless of the date upon which they obtained an order allowing access. By an order issued contemporaneously herewith, the Court has approved the settlement agreement containing this obligation and entered a consent judgment requiring such access. The Court notes, however, that this result is consistent with the terms of the contract regarding the provision of information. The contract’s purpose was to permit the State of

(Footnote Continued on Next Page)

## DISCUSSION

### I. Legal Standard

In deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). In doing so, however, a court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions drawn by the pleader from the facts alleged. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). A court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint in deciding a motion to dismiss

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(Footnote Continued From Previous Page)

Minnesota to acquire Intoxilyzers at a specific price for the duration of the contract. CMI could have received an order for new units the day before the contract expired. In such a circumstance, CMI would have been obligated to deliver the units after the contract expired. Such units would also have been under a warranty for two years after expiration of the contract. According to the contract interpretation CMI urged the Court to adopt, CMI would have had no obligation to provide information to defendants who could be convicted as a result of testing using such devices. This Court cannot agree that the contract could be so interpreted. The term of the contract triggering CMI's obligation to provide information does not contain any specific time limitation, but is broadly written to include any individual who was charged with a crime using testing achieved with the device and who obtained a court order. Further, CMI's interpretation would require the Court to conclude that the State contracted for a certain due process right for one group of defendants, but no such due process right for other defendants. This would be an unreasonable construction and it is not supported by the record.

under Rule 12(b)(6).<sup>4</sup> *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

To survive a motion to dismiss, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Although a complaint need not contain “detailed factual allegations,” it must contain facts with enough specificity “to raise a right to relief above the speculative level.” *Id.* at 1964-65. This standard “calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim].” *Id.* at 1965.

## II. Whether “Information” Includes the Source Code

This case turns upon the definition of the contractual term “information,” and whether that term includes the Source Code. The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). Contract language “must be given its plain and ordinary meaning and will be enforced by the courts even if the results are harsh.” *Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004) (quoting *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003) (quotation omitted)). The meaning of terms is determined within the context of the document as a whole and not in isolation. *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279

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<sup>4</sup> The Court has considered the allegations in the Complaint, along with contractual provisions contemplated by those allegations. Therefore, the Court considers this motion as a motion to dismiss, rather than as a motion for summary judgment under Federal Rule of Civil Procedure 56. *See* Fed. R. Civ. P. 12(d). Notwithstanding that, the Court determines that even if this motion were treated as a Rule 56 summary judgment motion, the outcome would not change.

N.W.2d 349, 354 (Minn. 1979). Accordingly, courts are required to harmonize all provisions if possible and to avoid a construction that would render one or more provisions meaningless. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

The construction and effect of a contract presents a question of law, unless an ambiguity exists. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Id.* Generally, courts may resort to extrinsic evidence of intent to construe a contract only if an ambiguity exists. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982).

In this case, however, the contract provides that it is “governed by the Uniform Commercial Code (UCC) as adopted by the State of Minnesota.” (Decl. of Daniel J. Koewler in Supp. of Intervenor’s Resp. to Def.’s Mot. to Dismiss (“Koewler Decl.”) ¶ 2, Ex. 1 at ¶ 31.) In contracts governed by the UCC, a court may consider certain extrinsic evidence without first finding that a contract is ambiguous; under the UCC a final contract may be “explained or supplemented” by evidence regarding course of performance, course of dealing, or usage of trade. Minn. Stat. § 336.2-202<sup>5</sup>; *Am. Mach. and Tool Co., Inc. v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 597 (Minn. Ct. App.

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<sup>5</sup> The UCC Comment to this section states that the section “definitely rejects . . . [t]he requirement that a condition precedent to the admissibility of [course of dealing, course of performance and usage of trade evidence] is an original determination by the court that the language used is ambiguous.” Minn. Stat. § 336.2-202 cmt. 1(c).

1984). Such evidence is admissible if it is relevant to prove a meaning to which the language of the contract is reasonably susceptible. *Am. Machine and Tool Co.*, 353 N.W.2d at 597; Minn. Stat. § 336.1-303(d) (course of dealing, course or performance and usage of trade evidence “is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement”). Such evidence, however, may not contradict the terms of the agreement. Minn. Stat. § 336.2-202.

In this case, the contract is not a single document. The State issued a request for proposals (“RFP”) stating that: “[t]he contents of this RFP and the response of the successful vendor will become contractual obligations, along with the final contract.” (McNab Aff. ¶ 2, Ex. 1 at ¶ 32.) Therefore, the contract consists of the RFP, CMI’s proposal in response, and the State’s Notification of Award. When multiple writings are executed as part of the same transaction, the documents will be construed together. *Wm. Lindeke Land Co. v. Kalman*, 252 N.W. 650, 652-53 (Minn. 1934).

The RFP contains a requirement that responsive proposals include a “provision for information to attorneys supplied directly from [the] manufacturer.” (McNab Aff. ¶ 7, Ex. 6 at ¶ 12.) CMI asserts that the definition of the term “information” is supplied by its proposal, which included a form letter to be sent by CMI to attorneys containing the following paragraph:

In response to your request of [sic] to obtain information, specifically the Operation and Maintenance Manuals for the [Intoxilyzer]. The Operation Manual for the [Intoxilyzer] is the only manual that would be available to you.

(McNab Aff. ¶ 11, Ex. 10.) CMI contends that the State did not object to this definition of information and subsequently awarded the contract to CMI. (McNab Aff. ¶ 12, Ex. 11.) Therefore, CMI argues that the contract defines information to include only the Operation Manual for the Intoxilyzer and that there is no contractual requirement that it provide the Source Code to Minnesota litigants.

Jacobsen asserts that the RFP defines the term information. Jacobsen contends that the term means any information that a court orders be produced, including the Source Code. According to Jacobsen, CMI's limitation of the scope of the term information to include only the Operation Manual was a material deviation from the terms of the RFP, and that CMI did not alert the State to the deviation, but instead unequivocally accepted the RFP's terms including its definition of information. Further, Jacobsen argues that CMI knew that the term included the Source Code because CMI agreed to provide the State with copies of its Operation Manual and Service Manual for only \$25, while the cost of the information supplied to attorneys was listed on CMI's pricing sheet at \$250, suggesting that something other than the manuals was to be provided. Jacobsen asserts that CMI's confidentiality agreement also contemplated that documents or materials other than the Operations Manual would be provided because it contained a term requiring the recipient not to disclose any pamphlets, manuals or any other documents containing information on the Intoxilyzer. Jacobsen argues the inclusion of other types of writings suggests the provision of information other than the Operation Manual.

The Court concludes that the term information does not include the Source Code. The RFP does not define the term information or require that any particular type of

information be provided. Rather, the definition is provided by CMI's proposal, which is a part of the contract, and which expressly refers to a request for information by stating that "the Operation Manual is the only manual that would be available to you." (McNab Aff. ¶ 11, Ex. 10.) This statement is unambiguous.<sup>6</sup> Further, contrary to Jacobsen's arguments, this document does not simply describe the procedure for obtaining information, it also substantively defines the information that CMI will provide.

In addition, none of the documents comprising the contract indicate that the parties contemplated that the Source Code for the Intoxilyzer would be provided to Minnesota litigants. Jacobsen's assertion that the RFP defined information to include any information whatsoever that a court might order be produced is unsupported by the language of the contract. Jacobsen further argues that the RFP indicates an intention for the Source Code to be provided because Minnesota litigants have a right to the Source Code under the Fifth and Sixth Amendments to the Constitution of the United States and under Minnesota Statute section 169A.53, subd. 3(b)(10).<sup>7</sup> This argument is unavailing.

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<sup>6</sup> The Court recognizes that some of the language of the contract is artless and somewhat inarticulate, a result that stems in part from the contracting method used, which results in multiple documents drafted independently rather than one integrated whole. Notwithstanding that, the proposal's language providing that the Operation Manual is the only manual available directly after a specific reference to a request for information is not reasonably susceptible to an interpretation that includes the Source Code.

<sup>7</sup> The question of whether criminal defendants have a constitutional or statutory right to access to the Source Code is an issue not before this Court. It certainly may be that these rights exist, though they are not contractual rights, and the Court's decision today that Jacobsen lacks a contractual right to the Source Code is not determinative of the question of whether Jacobsen and similarly situated litigants have a right to access to

(Footnote Continued on Next Page)

The State could have defined the term information in the RFP, and perhaps should have, but it did not do so. The existence of any constitutional or statutory rights operate independently of the contract and do not, without any reference to such rights, supply a definition for this undefined term.

Jacobsen's argument that CMI's definition of information constituted a material deviation does not bear on the interpretation of the contract. The RFP merely required that proposals include a provision for information to attorneys of criminal defendants; it did not impose any particular requirements on what that information might include. Therefore, CMI's limitation of the information to be provided to the Operation Manual was not a material deviation from the terms of the RFP. CMI's proposal, which is a part of the contract, supplied a contract term that was previously undefined. Further, the absence of a provision for obtaining a protective order in the contract suggests that the parties never intended for the Source Code to be considered information. The Source Code is CMI's confidential, proprietary intellectual property, disclosure of which would

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(Footnote Continued From Previous Page)

the Source Code. The Court's decision on the issue before it also is not inconsistent with the decisions of Minnesota appellate courts, some of which have allowed litigants access to the Source Code without answering squarely the question of whether the right to the Source Code arises from a contract, or a constitutional or statutory provision. In any event, in a separate order issued today, the Court has entered a Consent Judgment and permanent injunction that requires CMI to make the Source Code available, an outcome that the Court finds to be in the public interest as well as in the interests of justice, in part because when the State decides to use the Intoxilyzer results as evidence against its citizens, it owes those citizens some disclosure regarding the workings and reliability of this instrument. Beyond this, however, the Court will not engage in an inquiry regarding the scope of Minnesota litigants' substantive, constitutional and statutory rights because such an inquiry is best left to be developed in the Minnesota state courts.

be detrimental to CMI's position in the marketplace. Unlike the Operation Manual, which is reasonably protected by a confidentiality and non-disclosure agreement, the Source Code is the type of intellectual property for which a party would ordinarily seek or require execution of a protective order.

Jacobsen's other arguments fail to show that the contract requires CMI to provide the Source Code. Jacobsen asserts that CMI's pricing indicates its knowledge that the Source Code was included in information because CMI charged the State substantially less for manuals than it would charge Minnesota litigants. CMI contends that it merely gave preferred pricing to its contract partner. Whatever the reason for the pricing differential, the Court cannot conclude from a mere variation in pricing that the State and CMI intended for the Source Code to be included in the term information. The same is true for the term in CMI's confidentiality agreement requiring that a recipient not disclose pamphlets, manuals, or other documents. Even if the Court were to construe this as creating an ambiguity, there is simply no evidence that the parties contemplated that the Source Code was included in this term.

Further, the course of performance between the parties does not support an interpretation that would include the Source Code within the definition of information. Course of performance refers to the actions of the parties during the performance of the contract. Minn. Stat. § 336.1-303(a); *Cut Price Super Markets v. Kingpin Foods, Inc.*, 98 N.W.2d 257, 268 (Minn. 1959). "[T]he course of actual performance by the parties is considered the best indication of what they intended the writing to mean." Minn. Stat. § 336.2-202 cmt. 2. In this case, the parties entered into the contract in January of 1997,

and the contract was extended by amendment several times until its ultimate expiration on January 31, 2008. It is clear that the course of performance between the parties to this contract did not include access to the Source Code for Minnesota litigants.<sup>8</sup> In fact, CMI's near-absolute refusal to make the Source Code available, and its insistence on the entry of a protective order before it would provide the Source Code, have been hallmarks of CMI's performance under the contract and led to the present suit.<sup>9</sup>

Based on the foregoing, the Court concludes that the contract term requiring the provision of information by CMI does not include the Source Code. Therefore, Jacobsen does not have a contractual right to production of the Source Code and his Complaint must be dismissed.<sup>10</sup> As a result of this decision, the Court must also conclude that the other Plaintiff-Intervenors also lack a contractual right to obtain the Source Code. The Court anticipates that, in light of this decision, the parties will reach some agreement

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<sup>8</sup> Indeed, the controversy relating to the Source Code is one of recent vintage. The record in this case suggests that for many years, the parties operated under the contract without giving any thought to the Source Code, which undercuts Jacobsen's assertion that the parties intended that the Source Code would be provided. To the contrary, it appears more likely that issues regarding the Source Code were not contemplated by the parties at the time they entered into the contract and it did not become an issue until litigants began requesting Source Code access within the last few years.

<sup>9</sup> The record contains evidence that CMI provided the Source Code to one litigant. The Court concludes that this one variation from CMI's practice is not sufficiently probative to alter the otherwise consistent course of performance.

<sup>10</sup> The Court again notes that this order does not determine whether Jacobsen and similarly situated litigants have a right to access the Source Code. Instead, it only concludes that the State's contract with CMI does not provide such a right. Notwithstanding that, the Court's order approving the Consent Judgment and permanent injunction, also issued today, requires CMI to provide Source Code access to Minnesota litigants.

regarding dismissal of the other Plaintiff-Intervenors from this action or will make a request for such relief from this Court.

Accordingly, **IT IS HEREBY ORDERED** that:

1. The Defendant's Motion to Dismiss Complaint in Intervention of Plaintiff-Intervenor Christopher D. Jacobsen (Doc. No. 62) is **GRANTED**.
2. The claims of Defendant Christopher D. Jacobsen are **DISMISSED WITH PREJUDICE**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: July 16, 2009

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

State of Minnesota,  
by Michael Campion, its  
Commissioner of Public Safety,

Civil No. 08-603 (DWF/AJB)

Plaintiff,

and

**ORDER APPROVING CONSENT  
JUDGMENT AND PERMANENT  
INJUNCTION AND MEMORANDUM**

Robert J. Bergstrom, Craig A. Zenobian,  
Shane M. Steffensen, and Christopher D.  
Jacobsen,

Plaintiff-Intervenors,

v.

CMI of Kentucky, Inc.,

Defendant.

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Emerald A. Gratz, Daniel L. Abelson, and Thomas C. Vasaly, Assistant Attorneys General, and Alan I. Gilbert, Solicitor General, Minnesota Attorney General's Office, counsel for Plaintiff.

Charles A. Ramsey, Esq., and Daniel J. Koewler, Esq., Charles A. Ramsey & Associates, PLLC; and John J. Gores, Esq., Gores Law Office, counsel for Plaintiff-Intervenors.

David M. Aafedt, Esq., Jessica Slattery Karich, Esq., Erin A. Oglesbay, Esq., and William A. McNab, Esq., Winthrop & Weinstine, PA, counsel for Defendant.

Marsh J. Halberg, Esq., Halberg Criminal Defense, and Jeffrey S. Sheridan, Esq., Strandemo, Sheridan & Dulas, P.A., counsel for *amicus curiae* Minnesota Society for Criminal Justice.

Josh P. Graham, Esq., Merchant & Gould PC, counsel for *amicus curiae* Minnesota DWI Taskforce.

William A. Lemons, Esq., Minnesota County Attorneys Association, counsel for *amicus curiae* Minnesota County Attorneys Association.

Mark J. Schneider, Chestnut & Cambronne, P.A., counsel for *amicus curiae* Suburban Hennepin County Prosecutors Association.

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## INTRODUCTION

This matter is before the Court upon the Joint Motion for Entry of Consent Judgment and Permanent Injunction (the “Joint Motion”) filed by the Plaintiff State of Minnesota, by Michael Champion, its Commissioner of Public Safety (the “State”) and Defendant CMI of Kentucky, Inc. (“CMI”) and upon CMI’s Motion for Additional Findings of Fact and Conclusions of Law. The Court permitted appearances by *amicus curiae* in this matter and the Minnesota County Attorneys Association and the Suburban Hennepin Prosecutors Association appeared in support of the Joint Motion. The Plaintiff-Intervenors Robert J. Bergstrom, Craig A. Zenobian, Shane M. Steffensen, and Christopher D. Jacobsen (the “Plaintiff-Intervenors”) oppose the Joint Motion. Also appearing in opposition to the Joint Motion was the Minnesota Society for Criminal Justice.

For the reasons explained below in the Court’s attached Memorandum, the Court grants the relief requested in the Joint Motion, and issues this order approving the Consent Judgment, as modified, and entering a permanent injunction. The Court denies CMI’s Motion for Additional Findings of Fact and Conclusions of Law.

**CONSENT JUDGMENT AND PERMANENT INJUNCTION**

**WHEREAS**, by a contract awarded in January 1997, the State bought a fleet of Intoxilyzer 5000EN breath-alcohol testing instruments from CMI. The Intoxilyzer 5000EN instruments are used to test the breath-alcohol concentration of persons who may be charged with violations of Minnesota's driving while impaired ("DWI") and implied consent laws; and

**WHEREAS**, litigation has arisen between the State, CMI, and Plaintiff-Intervenors regarding access to and ownership of the source code ("Source Code") for the version of the Intoxilyzer 5000EN, sold to the State; and

**WHEREAS**, the State and CMI have filed and served dispositive motions addressing the majority of the pending claims in the case; and

**WHEREAS**, the State and CMI, wishing to avoid the cost, risk, uncertainty, and delay of further protracted and expensive litigation, including likely appeal, have entered into a conditional Settlement Agreement ("Settlement Agreement"), which is contingent upon the entry of this Consent Judgment and Permanent Injunction ("Consent Judgment") and incorporated herein by reference; and

**WHEREAS**, in furtherance of and in conjunction with the Settlement Agreement, the State and CMI have consented to the entry of this Consent Judgment; and

**WHEREAS**, this Consent Judgment and Permanent Injunction is not binding on Minnesota state courts; and

**WHEREAS**, the Court has carefully considered the validity and reasonableness of this Consent Judgment; and

**WHEREAS**, the State brought claims under the U.S. Copyright Act, 28 U.S.C. §§ 101, *et seq.*, and under the common law of Minnesota. Accordingly, this Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1367. Venue is proper pursuant to 28 U.S.C. § 1391(a)(2), as a substantial part of the events giving rise to the action occurred in this judicial district; and

**WHEREAS**, the State and CMI mutually desire to make the Source Code readily and reasonably available to defendants in criminal DWI cases and petitioners in implied consent cases. Such reasonable access exists under circumstances and conditions that adequately recognize and protect the State's interest in the security features and passcode-protected functions of the State's fleet of instruments and CMI's interest in its intellectual property. The State and CMI have entered into a Settlement Agreement that is expressly contingent upon the Court's entry of this Consent Judgment. The Settlement Agreement is fully incorporated herein by reference.

**NOW, THEREFORE**, the Court issues the following Findings of Fact Conclusions of Law, Permanent Injunction, and Order:

#### **FINDINGS OF FACT**

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, and based on the record of all proceedings in this case, the Court finds the following:

1. In January 1997, the State and CMI entered into a contract through a Request for Proposal ("RFP") issued by the State, a Proposal submitted by CMI, a Request for Clarification from the State, a Response to Request for Clarification from CMI, and a Notification of Contract Award by the State (collectively, the "Contract").

Pursuant to the Contract, CMI sold Intoxilyzer 5000EN breath-alcohol testing instruments configured for the State's specifications to the Minnesota Department of Public Safety and other Minnesota law enforcement agencies. There are approximately 264 Intoxilyzer 5000EN instruments currently being used by law enforcement agencies throughout Minnesota.

2. Under the Contract, CMI assigned to the State all copyrightable material that CMI conceived or originated and which arose out of the performance of the Contract. The Court finds that CMI conceived and originated part of the Source Code before the State and CMI entered into the Contract in January 1997. Therefore, this part of the Source Code did not arise under the Contract. In the Settlement Agreement, CMI agrees to assign and deliver to the State, free and clear, all portions of the Source Code that were conceived and originated and arose under the Contract (subject to the State's independent verification), irrespective of its copyrightability. The Court finds that this fairly and reasonably resolves the issues of ownership of the Source Code and alleged copyright infringement.

3. The Parties dispute whether Special Condition 12 of the Contract required CMI to provide "information" that included the Source Code to Minnesota DWI defendants or petitioners in civil implied consent cases, and whether CMI had a duty to provide any information following the expiration of the Contract. Under the Settlement Agreement, CMI agrees, *inter alia*, to make the complete Source Code, as well its process of compiling or assembling, linking, and installing the Source Code in computer readable form in its Intoxilyzer 5000EN instruments, available at its corporate

headquarters in Owensboro, Kentucky. CMI also agrees to make printed, hardbound copies of the complete Source Code (subject to the redaction of security and passcode features described herein) available in Minnesota. CMI agrees to make the complete Source Code available as long as criminal DWI and/or civil implied consent cases involving Intoxilyzer 5000EN test results are pending in Minnesota courts. CMI agrees to make the complete Source Code available to both defendants in criminal cases and petitioners in civil implied consent proceedings.

4. Based on the record before the Court, the Court finds that the manner and extent of access to the Source Code provided for under the Settlement Agreement and this Consent Judgment and Permanent Injunction constitutes a fair and reasonable resolution of the State and CMI's dispute over access to the Source Code for Minnesota litigants. The Court further finds that this resolution provides Minnesota litigants with reasonable access to review the Source Code.

5. The Intoxilyzer 5000EN instruments in the State's system are networked and have menu-driven features and functions that can be directly or remotely changed, which requires these features and functions to be passcode protected. The Court finds that the unauthorized disclosure of the Intoxilyzer 5000EN network security features and passcode-protected functions could compromise the security of the State's networked system of Intoxilyzer 5000EN breath-alcohol testing instruments.

#### **CONCLUSION OF LAW**

The Court concludes that the entry of this Consent Judgment and Permanent Injunction serves the public interest and the interests of justice by providing reasonable

access to the Source Code for Minnesota litigants in a manner that protects the State's interest in security features and passcode-protected functions, and CMI's interest in its intellectual property.

### **PERMANENT INJUNCTION**

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 65 of the Federal Rules of Civil Procedure, the Court orders that CMI shall make the Source Code available for inspection and review by Authorized Minnesota litigants (as defined in Paragraph 3, below), their counsel, or their experts, subject to the following terms and conditions:

1. Pursuant to the Settlement Agreement and the Consent Judgment, not later than fourteen (14) days after the entry of this Consent Judgment, and subject to the terms and conditions set forth herein, CMI shall make the Source Code available to Authorized Minnesota litigants, their counsel, or their experts, for inspection and review as set forth in Paragraph 1(a) below. Not later than thirty (30) days after the entry of this Consent Judgment, and subject to the terms and conditions set forth herein, CMI shall make the Source Code available to Authorized Minnesota litigants, their counsel, or their experts, for inspection and review as set forth in Paragraph 1(b) below.

a. **At CMI's corporate headquarters in Owensboro, Kentucky.** CMI shall make the Source Code available to Authorized Minnesota litigants, their counsel, or experts, during regular business hours between 8:00 a.m. and 4:00 p.m., excluding weekends, holidays, and any days when CMI is not open for regular business purposes. CMI shall provide access to the following:

- i. All Source Code files for the current version of Intoxilyzer 5000EN software (1408.62 and 7502.40 [a.k.a. 75\_0240]) in native electronic format, capable of review and analysis by commercial source code review software such as LINT or Understand.
- ii. All libraries and files used to assemble or compile and link the Source Code.
- iii. All make files and script files used to assemble or compile and link the Source Code.
- iv. The assembler and linker for the Z-80 processor and the compiler and linker for the 8051 processor.
- v. A computer capable of assembling or compiling and linking the Source Code. CMI will also provide a printer for printing sections of material for ease of review on site; however, all printouts including or comprising any portion of the Source Code will be retained by CMI at the end of the evaluation.
- vi. Completely assembled or compiled and linked "HEX files" for both the Z-80 and 8051 systems, and EPROMs with the HEX files loaded for both the Z-80 and 8051 systems.
- vii. A printout of actual data obtained as a result of calibration.
- viii. A COBRA system as used by the State of Minnesota to download data from instruments and the cables required to link to a test instrument.
- ix. A Minnesota-configured Intoxilyzer 5000EN for testing, loaded with the EPROMs mentioned in item vi. CMI will also make available wet bath simulators and solution for instrument testing.

CMI shall not charge Authorized Minnesota litigants, their counsel, or their experts any fee or cost for the access described above. No part of

the Source Code in its native electronic format shall be copied, transmitted, or removed from CMI's corporate headquarters in Kentucky. No portion of the Source Code shall be copied verbatim except as necessary for meaningful expert review. Any notes, summaries, reports, or other documents that contain a verbatim recitation of any portion of the Source Code shall not be publicly disclosed unless all verbatim recitations of the Source Code have been completely redacted, and if filed with a court of law, shall be filed under seal. If Authorized Minnesota litigants, their counsel, or experts, load the Source Code onto their own computers for analysis with commercial programs such as LINT or Understand, or for any other purpose, such computers may not have communications capabilities, including wi-fi/wireless, Ethernet, or modem capability, or such capabilities must be completely disabled. Further, such computers must have any external drives, USB ports, and other data transfer capabilities disabled. If any portion of the Source Code is loaded onto a reviewer's computer, the reviewer must agree to destroy the computer's hard drive at CMI in the presence of CMI's representative, or to leave the computer's hard drive at CMI at the conclusion of the review. CMI shall cooperate, assist, and take reasonably necessary measures to ensure a meaningful review of the Source Code and to protect the integrity of all aspects of the Source Code review.

b. **In printed, hardbound book form**. CMI shall also make the Source Code available to Authorized Minnesota litigants in Minnesota in a printed, hardbound book format, subject to the following:

i. The printed, hardbound Source Code shall be full and complete in all respects except that Source Code language controlling or constituting the instrument's network security features and menu passcodes shall be redacted.

ii. CMI shall charge Authorized Minnesota litigants no more than \$250 (or \$125 for publicly funded defenses) to obtain a copy of the printed, hardbound Source Code.

iii. The printed, hardbound Source Code shall not leave the State of Minnesota except to be returned directly to CMI at the conclusion of the case in which it was made available.

c. If an Authorized Minnesota litigant, or his or her attorney or expert, believes that access beyond what is set forth herein is reasonably necessary to perform a meaningful Source Code review, then the Authorized Minnesota litigant and CMI shall attempt in good faith to resolve the issue. If the issue cannot be resolved between the Authorized Minnesota litigant and CMI, the Authorized Minnesota litigant may petition this Court by motion, upon proper notice to the State and CMI, for an order granting such additional access. Reasonable costs and attorney fees may be awarded to the prevailing party in any such motion.

2. The Source Code, except for the portion assigned and provided to the State pursuant to Paragraph 8 of the Settlement Agreement, or which may be provided to the

State pursuant to Paragraph 16 of the Settlement Agreement, shall remain the exclusive property of CMI.

3. A petitioner in an implied consent case, the Commissioner of Public Safety, a defendant in a criminal DWI case, or the State, county, or local prosecuting authority, shall be an Authorized Minnesota litigant if all three of the following requirements are fulfilled:

a. the state district court judge presiding over the criminal DWI or civil implied consent case has ordered production of the Source Code or has made an express finding that the Source Code is relevant or material to the admissibility or reliability of a breath-alcohol test result at issue in the case;

b. the state district court judge has issued a Protective Order in the criminal DWI or civil implied consent case that designates the Source Code (except the portion assigned and provided to the State in Paragraph 8 of the Settlement Agreement) and any document or testimony containing the Source Code or any part thereof, as Confidential, and protects such Confidential information from disclosure to persons or entities outside the litigation. A recommended form Protective Order is attached hereto as Exhibit 1; and

c. any person receiving access to the Source Code pursuant to this Permanent Injunction has executed a Non-Disclosure Agreement in the form attached hereto as Exhibit 2. The provision of access to the Source

Code under this Permanent Injunction shall not confer upon any person any other right, title, license, or interest in the Source Code.

4. CMI shall not be required to provide access to the Source Code to any person who is, or has been, employed by (as an employee, agent, or consultant) any manufacturer of breath alcohol testing equipment within the preceding twenty-four (24) months.

5. Permitted uses of access to the Source Code:

a. Authorized Minnesota litigants shall be granted access to the Source Code under this Permanent Injunction solely for the purpose of defending or prosecuting criminal DWI and civil implied consent cases in Minnesota involving the results of a test administered using the Intoxilyzer 5000EN breath alcohol testing instrument as evidence in the case.

b. Any expert who has prepared a written report and/or provided opinion testimony in a Minnesota DWI or implied consent proceeding in which he or she originally obtained access to the Source Code under this Permanent Injunction may share such report and/or provide testimony on behalf of other Authorized Minnesota litigants in other DWI or implied consent proceedings if all the requirements of Paragraph 3 of this Permanent Injunction have been satisfied with respect to the subsequent proceeding(s).

c. Any attorney who has retained an expert in a DWI or implied consent proceeding and has obtained a report from the expert regarding

review of the Source Code, may share the report with a client or prospective client, and use the report and offer testimony of the expert, in a different DWI or implied consent proceeding if the requirements of Paragraph 3 of this Permanent Injunction have been satisfied with respect to the subsequent client and proceeding.

d. No written report or testimony regarding the Source Code based on access obtained pursuant to this Permanent Injunction shall be presented in any proceeding or offered into evidence in any forum or jurisdiction other than courts in Minnesota.

This Injunction is Permanent in nature. It shall continue in full force and effect until criminal DWI and/or civil implied consent cases involving Intoxilyzer 5000EN test results are no longer pending in Minnesota courts. This Court shall maintain continuing jurisdiction to enforce the terms of the Consent Judgment and Permanent Injunction and the provisions of the Settlement Agreement incorporated herein. Though the Court denies CMI's Motion for Additional Findings of Fact and Conclusions of Law, the Court reserves jurisdiction to revisit the relief requested therein upon a motion brought by CMI in the event that a determination of the issues presented in that motion are necessary to effectuate the Consent Judgment and Permanent Injunction. This Consent Judgment and Permanent Injunction are governed by federal law and may be modified only in accordance with the Federal Rules of Civil Procedure as the Court deems appropriate.

**ORDER**

1. The Joint Motion for Entry of Consent Judgment and Permanent Injunction (Doc. No. 178) is **GRANTED**.

2. CMI's Motion for Additional Findings of Fact and Conclusions of Law (Doc. No. 184) is **DENIED**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: July 16, 2009

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge

**MEMORANDUM**

The case now before the Court presents, on its face, issues of contract and copyright law. Underlying these issues, however, are concerns about the rights of criminal defendants and petitioners in implied consent drivers' license revocation matters to access the workings of a machine used to convict them or deny them driving privileges. Today the Court approves the Consent Judgment and Permanent Injunction based on the State and CMI's Settlement Agreement. As a result, the State may move forward with prosecution of DWI offenses and revocation proceedings using the Intoxilyzer in order to protect the safety of the public, and Minnesota litigants will have reasonable and, in fact, unprecedented access to the Source Code for the Intoxilyzer, while CMI's intellectual property rights will be protected.

The Court is persuaded that the consent judgment and permanent injunction it enters today are in the public interest, as well as in the interests of justice. In an order

also issued today, the Court concludes that the contract between the State and CMI under which the Intoxilyzers were sold and put into use in Minnesota does not afford litigants the right to review the Source Code. (Doc. No. 205.) In reality, the absence of a contractual right is of no moment in determining whether litigants have a right to access to the Source Code. If the State chooses to use the Intoxilyzer's results to convict its citizens and deny them driving privileges, it has some obligation to provide them with the means to analyze and challenge those results. The Plaintiff-Intervenors in this case argued that analysis of the Source Code is essential to mounting a proper defense. This may or may not be true, but it was clear to this Court that access to the Source Code, whatever its ultimate substantive bearing on these cases, was essential to resolution of that question.

This was the second attempt by the State and CMI to obtain a consent judgment. The Court denied a previous joint motion for a consent judgment and permanent injunction. (Doc. No. 95.) The Court concludes, however, that the present circumstances differ substantially from that first attempt. First, the State and CMI have addressed the Court's concerns regarding the inclusion of factual findings and conclusions of law that were unnecessary or extraneous, or that were unsupported by the record, by excising such provisions from their current Settlement Agreement, Consent Judgment and Permanent Injunction. Second, the current agreement grants extensive access to the Source Code in its native, electronic format, which is the format the Plaintiff-Intervenors sought for their review. Third, the current agreement delivers to the State the portion of the Source Code

in which the State has a copyright interest, vindicating the State's rights under the Contract.

The Court is also satisfied that requiring Minnesota litigants to conduct their Source Code review at CMI's headquarters in Kentucky is not an undue burden. When the Court declined to approve the first attempt at settlement and a consent judgment, it did so partially based on concerns about whether Source Code review in Kentucky provided meaningful access. The record, however, is more fully developed at this time and the Court no longer considers this location a bar to meaningful review. First, experts on whom the parties may rely to conduct a review of the Source Code are not located in Minnesota, and if the Court were to require production of the electronic version of the Source Code in Minnesota, these experts would be required to travel to conduct their analysis. Second, the Plaintiff-Intervenors argued that they had a right to "unfettered access" to the Source Code and that their experts should be entitled to analyze the Source Code in their own labs, wherever they might be located. This type of access, however, would not sufficiently protect CMI's interest in safeguarding the Source Code, which is confidential, proprietary information. Third, through this agreement, CMI will not only make the Source Code available, but also will provide analysts with access to the same testing systems and computer programs CMI uses. This access necessitates that the review be conducted in Kentucky.

The Court notes that CMI will be required to deliver to the State several copies of the Source Code in printed, hardbound form. The Plaintiff-Intervenors object to this provision, arguing that it unnecessarily limits their access to the Source Code because

their experts will be unable to review this printed version in their own labs or at CMI's facility in Kentucky. Previously, the Plaintiff-Intervenors contended that a printed version of the Source Code was essentially worthless because review of the native, electronic format provided the only meaningful way to analyze the Source Code. It is, therefore, difficult for the Court to reconcile the Plaintiff-Intervenors' concern that additional access to a document they considered worthless is now absolutely necessary. Nevertheless, the Court notes that the Permanent Injunction contains a provision requiring good faith negotiations in the event that a Minnesota litigant believes that greater or different access is required, and that should the parties be unable to resolve their disputes, they may seek an order for additional access from this Court. If review of the printed version of the Source Code in locations other than Minnesota ultimately is necessary, the Court anticipates that the parties would resolve this problem or that it would be subject to further review by this Court upon an appropriate motion. The same is true for any concerns about the limitation of the hours of the review to CMI's standard business hours and for concerns about access to future versions of the Source Code in the event CMI updates the Source Code presently in use. The Court is willing, under its retained jurisdiction, to assist the parties in resolving unforeseen issues, or to decide such issues as they are presented, in the best interests of the parties and in the interests of justice.

The Plaintiff-Intervenors also raise an objection to CMI's provision of funds for the State to defend the Source Code in subsequent litigation, suggesting that the State is somehow placed in a conflicted position as a result of this payment. The Court is not

troubled by this provision. The State and CMI have an identity of interest in their shared desire to ensure the proper functioning of the Intoxilyzer and its effective utilization in policing Minnesota's roads. The Court considers this provision to be similar to an indemnification provision, which is a standard commercial contract term.

In the next breath, the Plaintiff-Intervenors raise concerns about the cost they will bear to analyze the Source Code. As the Plaintiff-Intervenors produced no specific evidence of the amount that such a review will cost, the Court must consider their estimates to be speculative. Nonetheless, the Court will assume that a Source Code review will be fairly expensive. This is not dissimilar, however, from the costs associated with expert review of complex subject matter in other litigation, or from the analysis performed upon the advent of new technologies in the criminal context, such as DNA analysis. Further, once the Source Code has been analyzed in one case, information about that review may be made public via court testimony, information may be shared by similarly situated parties, and efficiencies in conducting the analysis may be found and utilized. The Court cannot conclude that the cost of the review is a reason for it to deny approval of a settlement providing access to exactly the version of the Source Code Plaintiff-Intervenors sought to see. Further, this Court does not have the authority to order the State or any other person to provide funding to Minnesota litigants to undertake this review. Minnesota litigants who wish to seek such funding from the State or another source may do so in their state court cases.

The Court also notes that the order it issues today approves a proposed protective order, attached as Exhibit 1 hereto, to be offered as a model in litigation in Minnesota

courts, though entry of this protective order is not a binding condition for Minnesota courts to follow. The Court is aware, based on the record in this case, that some Minnesota courts have ordered access to the Source Code without issuing a protective order. Doing so, however, does not allow CMI to protect its legitimate interest in safeguarding its proprietary, intellectual property. CMI developed the Source Code internally and independently, and public disclosure of the Source Code could place CMI at a competitive disadvantage in the marketplace. Such disclosure is not necessary for an analysis of the Source Code to occur. Entry of a protective order will strike the proper balance between the right of a Minnesota litigant to obtain reasonable access to the Source Code to test the workings of the Intoxilyzer and challenge its results, while protecting CMI's confidential, proprietary intellectual property. Though the Court declines today to make an express finding that the Source Code is a trade secret, the Court's continuing, retained jurisdiction over the consent judgment and permanent injunction will permit the Court to revisit this issue should such a finding become necessary.

The Court further notes that its order does not infringe on the Minnesota state courts' authority to conduct subsequent litigation and does not mandate that a state court follow the process set forth in this order. The order also does not, as the Plaintiff-Intervenors point out with concern, provide for additional subpoena authority beyond that already available to Minnesota litigants in their state court cases. Ultimate determinations regarding the analysis and reliability of the Source Code remain to be made in litigation in Minnesota state courts according to their authority to hear DWI

prosecutions and license revocation proceedings, and this Court's order does not operate to alter their process in any way. Rather, this Court's order provides a means for reasonable access to the Source Code should Minnesota courts choose to follow it.

D.W.F.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

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Bradley Richard Malmgren,

Petitioner,

ORDER

v.

File No. 19-HA-CV-09-2371

Commissioner of Public Safety,

Respondent.

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The Court previously issued an order requiring production of the source code for the Intoxilyzer 5000EN in the above-referenced matter. On July 16, 2009, a settlement providing access to the source code was approved by the Honorable Donovan Frank in the federal lawsuit initiated by the State against CMI of Kentucky, Inc., the manufacturer of the Intoxilyzer 5000EN. The Court finds that the settlement provisions reasonably satisfy Petitioner's source code request. Therefore, the Court makes the following:

**ORDER**

1. In conjunction with the Court's previous order requiring production of the source code for the Intoxilyzer 5000EN in the above-referenced matter, Petitioner shall receive access to the source code from CMI pursuant to the instructions and parameters set forth in the Order Approving Consent Judgment and Permanent Injunctions and Memorandum dated July 16, 2009, and filed as part of *State v. CMI of Kentucky, Inc.*, Civ. No. 08-603 (D. Minn.) (DWF/AJB) (the Consent Order).

FILED DAKOTA COUNTY  
CAROLYN M. REHN, Court Administrator

AUG 17 2009

BY 

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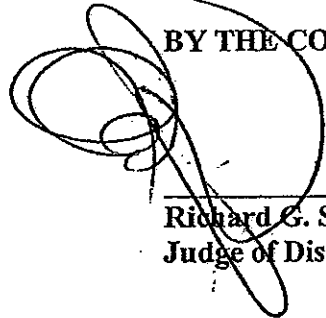
2. Consistent with the Permanent Injunction at Paragraph 3(b) of the Consent Order, the Court has executed a Protective Order in this matter.

3. Within 30 days from the date this order is filed, Petitioner shall retain an expert and have the expert execute the attached Non-Disclosure Agreement. If the Court does not receive a copy of the executed Non-Disclosure Agreement within 45 days from the date this order is filed, Petitioner's source code request is deemed waived. Because the Petitioner has raised no other issues in this matter, if the source code issue is deemed waived, the Court shall issue an order sustaining Petitioner's implied consent license revocation.

4. If Petitioner retains an expert and files the Non-Disclosure Agreement within 45 days of the date this order is filed, any evidentiary hearing to determine whether any defects in the source code affected the accuracy or reliability of the alcohol concentration test result in this case shall be heard by First Judicial District Judge Jerome B. Abrams. The Court shall schedule a status/scheduling conference hearing before Judge Abrams upon the timely filing of the Non Disclosure Agreement and a notice of the hearing location and an agenda for the hearing will be posted on the First Judicial District Web Page <http://www.mncourts.gov/district/1/?page=2084> at least 14 days prior to the scheduled hearing date. Judge Abrams has been assigned to this matter by Order of the Chief Judge of the First Judicial District pursuant to Minn. Stat. 484.69, subd. 3.

Dated: August 13, 2009

BY THE COURT



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Richard G. Spicer  
Judge of District Court