UNIFORM COMMERCIAL CODE COMMITTEE

REPORT PREPARED FOR THE May 6, 2011 COUNCIL MEETING

1. **Next Scheduled Meeting of the Committee.**

   Next scheduled meeting of the Committee: None has been scheduled yet.

2. **Council Approval.**

   No matters require Council approval.

3. **Membership.**

   On April 20, 2011, the attached communication was sent to all Committee members.

4. **Accomplishments Toward Committee Objectives.**

   I will continue to monitor current developments in Michigan law relevant to the UCC and report on those developments to Committee members.

5. **Meetings and Programs.**

   Nothing to report at this time.

6. **Publications.**

   No recent articles from members of the UCC Committee have been recently published.

7. **Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action.**

   See response to #4 above.

8. Miscellaneous.

Nothing to report at this time.

Respectfully submitted,

Patrick E. Mears, Chairperson

BARNES & THORNBURG LLP

MEMORANDUM

TO: All Members of the UCC Committee

FROM: Patrick E. Mears

DATE: April 20, 2011

RE: Recent Decisions

Accompanying this memorandum are copies of the following Michigan decisions addressing various provisions of the UCC.

1. *Rib Roof Metal Systems, Inc. v. National Storage Centers of Redford, Inc.*, 2009 WL 93675 (E.D. Mich. Apr. 8, 2009), addressing the issue of whether the holder of a third-party check was a "holder in due course" under MCL § 440.3306.

2. *Sundram Fasteners Ltd. V. Flexitech, Inc.*, 2009 WL 2351763 (E.D. Mich. July 29, 2009), addressing the issue of whether reasonable notification of termination of a contract for the sale of goods under Article 2 of the UCC had been given.

3. *Station Enterprises, Inc. v. Ganz, Inc.*, 2009 WL 2926572 (E.D. Mich. Sept. 10, 2009), addressing the applicability of Article 2's Statute of Frauds, MCL § 440.2206(1)(a).

4. *PJ Wallbank Springs, Inc. v. Amstek Metal, LLC*, 2009 WL 2230752 (E.D. Mich. July 22, 2009), addressing whether goods breached the merchantability warranty of MCL § 400.2314.

5. *Metropolitan Alloys Corp. v. Considar Metal Markting, Inc.*, 615 F.Supp.2d 589 (E.D. Mich. 2009), which also addresses issues under Michigan's statute of frauds in UCC Article 2.

6. *Crawford v. J.P. Morgan Chase Bank, N.A.*, 2009 WL 1913415 (E.D. Mich. June 30, 2009), addressing issues of whether a bank breached provisions of Article 3 of the UCC arising from the dishonor of a cashier's check.

7. *Whitesell Corporation v. Whirlpool Corporation*, 2009 WL 3718200 (W.D. Mich. Nov. 4, 2009). This decision addresses in the context of a motion in limine the applicability of MCL § 440.2202.

8. *Steel Strip Wheels, Ltd. v. General Rigging, LLC*, 2009 WL 3190415 (E.D. Mich. Sept. 30, 2009). This decision addresses the parol evidence rule of MCL § 440.2201, the rule of adequate assurance of future performance under MCL § 440.2609 and the doctrine of anticipatory repudiation under MCL § 440.2610.

Patrick E. Mears

Not Reported in F.Supp.2d, 2009 WL 963675 (E.D.Mich.), 68 UCC Rep.Serv.2d 768
(Cite as: 2009 WL 963675 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
RIB ROOF METAL SYSTEMS, INC., and Components Plus, Inc., Plaintiffs/Counter-Defendants,
v.
NATIONAL STORAGE CENTERS OF REDFORD, INC., Defendant/Counter-Plaintiff.

No. 07-13731.
April 8, 2009.

West KeySummary**Bills and Notes 56 ⇐342**

56 Bills and Notes
56VIII Rights and Liabilities on Indorsement or Transfer
56VIII(D) Holders in Due Course
56k336 Constructive Notice, and Facts Putting on Inquiry
56k342 k. Matters Apparent from Instrument. Most Cited Cases

Bills and Notes 56 ⇐345

56 Bills and Notes
56VIII Rights and Liabilities on Indorsement or Transfer
56VIII(D) Holders in Due Course
56k336 Constructive Notice, and Facts Putting on Inquiry
56k345 k. Circumstances Attending Transfer. Most Cited Cases

Under Michigan law, holder of third-party check, which was presented to holder by holder's client, was holder in due course and thus took check free of maker's claims for conversion and unjust enrichment. The maker, believing it was paying costs for construction of a new facility, issued a check to client, which fraudulently used check to pay off a client's prior existing debt to holder. The holder received third-party checks on occasion, so that alone was not enough to alert suspicion. Also, there was no indicia of fraud on the face of the check, and other circumstances surrounding receiving the check also made it plausible the check was valid. Mich. Comp. Laws § 440.3306.

Matthew J. Boettcher, Plunkett & Cooney, Bloomfield Hills, MI, for Plaintiffs/Counter-Defendants.

Jill A. Bankey, Siegel, Greenfield, Southfield, MI, for Defendant/Counter-Plaintiff.

OPINION AND ORDER GRANTING JUDGMENT TO PLAINTIFF, AND REJECTING DEFENDANT'S COUNTERCLAIMS

PAUL D. BORMAN, District Judge.

*1 Plaintiffs Rib Roof Metal Systems, Inc. and Components Plus, Inc. (collectively "Rib Roof") brought this action seeking a declaratory judgment that Rib Roof was a holder in due course of a check it negotiated from Defendant National Storage Centers of Redford, Inc. ("NSC"). Having conducted a bench trial, the Court makes the following finds of fact, conclusions of law, and enters declaratory judgment for Rib Roof.

I. BACKGROUND

This diversity case arises from Rib Roof's negotiation of a $137,975.00 check made out to Rib Roof and drawn on NSC's account. Rib Roof seeks a declaratory judgment that it is legally entitled to keep the $137,975.00. NSC alleges in its counter-complaint that Gary Gerrits, a non-party to the instant litigation, fraudulently induced it to draw the check to Plaintiffs, that Rib Roof knew, or should have known, that the check was fraudulently obtained, and, therefore, seeks the return of the $137,975.00.

II. FINDINGS OF FACT

Plaintiff Rib Roof Metal Systems, Inc. is a Tennessee corporation, with its principal place of business in Tennessee. (Compl.¶ 1). Plaintiff Components Plus, Inc. is a corporation registered in Texas, with its principal place of business in Texas. (*Id.* at ¶ 2). Defendant National Storage Center of Redford, Inc. is a Michigan limited partnership, with its principal place of business

in Michigan. (*Id.* at ¶ 3). Rib Roof is in the business of designing, manufacturing, and installing metal roofing and building systems. NSC is the owner of a mini-storage facility in Redford, Michigan.

In late 2004/early 2005, non-party Gary Gerrits, a contractor, approached Rib Roof for a loan to start a general contracting business specializing in the construction of storage facilities. Rib Roof agreed to provide working capital to Gerrits as a way to expand its own business in Michigan. On January 7, 2005, Gerrits and Rib Roof entered into an "Agreement for Working Capital." (Trial Ex. 1, Agreement for Working Capital). Rib Roof agreed to loan Gerrits $75,000, for use as "working capital for the purpose of obtaining contracts for the installation of Rib Roof metal building products over the next 6 months." (*Id.* at ¶ 3). The promissory note Gerrits signed obligated him to re-pay Rib Roof within six months. (*Id.*, Promissory Note). When Rib Roof loaned Gerrits the money, it understood that Gerrits had three building contracts in the works, including a mini-storage facility to be built in Brighton, Michigan, and Rib Roof was under the impression that Gerrits would repay the loan with profits from the three building contracts. Gerrits did not specify the other two potential building contract locations. Thus, Rib Roof could assume that when the check at issue came to Plaintiff Rib Roof from a Redford location, that this was one of Gerrits' building locations.

Shortly after Rib Roof loaned Gerrits the money, Gerrits began work on the storage facility project in Brighton ("Brighton Project"). On February 17, 2005, Gerrits subcontracted $178,300.00 worth of work on the Brighton Project to Rib Roof. (Trial Ex. 4, Subcontractor Agreement). Rib Roof completed its work on the Brighton Project by July 21, 2005. (Trial Ex. 7, Rib Roof, Inc. Invoice 4524). At that time, Rib Roof had not received any money from Gerrits. On September 9, 2005, Gerrits tendered Rib Roof a check for $29,325.00, the amount of the deposit for the subcontract, which was already completed. (Trial Ex. 9, Commerce Companies, LLC check). Two weeks later, on September 16, 2005, Rib Roof sent Gerrits a notice of furnishing to preserve its lien rights in the event that Gerrits did not pay Rib Roof for the materials provided under the subcontract. (Trial Ex. 10, Notice of Furnishing).

*2 Rib Roof employees, including Lolly Peirson, Randy Ferrell, and Verne Moser, and the President of Rib Roof, Carl Mitchell, all made numerous collection calls to Gerrits in an attempt to collect the money owing on the Brighton Project. Their collection attempts were unsuccessful. As a result of Gerrits non-payment, Mitchell decided not to do business with Gerrits any more.

Also during this time, one of Rib Roof's largest clients, OB Construction, told Rib Roof that it would no longer do business with Rib Roof if it continued to do business with Gerrits. OB Construction told Ferrell that Gerrits was in financial trouble.

On December 2, 2005, Gerrits sent a letter to his subcontractors and suppliers on the Brighton Project, including Rib Roof, notifying them that he had not been paid by the owners of the Brighton Project and, therefore, could not pay the subcontractors and suppliers. (Trial Ex. 13, Ltr. from Commerce Companies, LLC to All Subcontractors and Suppliers). Gerrits wrote that he had secured a promissory note from the owners and was in the process of obtaining a loan from his bank. (*Id.*) Gerrits went on to write that he expected to issue the final payments on the job in February 2006. (*Id.*)

In January 2006, Gerrits obtained a contract to build a storage facility in Redford for Defendant NSC. (Trial Ex. 16, Agreement for Construction Services). Under the guise of procuring materials for the Redford project, Gerrits submitted a sworn statement for payment to NSC, and directed NSC to write a check to Rib Roof in the amount of $137,975.00, the amount Gerrits owed Rib Roof for both the personal loan and the Brighton Project. (Trial Ex. 18, Michigan Sworn Statement; Trial Ex. 19, Ltr. from Commerce Companies LLC). Before NSC issued Rib Roof a check, NSC asked Gerrits to produce the subcontractor agreement. Gerrits gave NSC a subcontractor agreement that was signed only by Gerrits; Rib Roof was not a signatory to the contract. (Trial Ex. 17, Subcontractor Agreement). Nevertheless, after seeing the subcontractor agreement,

NSC issued a check payable to Rib Roof on February 8, 2008, in the full amount, and gave it to Gerrits. (Trial Ex. 20, Check). Unbeknownst to NSC, Gerrits had fraudulently fabricated the subcontractor agreement, and Rib Roof had never agreed to be a subcontractor on the Redford project.

After he obtained the check from NSC, Gerrits called Vern Moser, Rib Roof's chief financial officer, who worked out of Rib Roof's Nevada office, and told Moser that he was sending a check to pay off his loan and the amount owing on the Brighton project. Moser did not ask Gerrits where he got the money, and Gerrits did not mention that the check was issued by NSC. In an email from Gerrits to Moser, Gerrits reiterated that he was sending the check and asked where he should send it. (Trial Ex. 21, Email from Moser to Gerrits). Moser directed Gerrits to send the check to Lolly Pierson, Rib Roof's office manager in Rossville, Tennessee.

*3 Pierson did not testify in person at trial; her *de bene esse* deposition was submitted and read in Court. Her testimony included the following facts: Gerrits called Pierson to verify her address, and told her that he was sending a check and a transmittal letter to pay off the Brighton Project and the loan. (Pierson Dep. 45). Pierson was surprised when she received the check because Gerrits did not send the check in response to a specific collection call; there had been many previous collection calls. (Pierson Dep. 46). Pierson received and processed the check from NSC. (Pierson Dep. 42, 49). The transmittal letter that accompanied the check instructed Pierson to apply the check as follows:

Brighton, MI job balance on contract:	$62,975.00 (full and final payment)
Repayment of 1/15/05 loan:	$25,000
Repayment of 2/16/05 loan:	$25,000
Repayment of 3/15/05 loan:	$25,000
TOTAL:	$137,975.00

(Trial Ex. 22, Letter of Transmittal). Without the transmittal letter, Pierson would not have known which account to apply the check, as neither Gerrits nor his company were referenced on the check and Rib Roof did not have any direct business with NSC. (Pierson Dep. 55). Pierson did not question the validity of the third-party check because Rib Roof had received third-party checks "from time to time." (Pierson Dep. 52). Pierson did not contact NSC to inquire about the check. Pierson did not show the check to anyone at Rib Roof before she cashed it because she did not think it was necessary. (Pierson Dep. 50). Pierson did not have any reason to believe that Gerrits was dishonest, untrustworthy, or was engaged in illegal activity. (Pierson Dep. 67). Moser also testified that he had no reason to believe that Gerrits defrauded NSC into issuing the check at the time Rib Roof received it. (Moser Dep. 79-80). FN1

FN1. Randy Ferrell, a former Rib Roof employee, testified that he would have questioned the check. However, Ferrell was not involved in the payment process. Ferrell did not receive the check, he did not endorse the check, and he did not deposit the check. The payment process was handled entirely by Lolly Pierson. Ferrell did not even see the check until months later, when he was contacted by NSC regarding the check.

In late July 2006, Paramount Construction, LLC, subcontractor on Defendant NSC's Redford Project, called to tell NSC that Paramount was owed money for the Redford Project. NSC then looked at all the payments it made to subcontractors and discovered that Gerrits fraudulently induced NSC to issue a check to Rib Roof. On August 10, 2006, NSC's attorney notified Rib Roof of Gerrits' actions and demanded the return of the $137,975.00. (Trial Ex. 37, Ltr. from Robert Gross to Carl Mitchell).

On August 25, 2006, Plaintiffs filed a Complaint for a declaratory judgment in the United States District Court for the Western District of Tennessee. On October 16, 2006, NSC filed a motion to dismiss for lack of personal jurisdiction. On August 28, 2007, the district court granted the motion and transferred the case to the Eastern District of Michigan. *See Rib Roof Metal Sys., Inc. v. Nat'l Storage Ctrs of Redford,* No. 06-02553 (W.D.Tenn. Aug. 28, 2007).

On August 29, 2008, the instant Court ruled on the parties' cross-motions for summary judgment. The Court conducted a bench trial on the remaining issues beginning on March 3, 2009, and concluding on March 5, 2009. Counsel for Defendant National Storage stated in closing argument that, "this case boils down to Rib Roof's defense that it's a holder in due course of NMS' check." Counsel further stated that because Rib Roof had not met its burden of proof that it is a holder in due course, "NMS must prevail on its counterclaims ... for unjust enrichment, conversion and/or constructive trust."

*4 Based on the facts adduced at trial, as recited above, the Court has made conclusions of law, are set out below, which conclude that Plaintiff Rib Roof has proven by a preponderance of the evidence that it is a holder in due course. Thus, Defendant's counterclaims for unjust enrichment, conversion and constructive trust fail.

III. CONCLUSIONS OF LAW

The threshold issue in this case is whether Rib Roof is a holder in due course. The parties agree that if this Court concludes that Rib Roof was a holder in due course when it deposited the check, Rib Roof takes the check free of NSC's claims for conversion and unjust enrichment. For the reasons that follow, the Court holds that Rib Roof was a holder in due course.

Generally, a person who accepts a negotiable instrument takes the instrument subject to the property or possessory rights of another, unless the person is a holder in due course. Mich. Comp. Laws § 440.3306. Under Michigan law, someone is a "holder in due course" if:

> (a) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity.
>
> (b) The holder took the instrument (I) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an incurred default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 3306, and (vi) without notice that any party has a defense or claim in recoupment described in section 3305(1).
>
> Mich. Comp. Laws § 440.3306.

It is undisputed that Defendant NSC's check was a negotiable instrument, and Plaintiffs took NSC's check for value. Further, NSC does not argue that the instrument contained evidence of forgery, alteration, irregularity or incompleteness, or was overdue, had been dishonored or contained an unlawful signature. Therefore, Court must determine whether: 1) Rib Roof took the check in good faith; 2) Rib Roof had notice of a claim under § 3306, i.e. a property or possessory claim by a third party; and 3) whether Rib Roof had notice of a defense or claim in recoupment, such as fraud, as described § 3305(1).

"Good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Mich. Comp. Laws § 440.3103(1)(d). There is no evidence that Rib Roof took the check dishonestly; Rib Roof did not know when it accepted the check from Gerrits that he had obtained it through improper means. Moreover, Rib Roof observed reasonable commercial standards of fair dealing. Rib Roof accepted a check, from a client, Gerrits, which appeared to have been legitimately issued to Rib Roof by NSC, a fellow company in the mini-storage industry, on behalf of Gerrits, for amounts owing on Gerrits' account. Gerrits informed Rib Roof that the check was in the mail, provided instructions for the application of the funds, and the check

was for the exact amount that Gerrits owed. The fact the check was from a third-party payor and the fact that Gerrits paid the promissory note in full, are not enough to arise suspicion because Rib Roof received third-party checks from time to time and the promissory note was due in full when Gerrits presented the check to Rib Roof. Most importantly, the face of the check does not belie the fraud. Further, Gerrits, in securing the loans from Rib Roof had stated that he planned to repay the proceeds from other projects, without specifying the names of all of the projects. Thus, the fact that the check came from "another project," the Redford storage facility project, is not at all suspicious.

*5 Rib Roof endorsed and deposited the check. Rib Roof's actions were perfectly reasonable, given what it knew at the time it cashed the check, and Rib Roof comported with reasonable standards of fair dealing. There was nothing amiss with the check, therefore, Rib Roof took the check in good faith.

The next issue is whether Rib Roof took the check without notice of NSC's claims or Gerrits' fraud. Mich. Comp. Laws § 440.1201(27) defines "notice" as follows:

> Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his or her regular duties or unless he or she has reason to know of the transaction and that the transaction would be materially affected by the information.

Also, "[a] person has 'notice' of a fact when he or she has actual knowledge of it; he or she has received notice or notification of it; or from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists." Mich. Comp. Laws § 440.1201(25); *see Barbour v. Handlos Real Estate and Bldg. Corp.*, 152 Mich.App. 174, 185-85, 393 N.W.2d 581 (1986).

There is no evidence that Rib Roof knew of NSC's claims or Gerrits' fraud when it took the check. Mich. Comp. Laws § 440.1201(27) provides that the person conducting the transaction must have had notice, or would have had notice if due diligence was exercised, at the time the transaction was completed. Here, Pierson negotiated the check. Notably, there is no indicia of the fraud on the check. In addition, Pierson did not have actual knowledge of Gerrits' fraud at the time she completed the transaction; no one at Rib Roof knew of Gerrits' fraud when the transaction occurred. Pierson also did not know that OB Construction told Rib Roof that Gerrits had financial problems, and there was no reason for Mitchell, Moser or Ferrell to pass along that information to Pierson. Rumors of financial troubles would not presumptively cast suspicion on any payment Gerrits tendered to Rib Roof, particularly when Gerrits represented to Rib Roof that he was seeking financing to pay his suppliers and subcontractors and Gerrits paid Rib Roof in February 2006, when he expected to receive financing. Moreover, due diligence did not require Pierson to tell any one at Rib Roof about the third-party check because such communication was not a part of her regular duties and the check was not suspicious on its face.

*6 NSC argued at trial that the presence of a third-party payor should have alerted Rib Roof that there was something wrong with the check, and Rib Roof should have investigated the source of Gerrits' funds by calling NSC. In essence, NSC contends that Rib Roof had a duty to inquire.

NSC's argument fails for two reasons. First, Pierson testified that Rib Roof receives third-party checks on occasion; that alone, therefore, is not enough to alert her suspicion and spur an inquiry. Second, a holder in due course is not required to question the funds behind the negotiable instrument, if the instrument is valid on its

face. *See Mox v. Jordan,* 186 Mich.App. 42, 47, 463 N.W.2d 114 (1990); *Thomas v. State Mortgage, Inc.,* 176 Mich.App. 157, 165, 439 N.W.2d 299 (1989). To hold otherwise would require holders to question all payments, even when there is no *indicia* of fraud, forgery, alteration, irregularity or incompleteness on the face of the check and the holder had no notice of suspicious circumstances. The Court's analysis then, necessarily, focuses on the condition of the check, and the knowledge Rib Roof had when it negotiated the check. Here, there was no *indicia* of fraud on the face of the check. Furthermore, Rib Roof did not know, and could not have known, that Gerrits had fraudulently obtained the check from NSC. Rib Roof, per Gerrits' letter to his suppliers and subcontractors, knew that Gerrits was seeking a loan and expected payment in February 2006; the check arrived in February 2006. Also, it is not suspicious that the Gerrits paid the loan in full; the promissory note was due in full. Gerrits failure to pay earlier, and the rumors of his money troubles relayed by OB Construction, also do not give rise to sufficient suspicion to warrant an investigation by Rib Roof. Accordingly, this Court holds that Rib Roof took the check without notice of the fraud and NSC's claims.

IV. CONCLUSION

For the reasons discussed above, this Court concludes that Rib Roof was a holder in due course, and that Defendant has not proven their counterclaims of common law conversion and unjust enrichment. In order to prevail on their counterclaims, this Court would have had to first find that Rib Roof was not a holder in due course. As this Court concluded that Rib Roof was a holder in due course, Defendant's counterclaims necessarily fail.

Accordingly, the Court enters judgment on behalf of Rib Roof, declares that Rib Roof is legally entitled to retain the $137,975.00, and dismisses NSC's counter-complaint with prejudice.

SO ORDERED.

E.D.Mich.,2009.
Rib Roof Metal Systems, Inc. v. Nat. Storage Centers of Redford, Inc.

Not Reported in F.Supp.2d, 2009 WL 963675 (E.D.Mich.), 68 UCC Rep.Serv.2d 768

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 2351763 (E.D.Mich.), 69 UCC Rep.Serv.2d 594
(Cite as: 2009 WL 2351763 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
SUNDRAM FASTENERS LIMITED, Plaintiff,
v.
FLEXITECH, INC., Defendant.

No. 08-CV-13103.
July 29, 2009.

West KeySummary**Federal Civil Procedure 170A**
2510

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2510 k. Sales Cases in General.
Most Cited Cases

Genuine issue of material fact as to whether buyer's day-of notice of termination of contract for purchase of bolts was reasonable precluded summary judgment in seller's action under Michigan law for breach of contract. The reasonableness of the notice could not be determined without further development of facts. The day-of notice of termination could, in light of the nature of the parties' industry and the circumstances of industry-standard terminations, prove to be reasonable. M.C.L.A. § 440.2102.

John W. Bryant, Dean & Fulkerson, Troy, MI, for Plaintiff.

Kerry K. Cahill, Dykema Gossett, Bloomfield Hills, MI, Patrick F. Hickey, Dykema Gossett, Detroit, MI, for Defendant.

OPINION AND ORDER DENYING DEFENDANT'S "MOTION FOR SUMMARY JUDGMENT"

ROBERT H. CLELAND, District Judge.

*1 Pending before the court is Defendant Flexitech, Inc.'s "Motion for Summary Judgment," filed on June 15, 2009. The matter has been fully briefed, and the court concludes a hearing on the motion is unnecessary. *See* E.D. Mich. LR 7.1(e)(2). For the reasons stated below, Plaintiff's motion will be denied.

I. BACKGROUND

Defendant, headquartered in Plymouth, Michigan, is a manufacturer of brake hose assemblies and oil coolers, primarily for the automotive industry. (Pl.'s Resp. at viii.) Plaintiff Sundram Fasteners is an Indian company and the "largest manufacturer of high tensile fasteners in India." (*Id.*) In November of 2005, Defendant, through an intermediary, sought a supply of fasteners to be used in the production of brake assemblies for end use by General Motors Corporation. (*Id.* at ix.) Defendant and Plaintiff communicated via a series of emails and discussed the pricing for two specific types of these fasteners, known as "banjo bolts." (*Id.*) Defendant was interested in price quotes for part numbers 36-75003 ("03-bolt") and 36-75004 ("04-bolt"). As a result of these emails and at least one telephone conversation, Plaintiff emailed Defendant's buyer with a price quote of $0.275 for an expected annual volume of 4.5 million for the 03-bolt, and a quote of $0.300 for an expected annual volume of 1.6 million of the 04-bolt. (*Id.* at x-xi.)

On March 8, 2006, Defendant issued a "Blanket Purchase Order" to Plaintiff, which listed the quoted prices for the 03-and 04-bolts and required Plaintiff to "submit 300 parts with PPAP paperwork to the attention of ... [the] Quality Manager at [Defendant] by due date." [FN1] (*Id.*, Ex. B(3) at 3.) The blanket purchase order also included extensive terms and conditions, including that Defendant "may terminate the Blanket Purchase Order in whole or in part at any time, for any reason, without penalty." (*Id.*) Plaintiff did not contest this

or any other clause in the order (*id.* at xv-xvii) and, upon receiving a "release" from Defendant in March of 2006, began to manufacturer and ship the 03-and 04-bolts to Defendant (*id.* at xxiv, Ex. B(5)).

> FN1. The parties do not define PPAP. From the context of the argument, however, it appears this initial order for three-hundred pieces was intended for Defendant to perform an inspection of the parts, before "releases" were communicated from Defendant to Plaintiff for larger quantities to be shipped. (Pl.'s Resp. at xii-xiii.)

In September of 2006, Defendant sent Plaintiff a forecast of its anticipated needs of the bolts for the remainder of 2006 and all of 2007. (*Id.*, Ex. B(10).) The forecast called for hundreds of thousands of both the 03-and 04-bolts to be manufactured and shipped in the near future. (*Id.*) At the time of the forecasts, however, Defendant informed Plaintiff that the forecasts were just that, and would "be followed by firm releases which [Plaintiff] should ship to." (Def.'s Mot., Ex. 11.) Defendant sent a release to Plaintiff in January of 2007, but did not send any further releases for bolt shipment. (Pl.'s Resp. at xxiv.) After receiving no releases for approximately one month, Plaintiff sent Defendant numerous emails seeking to confirm the upcoming shipment schedule. (*Id.*, Exs. B(12), (13).) Finally, on March 23, 2007, Defendant's buyer responded to Plaintiff's inquiries, stating that Defendant "will no longer require this part from you." (*Id.*, Ex. B(14).) Defendant followed this email with a March 29, 2007 letter in which Defendant elaborated:

> *2 Due to the fact that [Plaintiff] failed [Defendant's] quality evaluation and having received two quality SCARs.[FN2] [Defendant] will no longer require this part from [Plaintiff]; this action is necessary to protect [Defendant] and our customer from any quality issues.
>
> FN2. SCAR stands for "Supplier Corrective Action Request" and is Defendant's process for alerting suppliers of defective products. (Pl.'s Resp., Ex. C(1).) In October of 2006, Plaintiff received a SCAR for an 04-bolt on which "flow through holes [did] not intersect." (*Id.*) In January of 2007, Plaintiff received a SCAR for an 04-bolt that did "not meet print specifications" because it would "not pass [Defendant's] ring thread gage." (*Id* ., Ex. C(5).)
>
> [Plaintiff's] last release from [Defendant] was on January 3, 2007 and has not received any additional releases. Please be aware that [Defendant] has no contractual obligation to [Plaintiff] at this time as your Purchase Order is based on firm releases from [Defendant].

(Def.'s Mot., Ex. 17.) Defendant continued to accept and pay for shipments of bolts which had been requested via releases prior to its March 29, 2007 letter. (Pl.'s Resp. at xvi-xvii.) At the end of March of 2007, there were no outstanding releases, and Defendant terminated the relationship. (*Id.* at xvii.) There were, however, approximately 2.2 million bolts which Plaintiff had manufactured but not yet shipped to Defendant, as a firm release for those bolts had not been issued. (Pl.'s Compl. at ¶ 22.)

In July of 2008, Plaintiff filed the current lawsuit, alleging that Defendant breached its contractual duty by (1) refusing to compensate Plaintiff for the 2.2 million bolts left in the supply chain upon contract termination, and (2) not providing releases for the total number of bolts negotiated before the initial blanket purchase order. (*Id.* at 4-5.) Defendant filed its motion for summary judgment arguing that the parties contract was in the form of a blanket purchase order which including specific termination language. The agreed-upon contract did not require Defendant to compensate Plaintiff for any product specifically not "released," and allowed Defendant to terminate the agreement at any time, with no ad-

vance notice. (Def.'s Mot. at 5-7.) Plaintiff counters that a genuine issue of material fact exists as to whether the blanket purchase order constitutes a valid contract. (Pl.'s Resp. at 7-8.) Further, Plaintiff avers that, even if the blanket purchase order constituted a contract between the parties, Defendant did not provide valid notice of its intent to terminate the contract and thus, the termination was unreasonable. (*Id.* at 8-16.)

II. STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Sagan v. United States,* 342 F.3d 493, 497 (6th Cir.2003). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th Cir.1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

***3** The court does not weigh the evidence to determine the truth of the matter, but rather, to determine if the evidence produced creates a genuine issue for trial. *Sagan,* 342 F.3d at 497 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The moving party must first show the absence of a genuine issue of material fact. *Plant v. Morton Int'l, Inc.,* 212 F.3d 929, 934 (6th Cir.2000) (citing *Celotex,* 477 U.S. at 323). The burden then shifts to the non-moving party, who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radia Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). He must put forth enough evidence to show that there exists a genuine issue to be decided at trial. *Plant,* 212 F.3d at 934 (citing *Anderson,* 477 U.S. at 256). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson,* 477 U.S. at 251-52 (1986). The existence of a factual dispute alone does not, however, defeat a properly supported motion for summary judgment-the disputed factual issue must be material. *See id.* at 252 ("The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict-'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' " (alteration in original) (citation omitted)). A fact is "material" for purposes of summary judgment when proof of that fact would establish or refute an essential element of the claim or a defense advanced by either party. *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir.1984) (citation omitted).

III. DISCUSSION

A. Blanket Purchase Order as Contract

Though not raised in Defendant's motion, Plaintiff contests whether the blanket purchase order applies to the dispute between these parties, as the purchase order number listed on the blanket order, "P3612327" does not match the purchase order number listed on subsequent releases. (Pl.'s Resp. at 7.) In the manufacturing industry, the term "blanket purchase order" "has a particular trade meaning: namely, a non-binding *estimate* of the buyer's requirements." *Detroit Radiant Prod. Co. v. BSH Home Appliances Corp.,* 473 F.3d 623, 631 (6th Cir.2007) (emphasis in original). Specifically, and under Michigan law, [FN3]

> FN3. Plaintiff does not contest that any contract at issue in this dispute, based on diversity of citizenship, is governed by Michigan law.

A blanket purchase order does not oblige [the

seller] to manufacture or ship any parts. That obligation arises when [the buyer] issues what is known as a shipment, production, or release order that would issue against the blanket purchase order. Blanket purchase orders can last for some time, while shipment orders are issued against them.

Id. (quoting *Urban Assoc., Inc. v. Standex Elec., Inc.*, No. 04-40059, 2006 WL 250020, *1 (E.D.Mich. Jan.30, 2006)); *see also Robich v. Patent Button Co. of Tenn., Inc.*, 417 F.2d 890, 891 (6th Cir.1969). Indeed, Plaintiff's employees, in negotiating the sale of the 03-and 04-bolts, demonstrated a general awareness of blanket purchase orders' function as sales contracts. (Def.'s Mot., Ex. 5 at p. 46; Ex. 6 at p. 82.) Defendant issued releases to Plaintiff from March 2006 until January 2007. (Pl.'s Resp. at xxiv.) And although the purchase order number listed on Defendant's releases did not, at least in some instances, match the purchase order number on the original blanket purchase order, Plaintiff does not claim it had any trouble determining what products were to be shipped, or what price the parties had agreed upon for those products. In fact, the examples of releases provided to the court are silent as to price information, and instead include only the "Item Number" and a "Quantity Amount." (Pl.'s Resp., Ex. A(3).) Thus, without reference to the original blanket purchase order, Plaintiff would have been shipping its products to Defendant without knowing what price would be paid. Plaintiff's argument that there is a "factual dispute as to whether [the blanket] purchase order, a different purchase order, or no purchase order at all" was intended to control these transactions is inconsistent with Plaintiff's employee's words and actions in shipping the 03-and 04-bolts. To imply that, because of a minor typo that was apparently not noticed until the commencement of this litigation, there is now a "different purchase order, or no purchase order at all" governing these significant shipments does little more than "show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, and is insufficient to establish a triable issue of material fact as to the legitimacy of the blanket purchase agreement agreed upon by Plaintiff and Defendant.

***4** Plaintiff also argues that, by the blanket purchase order's explicit terms, it was never properly accepted and thus did not govern the sale of the bolts to Defendant. Among the terms and conditions in the blanket purchase order is a section entitled "Acceptance." (Def.'s Mot., Ex. 8 at 3.) In pertinent part, the section states that:

> Acknowledgment by Seller of its receipt of this order, shipment by Seller of such goods as are subject to this order or performance by Seller of such work as is subject to this order shall constitute acceptance by Seller ... Acceptance of this order must be acknowledged by Purchaser's receipt of the executed acknowledgment copy of this order within three (3) business days of the date of this purchase order first set forth above.

(*Id.*) In simpler terms, and giving the words their "ordinary and common sense meaning," *Robich*, 417 F.2d at 892, Plaintiff was able to accept the contract through: (1) an acknowledgment copy of the order within three business days of receipt, (2) shipment of the goods referenced in the order, or-inapplicable here-(3) commencement of labor referenced in the order.

Plaintiff argues that, because its employees never sent an executed acknowledgment copy of the order, it was not accepted. From the plain language of the instrument, Plaintiff properly accepted the agreement when it first shipped the goods referenced in the order, namely, the 03-and 04-bolts. Regardless, however, "[i]f an offer suggests a permitted mode of acceptance, other methods of acceptance are not precluded." *Kvaerner U.S., Inc. v. Hakim Plast Co.*, 74 F.Supp.2d. 709, 714 (E.D.Mich.1999) (citing *Allied Steel & Conveyors v. Ford Motor Co.*, 277 F.2d 907, 910-11 (6th Cir.1960)). "One such manner of acceptance occurs when the offeree tenders performance." *Kvaerner*,

74 F.Supp.2d at 714. Plaintiff does not dispute that it shipped Defendant the bolts requested via releases for nearly one year, and that Defendant paid for the released shipments. Thus, when Plaintiff sent its first shipment in March of 2006, by the act of tendering performance, it accepted the terms of Defendant's blanket purchase order. *Id.* The fact that Plaintiff did not choose one of multiple methods of acceptance listed in the purchase order does not create a genuine issue of material fact as to whether Plaintiff accepted the blanket purchase order and its incorporated terms and conditions.

B. Timing and Notice of Contract Termination

In its motion for summary judgment, Defendant argues that the unambiguous language of the termination clause, as contained in the blanket purchase order, allowed Defendant to "terminate the Blanket Purchase Order, in whole or in part, at any time, for any reason, without penalty." (Def.'s Mot. at 6.) Therefore, Defendant states, "it had no contractual obligation to purchase any inventory in the supply chain, and it had no contractual obligation to provide advanced notice to [Plaintiff]." (*Id.*) Plaintiff does not dispute the express language of the termination clause, nor does it appear that Plaintiff disputes the claim that Defendant could terminate the contract at any time, for any reason.[FN4] (Pl.'s Resp. at xiii.) Plaintiff does argue, however, that reasonable notification was required before termination and, because Defendant did not provide such notification, the termination was invalid.

> FN4. Plaintiff argues, in passing, that there was an oral promise from Defendant, after shipments had begun, to purchase all quantities listed in the forecasts. (Pl.'s Resp., Ex. B at 5, ¶ 13.) Any such promise came after the contract had been accepted by performance, and thus was untimely to modify the contract's terms. Further, placing aside the negligible quantities included in the blanket purchase order for quality control purposes, the common trade usage of such an instrument expressly contemplates the lack of a quantity amount, to be later supplied by a release order. *Detroit Radiant Prod. Co.*, 473 F.3d at 631. Therefore, in a situation such as this, where the instrument is, in effect, totally silent as to the quantity, parol evidence, such as an oral promise to purchase certain quantities, cannot be used to supply the missing term. *Acemo, Inc. v. Olympic Steel Lafayette, Inc.*, No. 256638, 2005 WL 2810716, *4 (Mich.Ct.App. Oct.27, 2005) (quoting *In re Estate of Frost*, 130 Mich.App. 556, 344 N.W.2d 331, 333 (Mich.Ct.App.1984)).

**5 In a diversity action such as this, the court applies the long-standing *Erie* doctrine, which requires that the court apply the same substantive law as would have been applied if the action had been brought in a state court of the jurisdiction where the federal court is located. *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 723 (6th Cir.2007) (citing *Equitable Life Assurance Soc'y of the U.S. v. Poe*, 143 F.3d 1013, 1016 (6th Cir.1998)). Michigan law, applicable here, has adopted the Uniform Commercial Code ("UCC") for contracts involving the sales of goods. Mich. Comp. Laws § 440.2102; *Aaron E. Levine & Co., Inc. v. Calkraft Paper Co.*, 429 F.Supp. 1039, 1048 (E.D.Mich.1976). Of particular importance, Michigan's adoption of the UCC dictates that:

> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

Mich. Comp. Laws § 440.2309. Defendant points to the provision and argues that the blanket purchase order, by omitting a notice term, in effect dispensed with notice, was not procedurally or substantively unconscionable, and thus obviated any contractual requirement for advance notice of ter-

mination. (Def.'s Mot. at 10-15.) Plaintiff responds that, apart from any unconscionability, the notice term was not "dispensed" through omission and thus the UCC "fills the gap" to require reasonable notification. (Pl.'s Resp. at 8-15.)

In this summary judgment posture, it is undisputed that a term for "notice" is undefined in the contract, which provided only that Defendant could "terminate the Blanket Purchase Order, in whole or in part, at any time, for any reason, without penalty." (Def.'s Mot. at 6.) Thus, the initial question is whether the omission of a notice clause operates as "dispensing with notification" under Mich. Comp. Laws § 440.2309, or whether the omission requires Mich. Comp. Laws § 440.2309 to "fill the gap" and require "reasonable notification."

In common usage, to "dispense with" a term typically means something different than to "omit" a term. The former implies an active effort to contract around a requirement, while the later implies the situation where the requirement has been, either by ignorance or design, ignored. Indeed, those cases in other jurisdictions which have upheld termination clauses have done so when the reasonable notice requirement has been actively "dispensed" through a redefinition of the term of notice required. *See, e.g., Oreman Sales, Inc. v. Matsushita Elec. Corp. of Am.*, 768 F.Supp. 1174, 1180, n. 5 (E.D.La.1991) (collecting cases on New York's and Louisiana's interpretations of the UCC notice provision, and holding that "New York law generally upholds contractual clauses that permit either party to cancel the contract with or without cause upon notice."); *Div. of the Triple Serv., Inc. v. Mobil Oil Corp.*, 60 Misc.2d 720, 304 N.Y.S.2d 191, 194 (N.Y.Sup.Ct.1969) (upholding termination clause that provided for "notice from either party to the other, given not less than 90 days prior to such termination."); *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc.2d 446, 273 N.Y.S.2d 364, 365 (N.Y.Sup.Ct.1966) (upholding termination clause that allowed for termination "at any time without cause or notice by either party.") Those cases, however, do not provide direction where notice is not explicitly mentioned in the contract.

***6** Defendant cites to a single Michigan case as support for its position that the omission of a notice requirement permits termination at any time, without notice. (Def.'s Mot. at 13.) That case, however, concerned a purchase order for a service contract, and does not interpret, nor even mention, the Michigan application of the UCC. *Chrysler Corp. v. Diclemente Siegel Eng'g, Inc.*, No. 184700, 1996 WL 33347850 (Mich.Ct.App.1996) (per curiam). Defendant also cites a bankruptcy court's interpretation of the Ohio UCC, in which a contract which permitted "terminat[ion] ... any time without prior notice" was upheld. *In re Penn. Tire Co.*, 26 B.R. 663, 670 (Bankr.N.D.Ohio 1982) (noting that "the ... language suggests, at least, that the parties had agreed that 'reasonable notice' pursuant to [Ohio's UCC] meant no notice."). But that is a case where the parties expressly agreed to dispense with notification by not requiring notice at all.

The court is faced with a different type of situation-one in which "notice" is not explicitly mentioned. The contract does, however, include a temporal aspect, allowing for termination "at any time." (Def.'s Mot. at 6.) If "dispensing" with a notice provision can be done by providing for "no notice," *In re Penn. Tire*, 26 B.R. at 670, then it could be argued that allowing for termination at "any time," means the same thing. Put another way, if notice were required, but termination could be done "at any time," then the notice for termination could be done at any time, or contemporaneous with the termination. In either case, at the summary judgment stage, conclusively determining whether notice was "dispensed with" requires further factual development.

IV. Michigan UCC Application to Fill Gaps

If the court were to determine that notice had not been "dispensed with," then the Michigan UCC would operates as a set of default rules and, where the parties omitted certain terms, fill the "gaps." *See Robert Bosch Corp. v. ASC Inc.*, 195 F. App'x

503, 507 (6th Cir.2006) (applying Michigan's UCC to hold that "[t]he contract would thus consist of the terms upon which the parties agreed and any UCC gap fillers."); *Rowe v. Montgomery Ward & Co., Inc.*, 437 Mich. 627, 473 N.W.2d 268, 288 n. 13 (Mich.1991) (Boyle, J., concurring) (in wrongful discharge context, noting that "the Court would not be precluded from resorting to 'gap fillers' analogous to those contemplated under the UCC to supply an omitted term or to resolve an ambiguity."). Here, if the court were to find that the parties created a gap as to the notice required prior to termination, the Michigan UCC provision that would supply the missing term dictates that:

> (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

*7 Mich. Comp. Laws § 440.2309. Thus, for either party to terminate the blanket purchase order, the UCC would fill the gap and require that "reasonable notification be received by the other party." *See also Coburn Supply Co., Inc. v. Kohler Co.*, 342 F.3d 372, 375-76 (5th Cir.2003) (where "[n]o contractual term expressly control[led] the issue of notice," holding that the Texas UCC required the "gap filler" provision to imply "reasonable" notice .) Therefore, if upon further factual development, the court were to find notice had not been properly dispensed with, it would need to turn to the issue of the amount of time, pre-termination, that was "reasonable."

V. "Reasonable Notification"

Under the Michigan UCC, "what is a 'reasonable time' depends upon 'the nature, purpose and circumstances' of the action." *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich.App. 391, 254 N.W.2d 899, 905 (Mich.Ct.App.1977) (quoting Mich. Comp. Laws § 440.1204(2)). Because of the fact-intensive inquiry into the nature, purpose, and circumstances of the action, reasonableness is normally a question for the trier of fact. *Barron v. Edwards*, 45 Mich.App. 210, 206 N.W.2d 508, 510 (Mich.Ct.App.1973); *see also St. Ansgar Mills, Inc. v. Streit*, 613 N.W.2d 289, 295-96 (Iowa 2000) (collecting cases, from numerous jurisdictions, holding that the determination of reasonableness under the UCC is a factual question inappropriate for summary judgment.) There is no dispute that Defendant provided notice, but that the notice provided was contemporaneous with its termination of the contract. Plaintiff argues that day-of notice is unreasonable as a matter of law. (Pl.'s Resp. at 12.) But Defendant's day-of notice [FN5] of termination may indeed, in light of the nature of the parties' industry and the circumstances of industry-standard terminations, prove to be reasonable. The reasonableness of the notice cannot be determined without further development of facts, and is therefore inappropriate for summary judgment. *St. Ansgar Mills*, 613 N.W.2d at 296-96. In so holding, the court cannot evaluate the balance of Defendant's summary judgment claim-i.e. whether it did or did not agree to compensate Plaintiff for any supply-chain remainder after termination-because the court has determined that the validity of the termination itself, by virtue of day-of notice, is inappropriate for resolution on summary judgment.

> FN5. Defendant argues, via a footnote, that, if reasonable notice was required, "the notice [Plaintiff] received was two months," because "in January 2007, [Defendant] issued its last release for product ... Termination did not occur until March 2007." (Def.'s Reply at 8 n. 3.) The argument is without merit. Using a blanket purchase order, Defendant was obligated only to buy the product it "released," which it did when its manufacturing needs required. By the very nature of the arrangement, there could be times, perhaps exceeding two months, when Defendant would not issue a release. The mere lack of a release cannot be assumed to equal notice of termination, or any pause in re-

leases under a blanket purchase order could terminate the instrument, whether intended or not.

VI. CONCLUSION

In sum, the court finds that, in this summary judgment posture, a valid contract existed between the parties in the form of a blanket purchase order, and that the contract did not contain any explicit discussion of the notice required in the event of termination. The lack of explicit mention, however, may or may not turn out to be, upon further factual development, sufficient to "dispense" with notice under the UCC. If insufficient, the Michigan UCC's "gap filling" provision provides that "reasonable notice" is required, which depends upon the nature, purpose and circumstances of these parties' interactions and industry custom. Because the amount of time required for notice to be reasonable will also require further factual development, it is inappropriate for resolution on summary judgment. Accordingly,

*8 IT IS ORDERED that Defendant's "Motion for Summary Judgment" [Dkt. # 16] is DENIED.

E.D.Mich.,2009.
Sundram Fasteners Ltd. v. Flexitech, Inc.
Not Reported in F.Supp.2d, 2009 WL 2351763 (E.D.Mich.), 69 UCC Rep.Serv.2d 594

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 2926572 (E.D.Mich.), 2009-2 Trade Cases P 76,737, 70 UCC Rep.Serv.2d 156
(Cite as: 2009 WL 2926572 (E.D.Mich.))

H

United States District Court,
E.D. Michigan,
Southern Division.
STATION ENTERPRISES, INC., d/b/a Tree Town Toys and Brain Station, Plaintiff,
v.
GANZ, INC., et al., Defendant.

No. 07-CV-14294.
Sept. 10, 2009.

West KeySummary**Federal Civil Procedure 170A ⚿2510**

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2510 k. Sales Cases in General.
Most Cited Cases

Genuine issue of material fact existed as to the meaning of an alleged contract term. Thus, the buyer was not entitled to summary judgment. The buyer alleged that the parties made an oral contract in which the seller promised that the seller would have "high priority delivery status."There was evidence of performance, partial performance and payment giving rise to a question of fact whether a contract was offered and accepted. However, the buyer only presented limited probative evidence that this oral contract extended to subsequent orders placed by the buyer, and as to what the term itself meant. M.C.L.A. § 440.2206(1)(a).

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Adam A. Wolfe, David D. Murphy, James D. Vandewyngearde, Pepper Hamilton, Detroit, MI, Angela M. Hayden, Bruce O. Baumgartner, Baker & Hostetler, Cincinnati, OH, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT (# 71)

GEORGE CARAM STEEH, District Judge.

*1 Plaintiff Tree Town Toys ("Tree Town") brings the present lawsuit against Ganz, Inc., and Ganz U.S.A. LLC (collectively "Ganz") alleging breach of contract and breach of warranty in violation of Article 2 of the Michigan Uniform Commercial Code, a common law claim of misrepresentation, as well as violation of the Sherman Act, 15 U.S.C.A § 1. Defendants now move for summary judgment pursuant to Fed.R.Civ.P. 56(c), alleging there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

STATEMENT OF FACTS

This is a case stemming from a contractual dispute between two commercial parties regarding the delivery of goods, specifically "Webkinz" toys. Webkinz are small stuffed animals, each of which is packaged with a unique user code that grants access to a product-linked website, "Webkinz World."

Tree Town owns a retail toy store and also sells toys online. Ganz markets and distributes toys, including Webkinz, in the U.S.A. and worldwide. Tree Town began ordering Webkinz and other merchandise from Ganz in August, 2006. The parties conducted business without complaint until January 2007, when the series of events in question began.

Tree Town and Ganz agree that demand for Webkinz products increased sharply in early 2007, and Ganz acknowledges struggling to fulfill orders for established and new customers during this period. On January, 19, 2007, Tree Town attempted to place a large order for the toys through Ganz' sales representative Kelly Fisher. Fisher told Tree Town owners Hans and Patricia Masing that she was unable to place the order, but that the products could be purchased at the Chicago Gift Show, which began the following day. The Masings traveled to

Chicago later that day.

Both parties agree that at the Chicago show, Tree Town was assured access to special financing terms and unlimited purchases of otherwise quantity-controlled limited-edition products in return for meeting certain minimum purchase requirements. Plaintiff also contends it was promised "high priority delivery status" for all future orders.

Plaintiff claims that the promises of financing, access to limited-edition products and "high priority delivery status" constituted an offer to form a contract, which plaintiff accepted by placing orders for several thousand Webkinz units and additional non-Webkinz merchandise at the gift show, prepaying $7,704 on two separate credit cards and writing a check for $22,136 on January 20.

Plaintiff claims its January 20 orders were subsequently either not fulfilled or were only partially fulfilled. Plaintiff also claims that various additional orders placed after Jan. 20, 2007 were either not fulfilled or were only partially fulfilled.

Defendants acknowledge that "the demand for Webkinz rose exponentially beginning in January 2007" and that as a result of this "surprise boost in popularity" "shipment of Webkinz against orders fell behind for several months before supplies caught up with demand." While acknowledging this problem, defendants also claim part of the delay stems from their decision to put the plaintiff's outstanding orders on hold in April, 2007, to investigate what Ganz viewed as unusual ordering habits. Plaintiff responds that depositions have shown no evidence of such an investigation.

*2 Plaintiff claims it was told during this period that it needed to purchase more non-Webkinz product ("Core Product") to ensure shipping of its Webkinz orders. Plaintiff claims it ultimately ordered $15,000 in Core Product in an effort to have Ganz determine whether the original Webkinz orders would be shipped.

On May 24, 2007, plaintiff notified Ganz that it was cancelling all outstanding orders for Core Product, but did not cancel its outstanding orders for Webkinz. Ganz accepted plaintiff's cancellation via e-mail on July 11, and wrote that it would, "ship your client's orders for Webkinz merchandise as stock becomes available."

On August 24, plaintiff notified Ganz that it was cancelling all outstanding orders for Webkinz due to Ganz' failure to deliver in a reasonable time. The records provided by the parties are unclear on whether any shipments of Webkinz were shipped between defendants' July 11 promise to ship the pending Webkinz orders and plaintiff's August 24 cancellation.

Plaintiff filed its complaint on October 10, 2007 asserting causes of action for breach of contract, breach of warranty, misrepresentation and violations of the Sherman Act against Ganz. Defendants filed a motion for summary judgment under Fed.R.Civ.P. 56 on March 31, 2009.

STANDARDS FOR DISMISSAL UNDER RULE 56

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must construe all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 575 (1986). The issue to be decided is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judg-

ment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); see also *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir.2000). The nonmoving party cannot rest on its pleadings to avoid summary judgment, but must support its claim with probative evidence. *Anderson*, 477 U.S. at 248; *Kraft v. U.S.*, 991 F.2d 292, 296 (6th Cir.1993), *cert. denied*, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

ANALYSIS

I. Breach of Contract

Plaintiff contends that an oral contract covering all subsequent Webkinz orders was formed at the Chicago Gift show when it accepted the Ganz' representative's offer of "high priority delivery status", access to special financing terms and unlimited purchases of otherwise quantity-controlled limited-edition products by (a) placing orders that met certain minimum purchase requirements and, (b) tendering payment for those orders.

*3 Defendants' motion for summary judgment argues in opposition that the oral contract fails to meet that statute of frauds or, alternatively, that a lack of acceptance prevented plaintiff's orders from becoming binding contracts between the parties.

A. Statute of Frauds

Under the Uniform Commercial Code as adopted in Michigan, a contract for the sale of goods for the price of $1,000 or more is not enforceable unless there exists a writing sufficient to indicate that the contract has been made between the parties and is signed by the party against whom enforcement is sought. M.C.L.A. § 440.2201(1). In dealings between merchants, a writing in confirmation of a contract sufficient against the sender satisfies the requirements of a written contract if it is received within a reasonable time and no written notice of objection to its contents is given within 10 days after it is received. M.C.L.A. § 440.2201(2). Receipt and acceptance of payment "constitutes an unambiguous overt admission by both parties that a contract actually exists." Official comment 2, M.C.L.A. § 440.2201. In addition, terms upon which confirmatory memoranda of the parties agree, or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms may be explained or supplemented by course of dealing or usage of trade or by the course of performance. M.C.L.A. § 440.2202.

The statute of frauds is intended "to afford a basis for believing that offered oral evidence rests on a real transaction." *Matter of Estate of Frost*, 130 Mich.App. 556, 559, 344 N.W.2d 331 (1983). When a writing sufficient to satisfy the statute is produced, the statute of frauds is satisfied and the only question remaining is to determine whether parol evidence may be admitted in order to make the agreement sufficiently definite to be enforceable. *Id.*

Here, there is a course of dealing between the parties that includes multiple orders, acknowledgements, payments tendered and accepted, and goods shipped and accepted. These orders and acknowledgements include the subject matter Webkinz, prices, quantities and delivery dates.

For example, Ganz acknowledges that order AP64960 was placed by plaintiff at the Chicago Gift Show on January 20, 2007, payment was tendered in the form of a check and accepted by Ganz, and the full order of 4,020 Webkinz toys was shipped to plaintiff by February 26, 2007. In addition, order AP64940 was also placed on January 20, 2007. Ganz acknowledges receiving the order, accepting payment via a combination of credit card payments and checks, and partially shipping the goods. For order AP64940, 1,200 Webkinz Koalas were shipped, but 1,200 Lil' Kinz Tree Frogs were not.

Finally, in one last example, Ganz acknowledges that plaintiff placed order BC11440 on March 8, 2007, that plaintiff paid for the order via credit card, and that the order was partially filled on or about May 10, 2007, when 84 of 1,416 items ordered were subsequently shipped.

*4 The court finds that the combination of orders, acknowledgement, terms and conditions, and performance between the parties suffices to satisfy the statute.

B. Acceptance by partial performance and payment

Under the Uniform Commercial Code (U.C.C.) as adopted by Michigan, an offer to make a contract may be construed as "inviting acceptance in any manner and by any medium reasonable in the circumstances." M.C.L.A. § 440.2206(1)(a). Under the U.C.C. either "shipment or the prompt promise to ship is made a proper means of acceptance of an offer." U.C.C. official comment to M.C.L . A. § 440.2206.

In addition, receipt and acceptance of payment "constitutes an unambiguous overt admission by both parties that a contract actually exists." Official comment 2, M.C.L.A. § 440.2201.

Here, as noted in the previous section, there is evidence of performance, partial performance and payment sufficient to raise a question of fact as to whether a contract was offered and accepted at the Chicago gift show. Both parties acknowledge that payment was made and accepted for orders placed at the show. Some of those orders were shipped in their entirety, some of them were partially shipped, and some had projected shipping dates after the plaintiff's subsequent cancellation of all Webkinz orders.

Given the conduct between the parties on and after the Chicago Gift Show, the court finds there is a genuine question of material fact concerning whether an oral contract was formed concerning orders placed on Jan. 20, 2008.

More problematic, however, is the question of whether any contract formed at the Chicago Gift Show would cover subsequent orders placed by the plaintiff. The complaint attempts to extend any contract formed at the show to all subsequent orders by claiming that the plaintiff was promised ongoing "high priority delivery status," but plaintiff offers limited probative evidence of such a promise. Furthermore, the plaintiff does little to demonstrate what either side understood any potential promise of "high priority delivery status" to include, and whether or how such a promise was not met.

However, in construing all reasonable inferences in favor of the non-moving party, the court finds an issue of fact exists regarding the meaning of "high priority delivery status," whether it was a contract term, and, if so, whether it was breached.

C. Anticipatory breach

Plaintiff includes in its breach of contract complaint three Webkinz orders with shipping dates after plaintiff's August 24, 2007 cancellation notice to Ganz of all pending Webkinz orders. The three orders in question were scheduled to ship between October 1, 2007 and Jan. 10, 2008.

To bring action for anticipatory breach of contract, the plaintiff must show that the defendant unequivocally declared the intent not to perform. *Bob Turner, Inc. v. Leahy,* 2000 WL 33406998 (Mich.Ct.App.2000); *Washburn v. Michailoff,* 240 Mich.App. 669, 674-75, 613 N.W.2d 405 (2000). One example of anticipatory breach would entail a party to the agreement informing the other party that it is "absolutely impossible" to perform the contract. *Buys v. Travis,* 243 Mich. 470, 475, 220 N.W. 798 (1928). A statement cannot be considered a renunciation unless it is a distinct, unequivocal, and absolute refusal to perform. *Frohlich v. Independent Glass Co.,* 144 Mich. 278, 280-81, 107 N.W. 889 (1906).

*5 Here, plaintiff has offered no evidence that Ganz unequivocally declared an intent not to perform in regard to the latter orders. In a letter dated

June 4, Ganz acknowledges the previous supply problems, but claims that its supply problem has eased and it is now able to "resume substantial shipments to its customers." Defendants' motion for summary judgment as to plaintiff's claims in regard to any Webkinz orders with shipping dates beyond plaintiff's August 24 notice of cancellation is GRANTED.

D. In summary

Defendants' motion for summary judgment in regard to plaintiff's claim of breach of contract regarding all Webkinz orders scheduled to ship prior to plaintiff's August 24, 2007 cancellation is DENIED for reasons stated above. Defendants' request for summary judgment in regard to breach of contract claims regarding all Webkinz orders scheduled to ship after plaintiff's August 24 cancellation is GRANTED for reasons stated above.

II. Breach of Warranty

In Count II, plaintiff originally brought a breach of warranty claim, but has stipulated that it be dismissed. Defendants' request for summary judgment in regard to plaintiff's breach of warranty claim is GRANTED as stipulated to by the parties.

III. Misrepresentation

In Count III of the complaint, plaintiff's claim of misrepresentation alleges that it was induced into placing orders at the Chicago Gift Show when Ganz falsely and in bad faith represented that prepayment of orders made at the gift show would result in high priority delivery status. In its response to defendants' motion, plaintiff appears to attempt to amend its misrepresentation claim to a claim of fraud in the inducement.

Under the Economic Loss Doctrine as adopted by Michigan, economic losses related to commercial transactions are generally not recoverable in tort. *Quest Diagnostics, Inc. v. MCI Worldcom, Inc.*, 254 Mich.App. 372, 376, 656 N.W.2d 858 (1992). A claim for misrepresentation is a claim in tort. *A & A Asphalt Paving v. Pontiac Speedway,* 363 Mich. 634, 110 N.W.2d 601 (1961).

Plaintiff argues in its response that fraud in the inducement is an exception to the Economic Loss Doctrine. "Courts generally have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine." *Huron Tool & Engineering Co. v. Precision Consulting Services,* 209 Mich.App. 365, 371, 532 N.W.2d 541 (1995). "Fraud in the inducement ... addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort." *Id. (quoting Williams Electric Co., Inc. v. Honeywell, Inc.,* 77 F.Supp 1225, 1237-38 (N.D.Fla., 1991)).

Whether the claim is misrepresentation or fraud in the inducement, there is insufficient evidence to support the allegation that Ganz never intended to provide priority shipping. Plaintiff has not even defined the term (priority shipping) sufficiently, and any alleged "promise" has not been shown to be definitive enough to be entitled to reliance by plaintiff. An amended complaint stating the proposed claim has not been submitted for review; nor has plaintiff outlined specific facts supporting this putative claim. Given the extended discovery period related to this case, and the fact that discovery is closed, the court will not allow further amendments.

*6 Defendants' motion for summary judgment as to plaintiff's claim of misrepresentation is GRANTED and permission is DENIED to plaintiff to amend its complaint to include claims of fraud in the inducement made in regard to priority shipping of orders placed at the Chicago show.

IV. Unlawful Tying-Sherman Act § 1

In Count IV, plaintiff alleges violation of the Sherman Act arising from defendants' conditioning the sale and delivery of Webkinz to the purchase of non-Webkinz merchandise. The Sherman Act does not explicitly prohibit tying arrangements, however such arrangements can violate Section 1 of the Sherman Act when they produce an anticompetitive effect. Requiring that a customer purchase un-

wanted products is not illegal; rather, it is the reduction of competition in the market for those unwanted "tied" products that forms the violation of the Sherman Act.

A tying arrangement is defined "as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 461-62, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). Tying arrangements have been found to be "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pac. Ry.,* 356 U.S. at 6. A tying claim under the Sherman Act requires that the plaintiff prove that a seller had substantial economic power in the tying product's market, and an anticompetitive effect in the tied-product market. *Highland Capital, Inc. v. Franklin National Bank,* 350 F.3d 558, 565 (6th Cir.2003) (citations omitted), *Eastman Kodak,* 504 U.S. at 462 (arrangement constitutes impermissible tie under § 1 of Sherman Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.").

There are two theories of tying-*per se* and rule-of-reason. Under rule-of-reason analysis, the antitrust plaintiff must show an adverse effect on competition. The Sixth Circuit has adopted the following three-step analysis for determining whether a tying arrangement is likely to cause such an anticompetitive effect: "(1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct." *Hand v. Central Transp., Inc.,* 779 F.2d 8, 11 (6th Cir.1985). Under traditional per se analysis, restraints of trade were condemned without any inquiry into the market power possessed by the defendant. However, under current per se analysis, the antitrust plaintiff must show the seller possesses substantial market power in the tying product market and that the arrangement affects a substantial volume of commerce in the tied market. *Kodak,* 504 U.S. at 462, 478-79. The two theories differ in only one respect-the per se analysis dispenses with proof of anticompetitive effects. *PSI Repair Services, Inc. v. Honeywell, Inc.,* 104 F.3d 811, 815 n. 2 (6th Cir.1997) (citing 10 Phillip E. Areeda et al., *Antitrust Law* ¶ 1760e, at 372 (1996)).

A. Relevant Product Market (Tying Market)

*7 Plaintiff defines the relevant tying market in this case as the market for toys combined with online internet gaming in the United States. Plaintiff has not produced any expert witness testimony regarding the relevant product market. A product market is defined in terms of interchangeability of use or cross-elasticity of demand. *Brown Shoe v. United States,* 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Defendants question why the market should exclude toys that do not have an online gaming component, or online gaming sites that are not combined with toys. There is no evidence in this case that other toys or web sites are not reasonably interchangeable with Webkinz, or that there is insufficient cross-elasticity of demand between such products and Webkinz.

B. Market Power in Relevant Product Market

Discovery in this case shows that defendants' sales of Webkinz in the United States from August 2006 to September 2007 were over $256 million. Plaintiff compares this figure to sales of Shining Stars, another toy that provides online gaming. Russ Berrie & Company, the manufacturer of Shining Stars, announced sales of $4 million in the second quarter of 2007.

Defendants' attack plaintiff's "proof" of market

power in the relevant product market. First, plaintiff presented no evidence that Shining Stars is Webkinz' closest competitor. Second, comparing the top two competitors in a market, without more, does not prove anything about either firm's market power. For example, if 50 other competitors had yearly sales of $5 million each, then Webkinz' $256 million in 2006 to 2007 would be only half of the relevant market. This is a different picture than plaintiff tries to present when it only compares figures to one competitor.

Plaintiff next argues that there are barriers to entry in the relevant product market, specifically, "network effects." A network effect refers to a situation where the value of a good or service depends on the number of existing users. As the popularity of the product increases, the purchase of the good by another consumer indirectly benefits those who already own the product. Webkinz has a social networking feature that allows a purchaser of a Webkinz to invite other Webkinz users to play an online game. Potential competitors face the problem of attracting customers when there are few others online. Plaintiff offers no evidence to support its "network effects" argument.

C. Tied Product Market

The basis for condemning tying arrangements as a violation of the Sherman Act lies in their impact on competition in the *tied* product market. *Illinois Tools Works v. Indep. Ink, Inc.*, 547 U.S. 28, 34, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). Plaintiff alleges that defendants conditioned the shipment of Webkinz to the purchase of Core Product. Core Product allegedly consists of three tied product markets: Souvenirs & Novelties, the Home Decorative Accessories Market, and the Seasonal Decorations Market. According to plaintiff, all three tied product markets are recognized as submarkets of the giftware industry. Plaintiff defines the Souvenirs & Novelties market as the United States market for the sale of items to souvenir and novelty shops that are designed to be bought and given as gifts for personal reasons or special events such as Mother's Day or graduation. The Home Decorative Accessories market is the United States market for products designed and manufactured to be bought to decorate the interior of a home. The Seasonal Decorations market is defined as the United States market for products designed and manufactured for the Holidays, such as Halloween, Thanksgiving, Christmas and Easter.

D. Injury to or Impact on Competition

*8 Plaintiff alleges that defendants had a policy requiring plaintiff and other retailers, on a nationwide basis, to purchase unspecified quantities of Core Product in order to receive shipments of Webkinz. According to plaintiff, Ganz was motivated by a desire to restrict competition in the relevant tying and tied product markets. Plaintiff suggests that at trial it will be able to prove it suffered damages from having to purchase the tied products, that took up valuable inventory space that could have been used for products that compete against the tied products.

Plaintiff's argument misses the point of the Sherman Act's protection of competition in the tied market. Plaintiff offers no evidence that the defendants' conduct resulted in an increase in price or a decrease in output of any tied product, or the elimination of any competing manufacturer of those products.

E. Conclusion

Defendants' motion for summary judgment as to plaintiff's Sherman Act claim is GRANTED. Plaintiff has failed to provide any evidence supporting its allegation of a negative impact on competition in the tied produce market.

CONCLUSION

For the reasons stated in this opinion, defendants' motion for summary judgment is DENIED in relation to plaintiff's claim of breach of contract regarding all Webkinz orders scheduled to ship prior to plaintiff's August 24, 2007 cancellation. In addition, defendants' motion for summary judgment as to plaintiff's claim of misrepresentation is GRAN-

TED and permission is DENIED to plaintiff to amend its complaint to include claims of fraud in the inducement.

Defendants' request for summary judgment in regard to plaintiff's claims for violation of the Sherman Act, breach of warranty and all breach of contract claims regarding Webkinz orders scheduled to ship after plaintiff's August 24 cancellation is GRANTED.

E.D.Mich.,2009.
Station Enterprises, Inc. v. Ganz, Inc.
Not Reported in F.Supp.2d, 2009 WL 2926572 (E.D.Mich.), 2009-2 Trade Cases P 76,737, 70 UCC Rep.Serv.2d 156

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 2230752 (E.D.Mich.), 70 UCC Rep.Serv.2d 368
(Cite as: 2009 WL 2230752 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
PJ WALLBANK SPRINGS, INC., Plaintiff,
v.
AMSTEK METAL LLC, Defendant.

No. 2:06-cv-15645.
July 22, 2009.

West KeySummary**Sales 343 ⇐284(1)**

343 Sales
343VI Warranties
343k281 Breach
343k284 Warranty of Quality, Fitness, or Condition
343k284(1) k. In General. Most Cited Cases

A spring manufacturer's claim against a steel supplier that wire provided was not "fit for ordinary purposes" failed because the manufacturer's electrical resistance stress relief process was not common enough that steel spring wire that broke in response to such stress relief would be regarded as unfit for the purpose of making springs. Evidence regarding the electrical resistance stress relief process only tended to show that the process existed and was known of, not that it was in wide enough use in the trade that wire that was incompatible with it could not satisfy the requirements of Michigan's implied warranty of merchantability requirements. M.C.L.A. § 440.2314.

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James E. Deline, Davidde A. Stella, Michael A. Sneyd, Kerr, Russell, Detroit, MI, for Defendant.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (document no. 81)

STEPHEN J. MURPHY, III, District Judge.

*1 The plaintiff in this action, PJ Wallbank Springs, Inc. ("Wallbank"), is engaged in the manufacture of springs, primarily for use by the automobile industry. The defendant, Amstek Metal LLC ("Amstek"), was for a time one of Wallbank's main suppliers of the steel wire from which the springs were made. A contract between the parties for the supply of the wire incorporated, among other documents, a technical specification designated GM186M, governing in part the physical characteristics of the wire. *See* General Motors Engineering Standards, Spring Materials: Chrome Silicon Spring Wire, GM186M (hereinafter "GM186M"), docket no. 81-13. This litigation arises out of an incident that occurred in 2006, in which springs manufactured by Wallbank began breaking before being inserted into autos. Wallbank now claims that the breakage was caused by defects in the wire shipped by Amstek, which rendered it out of conformity with GM186M and other aspects of the parties' contract.

This is Amstek's second motion for summary judgment. Only three claims by Wallbank survived Amstek's first motion. *See* document nos. 34, 38 & 94. Those claims are as follows. First, Wallbank alleges that a substance known as retained austenite was present in the Amstek wire in proportions greater than what was permitted by the parties' contract, and that the breakage was caused by the austenite. Second, Wallbank argues that the presence of the austenite is proof that the defective wire was processed different than other wire delivered by Amstek, and that such a process change would also be a violation of the parties' contract. Finally, Wallbank asserts that because the wire broke when put to its intended use-coiling into springs-it did not conform to the implied warranty of merchantability that it carried under Michigan law.

In the instant motion, Amstek asserts three general arguments not raised in its first motion for summary judgment. The first argument is that Wallbank has not adduced sufficient evidence in discovery to permit a factual finding that the broken springs were in fact made from Amstek wire, instead of wire from another of Wallbank's suppliers, or that if they were made from Amstek wire that the wire was defective. The second argument attacks Wallbank's expert testimony as to the mechanism by which the alleged defects caused the breakage. As will be explained below, Amstek argues that the theories put forth by Wallbank's expert are clearly incapable of accounting for the observed facts in this case, and thus Walbank has failed to carry its burden of proof on the issue of causation. Amstek's third argument goes only to merchantability: it argues that the evidence indicates that its wire was perfectly suited for use in standard spring-making processes, and broke only when processed through Wallbank's unique system. As a result, says Amstek, even if there was a defect in the wire that impaired its usefulness to Wallbank, this did not affect its general merchantability.

*2 For the reasons that follow, the Court decides that Amstek has pointed out deficiencies in Wallbank's case, but views only some of those deficiencies as so fatal to warrant summary judgment. Accordingly, the latest motion will be granted in part and denied in part.

LEGAL STANDARD-SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact regarding the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Martin v. Ohio Turnpike Comm'n,* 968 F.2d 606, 608 (6th Cir.1992).

In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences in a light most favorable to the nonmoving party. *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir.1987). The Court is not required or permitted, however, to judge the evidence or make findings of fact. *Id.* at 1435-36. The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *Id.* at 1435.

A fact is "material" for purposes of summary judgment if proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir.1984). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). FN1 Accordingly, when a reasonable jury could not find that the nonmoving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Id.; Feliciano v. City of Cleveland,* 988 F.2d 649, 654 (6th Cir.1993).

FN1. No jury demand has been filed in this case, and the Court will sit as the trier of fact. But "[t]he standard for summary judgment will be the same for cases where the judge sits as finder of fact." *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632, 637 (3d Cir.1993).

Once the moving party carries the initial burden of demonstrating that there are no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. *Anderson,* 477 U.S. at 256. To create a genuine issue of material fact, the nonmoving party must present

more than just some evidence of a disputed issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As the United States Supreme Court has stated, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50 (citations omitted); *see Celotex,* 477 U.S. at 322-23; *Matsushita,* 475 U.S. at 586-87.

*3 Consequently, the nonmoving party must do more than raise some doubt as to the existence of a fact; the nonmoving party must produce evidence that would be sufficient to require submission of the issue to the jury. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252; *see Cox v. Ky. Dep't of Transp.,* 53 F.3d 146, 150 (6th Cir.1995).

FACTS

I. *Manufacturing Wire*

A. Manufacturing Springs

The evidence indicates that the combined processes of manufacturing steel wire, and then of manufacturing springs from that wire, include five main stages that are relevant to this motion. Amstek did not itself manufacture the wire it sold to Wallbank, but instead purchased it from a Korean mill known as KIS. The first steps of the manufacturing process therefore took place at KIS's facility. The initial step is known as "austenitizing." This is a process whereby raw steel is heated to temperatures of approximately 850 degrees Celsius, in order to transform its internal microstructures into austenite. Austenite itself is not a desirable component of steel wire, but it can be further transformed into martensite, which *is* such a component. The second step, known as "quenching," is designed to induce this transformation. Because austenite cannot normally exist at room temperature, as the wire cools after the austenitizing process its microstructures will transform once again. If the cooling occurs rapidly enough, the austenite will become untempered martensite. During the quenching stage, the austenitized steel is immersed in oil or water in order to cause this rapid cooling. The third stage is "tempering," in which the wire is heated once again to convert the untempered martensite into the less-brittle tempered martensite.

At this point the wire is ready for shipping to Wallbank for further processing into springs. At Wallbank's facility, the final two crucial steps occur. The fourth stage is the coiling of the wire into springs. As a result of this process, the steel on the outside edges of the new spring is stretched, while the insides of the coil are compressed. This creates mechanical stresses on the spring that must be relieved by the fifth step, known as "stress relieving." FN2 The stress relieving process used by many spring manufacturers, and the one contemplated by the GM186M spec that Wallbank required its wire to conform to, involves baking the new springs in an oven for at least half an hour. GM186M, docket no. 81-13, § 6. PJ Wallbank Springs had used a system of this type in the 1970s, in which its springs appear to have been passed through ovens on conveyor belts, but Wallbank had experienced significant difficulties with springs becoming tangled together on the belts. Dep. of Melvyn Wallbank, docket no. 85-5, pp. 43-44. As a result, Melvyn Wallbank, who is now the President and CEO of PJ Wallbank and apparently was employed by the company at that time, developed a new stress relieving process for his company based on a technique that had recently been covered in the industry press, whereby springs were stress relieved by having an electrical current passed through them. Decl. of Melvyn Wallbank, docket no. 85-3, ¶ 8. In Wallbank's process, an electrical current is applied to the springs for approximately 3 seconds. Dep. of Brian M. Lopossa, docket no. 93-3, p. 94. Wallbank's target was to heat the springs to approximately 800

degrees Fahrenheit. Expert report of Dr. George Krauss, docket no. 54, p. 10. It is undisputed, however, that only the coils in the middle of the spring actually reached this temperature. *Id.* The springtips reached a significantly lower temperature. The only testimony in the record indicates that this temperature was 350 degrees Fahrenheit, *see* dep. of Arthur Griebel, docket no. 35-3, p. 94.[FN3]

> FN2. It appears that this step is also sometimes referred to as "tempering." In order to distinguish it from the other tempering that the evidence indicates occurs after quenching, the Court will refer to the post-coiling procedure as "stress relief."
>
> FN3. In its order on Amstek's previous summary judgment motions, the Court noted some confusion over whether Mr. Griebel had intended to state the temperature in degrees Fahrenheit or Celsius. *See* Opinion and Order of May 4th, docket no. 94, p. 11 n. 5. It is not relevant to this motion whether the difference in temperature between the center coils and the spring tips was 550° C or only some 135 degrees (as it would be if the tip temperature were 350° *Celsius*). The important fact-undisputed-is that a temperature gradient existed.

*4 After the spring has been formed and stress-relieved, Wallbank proceeds to insert them into its springpacks and other parts. Only one stage of this process is relevant here: at some point a metal object known as a "bayonet tab" is inserted into one end of the spring. *See* Stork CRS Report No. S-13674, docket no. 81-8, p. 9 fig. 2. The purpose of this tab is neither relevant to this motion nor revealed in the record. What *is* relevant is its effect on the spring: it appears that the insertion of the tab places a significant amount of stress on the last coil of the spring, which is where the breakages at issue in this case occurred.

II. *Spring Breakages*

One of the uses for Wallbank's springs is in automobile transmissions; in this capacity it sold many transmission springpacks to Allison Transmission ("Allison"), which at the time of the incident here in question was a division of General Motors. In late June of 2006, Allison reported finding broken springs in the transmission springpacks shipped to it by Wallbank. Based on these breakages, Allison ultimately "rejected approximately 93,761 spring packs." Docket no. 81-7, p. 8. "[M]ost or all of these parts" were eventually returned to Wallbank. *Id.* The record indicates that the returned parts still had their Wallbank barcodes on them, which would have permitted Wallbank to identify the date or dates the springs were manufactured. Dep. of Walter Piontkowski, docket no. 93-4, p. 148. But there is no record that any specific dating of this type was ever performed.[FN4] *Id.* Based on the ship date of the defective springs, however, Wallbank did identify a range of dates during which they must have been manufactured. *Id.* Wallbank's records indicated that on those dates, springs of the type that was eventually discovered broken had definitely been manufactured with KIS wire. *Id.* pp. 145-49. The evidence is somewhat equivocal as to whether wire from another manufacturer had also been used to produce the same type of springs during that period. *Id.*

> FN4. In an apparent attempt to evidence these facts, Wallbank has attached the declarations of two of its employees to its response to the instant motion. Decl. of Troy Roberts, docket no. 86; decl. of Walter Piontkowski, docket no 86-2. Mr. Robertson declares, that "[o]n or about June 23, 2006, Allison Transmission ('Allison') notified Wallbank that it had experienced spring breakages for part 29542191. From information provided by Allison and review of Wallbank's wire logs, Wallbank determined the parts had been made from Kiswire." Decl. of Troy Roberts at ¶ 2. Piontkowski states that "[w]hen GM and Allison Transmission reported spring breakages for part 29542191,

> I reviewed our system and determined the parts had been made from Kiswire." Decl. of Walter Piontkowski at ¶ 2. Amstek offers several objections to the admissibility of these statements, some of which seem to the Court to be potentially meritorious. Because the Court concludes that a question of fact exists even without these statements, however, no decision on those issues is necessary at this time.

This was not the first time some of Wallbank's springs had broken. Amstek has adduced, under seal, a memorandum created by Wallbank employee Walter Piontkowski, cataloging a number of apparently minor complaints that Wallbank received from customers who had found broken springs at their plants. Dep. of Walter Piontkowski, docket no. 85-8, pp. 85-86. This memorandum reveals a number of such incidents between 2004 and June of 2006. With one exception, each incident involved springs that were broken at the end coil near where the bayonet tab had been inserted. *Id.* at 91; Memorandum of Wire Breakages, docket no. 82. The memorandum includes the number of broken parts for most but not all of its entries; those numbers range from a single broken spring to 18 broken springs. Memorandum of Wire Breakages, docket no. 82.

The broken springs at Allison were discovered and communicated to Wallbank in late June of 2006. There is no evidence in the record as to the exactly, or even roughly, how many springs were found broken. According to Melvyn Wallbank, though, the previous problems with broken springs had been "incidental events, troubling but incidental events," whereas the June 2006 breakage at Allison "was like over the cliff free-fall." Dep. of Melvyn John Wallbank, docket no. 85-5, p. 292. After Allison concluded that only KIS wire was involved in the breakage, it instructed Wallbank to discontinue its use of KIS wire. Wallbank did so, and after this "experienced virtually no broken springs on part 42191," which had been causing the problems before. Supp. Decl. of Melvyn Wallbank, docket no. 87-2, ¶ 3. Specifically, Wallbank observed a total of two broken springs on part 42191 between August 21 st and September 20th, 2006. *Id.*

*5 Between September and November of 2006, despite having discontinued its use of KIS wire, Wallbank did experience some additional broken springs. Wallbank had been experiencing a different problem known as "spring disengagement," in which the springs were not, or did not remain, physically attached to other parts of the springpack assembly. Wallbank hired a company known as "Fasttek" to study how this problem might be corrected.[FN5] One of Fasttek's recommendations was to decrease the diameter of the end coil of the springs, in order to create a tighter fit. *Id.* ¶ 5. Predictably, this made the end coil of the spring more susceptible to breaking. *Id.* ¶¶ 5-6; e-mail from Ram Adaikappan, Oct. 12, 2006, docket no. 81-5, p. 3; dep. of Melvyn John Wallbank, docket no. 85-5, pp. 290-91. Correspondence from Fasttek to Wallbank, however, indicates that Fasttek suspected that at least some of the disengagements were actually caused by spring breakages. E-mail from Ram Adaikappan, Oct. 10, 2006, docket no. 81-5, p. 2. In any event, between September 21st and November 20th, 2006, Wallbank found 20 more broken springs, out of 368,028 parts produced, *id.* ¶ 5, which Melvyn Wallbank describes as "statistically insignificant" compared to the problems it experienced with the broken springs at Allison, *id.* ¶ 6. After switching to yet another wire supplier on November 21 st, 2006, and through at least April 15th, 2009, Wallbank experienced no further spring breakages on part 42191. *Id.* ¶ 7.

> FN5. Fasttek's full name is not disclosed in the record.

III. *Testing After the Allison Breakage Event*

In response to breakage at Allison's facility in June of 2006, Wallbank and Allison engaged in extensive testing of wire from various manufacturers. Allison sent a group of engineers known as a "Red

X Team," which was charged with identifying whether the problem causing the breakage was in the material or was occurring at some specific point in Wallbank's manufacturing process. The Red X Team did not attempt to build any kind of theoretical model of what was wrong with the wire or springs, but instead focused on empirically identifying which material or process was causing the problem, and finding a replacement for that element that would work better.

In that regard, the Red X Team's undisputed finding was that the breakage occurred only on springs that were made from KIS wire. *See* Dep. Of Walter Piontkowski, docket no. 81-3, p. 119 ("In all the testing that [the Red X Team] did, the KIS wire would break, the Mount Joy didn't."), *id.;* dep. of Brian M. Lopossa, docket no. 85-4, p. 117 ("[W]e did a random test versus Mount Joy and KIS material, same setup. We just ran them in a random order, and it always followed the KIS material. So that's why we then deselected that and we went toward the supplier."); *id.* at 119 ("[W]e made springs ... at 800 degrees for 2.8 seconds dwell time. The KIS material, we had 16 good and 74 bad." FN6 "The Joy, we had 100 good with 0 bad."); *id.* at157 ("KIS wire before was the one that was breaking. We didn't know what was causing it."); *id* . at 223-36; *id.,* docket no. 93-3, p. 86 ("KIS broke; Mount Joy did not break."). From this testing, Allison and Wallbank "infer[red]" that it was springs made from KIS wire that had been breaking at Allison's plant, dep. of Walter Piontkowski, docket no. 81-3, p. 121, and Allison directed Wallbank not to use any more KIS wire in making springs for Allison, dep. of Brian M. Lopossa, docket no. 85-4, pp. 156-57.

> FN6. Because these tests were done after manipulating the coiling process in various ways, including by decreasing the diameter of the end coil to increase the tension on the spring, this ratio likely is not indicative of the proportion of springs actually delivered to Allison that eventually broke, and the Court considers it only as qualitative evidence that testing revealed a tendency toward breakage in the KIS wire.

***6** Wallbank does not dispute, however, that even with springs made from KIS wire the Red X Team was able to eliminate the breakage problem by using an oven for stress relief instead of Wallbank's electrical resistance technique. Dep. of Melvyn Wallbank, docket no. 81-6, pp. 126-29, 247; dep. of Brian M. Lopossa, docket no. 85-4, pp. 114, 120; dep. of Walter Piontkowski, docket no. 81-3, pp. 170-73; Dep. of Larry Witte, docket no. 93-6, p. 32 ("When they tempered the entire spring in an oven at 800, they could bend it, it did not have the fracture behavior."); Stork CRS Report No. S-13674, docket no. 81-8, p. 4: ("PJ Wallbank Springs formed springs from the 'Bad' KIS wire but did not temper the springs. None of the springs cracked after insertion of the bayonet tips.") Thus, the testing conducted by Wallbank and Allison's Red X Team revealed that springs made from wire in Wallbank's facility broke only if (1) made out of KIS wire and (2) subjected to Walbank's electrical resistance stress relieving process.

It is also undisputed that no testing was done on any of the springs that had actually been shipped to Allison, or even on springs made from the same reels but not shipped to Allison. Dep. of Walter Piontkowski, docket no. 81-3, p. 165; Dep. of Melvyn John Wallbank, docket no. 81-6, p. 121. Instead, the KIS wire used in the Red X Team's testing was taken from two or three other reels of .0625" wire, out of the many that Wallbank had on hand. Dep. of Walter Piontkowski, docket no. 81-3. pp. 121, 164; dep. of Melvyn John Wallbank, docket no. 81-6, pp. 121-22. It appears based on other documentation in the record that the KIS heat numbers of the reels tested by Wallbank were 29205-7, 26920-2, and 37901-2. Letter from Walter Piontkowski to Charles Stevens, Aug. 10, 2006, docket no. 93-5, p. 11. Other testing arranged for by Wallbank, including testing performed by KIS on samples provided by Wallbank, was also done

on these test reels and possibly a very small number of others. J.Y. Choi, Analysis Report of 0.0625" OT CrSi wire Breakage for PJ Wallbank, docket no. 86-7, p. 1; J.Y. Choi, Additional Analysis Report of 0.0625" OT CrSi Breakage at PJ Wallbank, docket no. 86-9, pp. 3-5; Arthur H. Griebel, Stork CRS Report No. S-13674, docket no. 38-4, pp. 7-8; Retained Austenite (RA) Evaluation, docket no. 48-9, *passim;* Expert Report of Dr. George Krauss, docket no. 54, pp. 8-9. As Wallbank has since sold for scrap all the suspect springs that were returned to it by Amstek, dep. of Walter Piontkowski, docket no. 81-3, p. 165, it is too late now for any such tests to be conducted on those springs.

ANALYSIS

I. *Lack of Evidence as to Characteristics of Springs Broken at Allison*

Based on this record, Amstek notes that Wallbank has no direct proof (1) that it was Amstek-delivered springs that broke at Allison and consequently caused Wallbank damages, or (2) that the physical characteristics of the broken springs did not conform to the contractual requirements. Instead, Wallbank's evidence is that *other* KIS wire both was potentially nonconforming and tended to break when run through Wallbank's manufacturing processes.

*7 It is true that there is no evidence in the record that any testing was done to ascertain the physical characteristics of the springs that actually broke at Allison, or of any wire from the reels from which those springs were made. In the Court's view, however, Wallbank *does* have evidence that the springs found broken at Allison were made from KIS wire. First, it is undisputed that Wallbank was in fact using KIS wire in its plant on at least some of the days when the broken springs were manufactured. Second, there is substantial testimony in the record that after Wallbank *stopped* using KIS wire-at Allison's request-the breakages also stopped.

Allison challenges this second conclusion as untruthful by pointing to records from Wallbank showing that spring breakages were occurring in non-KIS wire both before and after the incident at Allison, and by noting that Wallbank has failed to provide even an estimate of the actual number of springs that broke in that incident. The Court agrees that this omission is somewhat suspect, but concludes that the testimony by Melvyn Wallbank that the Allison breakage was comparatively much greater than previous breakages would permit a reasonable finder of fact to conclude that the problem substantially subsided after Wallbank discontinued the use of KIS wire.[FN7]

FN7. This would be true even if the breakages that occurred after the Allison incident, in September through November of 2006, could not be discounted due to the changes in diameter of the spring end coils that Wallbank was experimenting with at that time. Amstek objects that these breakages should *not* be discounted, because the broken springs that were made from KIS wire also had reduced-diameter end coils. This is wrong for a multitude of reasons. First, it was only during the post-incident testing that the end coil diameter was reduced; there is no evidence that the production parts that broke at Allison had anything other than a standard diameter end coil. Second, the evidence is that a very high portion, up to 60 percent or higher, of reduced-diameter springs made from KIS wire broke in testing. Comparatively, only 20 out of 368,028 reduced-diameter springs broke in the September-to-November period. Third, there is no data in the record as to how much the end coil diameter was reduced, either in the KIS wire testing process or in the later period, and accordingly there is no way to meaningfully compare breakage rates between the two.

Based on this evidence, a reasonable trier of fact could conclude that it was KIS springs that

were breaking at the Allison plant. The evidence would also permit a finding that, when a sampling of the unused wire reels in Wallbank's factory immediately after the breakage at Allison was tested, only the KIS wire was found to have excessive retained austenite, and only the KIS wire broke. In the Court's view, these two conclusions would also permit a reasonable finder of fact to infer that the broken springs made from KIS wire found at Allison's plant had been made from wire with the same deficiencies as the tested wire.

Amstek repeatedly cites *Citizens Ins. Co. v. KIC Chems., Inc.*, No. 04-385, 2007 WL 1238893 (W.D.Mich. Apr.27, 2007), for the opposite conclusion. In that case, a manufacturer of dried fruit products, had purchased sunflower oil to spray on its fruit before packaging in order to keep the fruit from sticking together. The oil was delivered in June and August of 2001. After receiving complaints from customers in August and November 2001 that the fruit had an oily odor and flavor, the fruit manufacturer arranged for testing of a sample of oil in November of that year. The testing revealed that the iodine and peroxide contents of the oil were above specification. In a suit for breach of contract, the court concluded that "[p]laintiffs have ....failed to show that the testing conducted in November (four or five months after acceptance) was actually done on samples from June or August," *id.* at *4, and therefore entered summary judgment in favor of the defendants. *Id.*

Amstek argues that the instant case is indistinguishable from *KIC*, in that it involves one set of goods that caused damages, and another that test results allegedly indicate was defective, but no evidence that the same defect was present in the goods that caused the damages. In the Court's view, however, this similarity is partly superficial. There are two reasons for this. First, there are crucial differences between steel wire and sunflower oil that distinguish this case from *KIC*. Common sense dictates that, as sunflower oil is an organic substance, its qualities can be affected by age, storage temperature, possibly humidity, and any number of other factors that might easily result in significant differences between two different shipments. By contrast, one would not expect compositional defects in steel wire of the kind alleged here to be caused by such common phenomena. Indeed, there is no evidence in the record that such defects could be caused by anything other than a change in either the raw materials or the processes used in manufacturing the wire. Under these circumstances, testing of the type offered here could support a finding that the broken springs were made from defective wire, even though similar testing on sunflower oil was insufficient in *KIC*.

*8 Second, this case is different from *KIC* in that there was apparently no evidence in that case that the fruit manufacturer had been able to eliminate the customer complaints by discontinuing use of the defendant's sunflower oil. In other words, in *KIC* there was no showing that the problem would not occur if nondefective oil were used. Here, by contrast, Wallbank has shown that the breakage problem stopped, or at a minimum subsided to negligible levels, after it stopped using KIS wire at its customers' express request. This not only tends to show that KIS wire was used in Allison's broken springs, but also that any defect that might be causing *other* broken springs made from KIS wire was also likely the cause of the breakage at Allison. As a result, the rationale of *KIC* does not mandate summary judgment based on the evidence in this case.

In summary, to prevail on any of its claims Wallbank must show (I) that the wire that broke at Allison's plant had been delivered by Amstek, and (ii) that this same wire had some defect that caused it to break. The evidence adduced to date by Wallbank on both of these issues, and particularly on the second one, is far from overwhelming. Nevertheless, the Court is readily able to say that a reasonable trier of fact could find for Wallbank on these issues. Accordingly, summary judgment is not appropriate on these grounds.

II. *Viability of Wallbank's Technical Theory of Causation*

Amstek next argues that, even assuming that KIS wire did not conform to the contract specifications and was in fact involved in the breakage that occurred at Allison's plant, Wallbank has offered no explanation of how the defects in the wire could have caused the breakage that actually occurred. Amstek purports to bring this argument only against Wallbank's claim for breach of an implied warranty of merchantability. But under Michigan law, a plaintiff cannot recover on either a contract or an implied-warranty claim without proof that the breach caused the plaintiff damages. *Alan Custom Homes, Inc. v. Krol*, 256 Mich.App. 505, 512, 667 N.W.2d 379 (2003) (contract); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 96, 133 N.W.2d 129 (1965) (implied warranty); *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 737 (6th Cir.2000) (applying Michigan law and citing *Piercefield*). FN8 Accordingly, Amstek's scientific objections to Wallbank's theory of causation go to the viability of all of Wallbank's remaining claims.

> FN8. *Piercefield* was a products-liability case, as was *Hollister* and many others of its progeny. But the Court does not doubt that a similar element of causation is a component of all implied-warranty claims.

A. Wallbank's Theory

Wallbank claims that the springs in question broke because of a defect in the steel known as "quench embrittlement," which may have been aggravated by another phenomenon known as stress-induced austenite transformation. It advances these claims by way of its expert witness, Dr. George Krauss, whose expert report and declaration appear on the docket at entries 54 and 87-6. The following statement of Krauss's theories is derived from those documents. FN9 According to Krauss, the root cause of both the quench embrittlement and the stress-induced austenite transformation experienced by the springs made from KIS wire was the excessive heat that Wallbank alleges was used by KIS in its austenitizing ovens. Krauss states that the heat of the austenitizing process causes some of the carbides present in the pre-austenitized steel to dissolve, which releases the carbon molecules that previously were components of the carbides. If the austenitizing temperature is too high, the carbides will melt completely, releasing an undesirably high number of carbon molecules. These excess carbon molecules will tend to congregate along the boundaries of the austenite grains, and remain there even after some of the austenite transforms to martensite. The result is quench embrittlement-a higher susceptibility to breakage along the grain boundaries, which is caused by this carbon buildup.

> FN9. The Court acknowledges the presence in the record of other statements by Dr. Krauss, but finds his report and declaration sufficient to flesh out his opinions.

*9 According to Krauss, the presence of these carbon molecules also has detrimental effects on the remainder of the spring-manufacturing procses. Specifically, austenite with a higher carbon content will not begin transforming to martensite until it reaches a lower quenching temperature than lower-carbon austenite would require for a similar transformation, with the result that in steel with high-carbon austenite, more retained austenite is left once the quench is complete. This austenite is what leads to stress-induced austenite transformation. Krauss states that this phenomenon occurs when high retained-austenite steel is coiled into a spring. The mechanical stresses of the coiling cause the austenite to transform to untempered martensite. Because untempered martensite is less dense than austenite, this transformation results in an increase of volume in the portions of the spring subjected to the coiling stresses, thus adding to the stress on the spring. When the newly-made spring is run through a stress relieving process, Krauss claims that the presence of this untempered martensite causes a phenomenon known as transition carbide precipitation, which reduces the volume of the martensite and thus acts to increase rather than reduce the

stresses on the steel. In this way, although he does not explicitly say so, it appears that Krauss's position is that when applied to springs with excessive pre-coiling retained austenite levels, the stress relieving process will actually backfire in some measure, and increase rather than reduce the stresses on the spring.

B. Amstek's Objections; Analysis

Amstek lodges essentially four objections to the applicability of this theory to the facts of this case. One of the objections is that the evidence indicates that the wire was *not* excessively austenitized, as Krauss maintains. The Court has already considered these arguments in connection with Wallbank's motion for reconsideration of the Court's order on Amstek's first summary judgment motion. There, the Court concluded that genuine questions of fact remain as to whether the wire was properly austenitzed. The Court will not revisit that conclusion here.

Amstek also objects that quench embrittlement would not explain why Wallbank's broken springs fractured only near their tips, and not at random locations throughout the springs. There appears to be no dispute that when quench embrittlement occurs in a length of wire, it weakens the entire wire and not just the tips. The record clearly suggests, however, that the springs in question here broke near their tips because the insertion of the bayonet tab at the end of the spring placed extra stress on the end coil. Stork CRS Report No. S-13674, docket no. 81-8, pp. 2-4; *id.* p. 9 fig. 2; Dep. of Melvyn John Wallbank, docket no. 81-6, p. 247. In fact, there is testimony that in testing, three quarters of the observed spring fractures occurred when the bayonet tab was inserted. Dep. of Brian M. Lopossa, docket no. 93-3, p. 220. Further, the snap-ring pliers test that actually resulted in much of the other breakage during testing was intended to simulate the insertion of a bayonet tab. *Id.* p. 98; dep. of Walter Piontkowski, docket no. 93-4, p. 172. Accordingly, it makes perfect sense that most of the fractures would be near this top coil, and the Court does not find the physical placement of the breakages on Wallbank's springs to be an insuperable obstacle to its theory of quench embrittlement.

***10** Another of Amstek's objections is that the presence of silicon in the KIS wire should have retarded the formation of the cementites that cause quench embrittlement. It bases this argument on statements in Krauss's expert report. In his expert report and again in his more recent declaration, Krauss considers and rejects another form of embrittlement, known as tempered martensite embrittlement ("TME"), as a possible cause of the breakage. Expert Report of Dr. George Krauss ("Krauss report"), docket no. 54, p. 6; decl. of Dr. George Krauss ("Krauss decl."), docket no. 87-6, ¶ 13. Krauss appears to state that TME is caused by the formation of excessive amounts of cementite during the tempering process. Krauss report at 6; Krauss decl. at ¶ 13. Silicon retards cementite formation, thus preventing TME from occurring in all but the hottest tempering processes. Krauss report at 6; Krauss decl. at ¶ 13. Dr. Krauss notes that the KIS wire contains appreciable quantities of silicon, and concludes that the presence of this silicon would have prevented TME from occurring in the wire. Krauss report at 6; Krauss decl. at ¶ 13.[FN10]

> FN10. In Amstek's previous motion for summary judgment, the Court held that Wallbank had raised a question of fact as to whether the breakage in its springs had been caused by tempered martensite embrittlement. Opinion and Order of May 4th, 2009, docket no. 94, pp. 18-19. On this motion, Wallbank has adopted Krauss's conclusions and abandoned this position. Response brief, docket no. 85, p. 17 n. 3. Accordingly, Wallbank now relies solely on a combination of quench embrittlement and stress-induced austenite transformation as the cause of the breakage.

Amstek seizes on these statements, arguing that if silicon can prevent TME by inhibiting cementite formation, it must also prevent quench embrittle-

ment in the same way. The differences between Krauss's respective accounts of how TME and quench embrittlement occur, however, lead the Court to give scant weight to this argument. According to Krauss, TME occurs during the tempering process, whereas quench embrittlement occurs earlier, during the austenitizing and quenching stages of manufacture. Thus, in the absence of any evidence to the contrary, a reasonable finder of fact could easily conclude that silicon is capable of retarding cementite formation during tempering but not during quenching or austenitizing, thus explaining how it could prevent TME but not quench embrittlement.

Amstek's remaining objection is more serious. It notes that according to Dr. Krauss's own voluminous writings on the topic, a basic characteristic of quench embrittlement is that it occurs during the austenitizing and quenching processes, without any tempering and certainly before the wire is coiled into a spring or otherwise shaped. Indeed, one of Krauss's own articles defines quench embrittlement as "the susceptibility to intergranular fracture in as-quenched and low-temperature tempered high-carbon steels due to cementite formation." A. Reguly, G. Krauss, et al., *Quench Embrittlement of Hardened 5160 Steel as a Function of Austenitizing Temperature,* Metallurgical and Materials Transactions A, Jan. 2004, docket no. 74-15, p. 153. The introductory material of the same article explains that

> Under tensile or bending stress states, the higher carbon steels are highly susceptible to intergranular fracture in both the as-quenched condition and after tempering at low temperatures generally considered to be safe from embrittlement phenomena. In view of the fact that tempering is not required to render the microstructure susceptible to intergranular fracture, the latter embrittlement phenomenon is referred to as quench embrittlement.

***11** *Id.* Similarly, a textbook authored by Dr. Krauss states, in the first sentence of its section on quench embrittlement, that "[t]he conditions for *quench embrittlement* .... develop in high-carbon steels during austenitizing or during quenching; tempering is not required." George Krauss, *Steels: Processing, Structure, and Performance,* at 390 (2005). Krauss's declaration submitted in this litigation confirms this by stating that

> [q]uench embrittlement develops during austenitizing when carbon in austenite segregates to austenite grain boundaries and creates, together with the segregation of phosphorous if present, the conditions for brittle intergranular fracture along the prior austenite grain boundaries after quenching to martensite and tempering at temperatures below those in a silicon-containing steel that would procedure tempered martensite embrittlement.

Decl. of Dr. George Krauss, docket no. 87-6, ¶ 15.

Given this characteristic of quench embrittlement, Amstek questions how it could possibly have been the cause of the breakage in this case, which undisputedly occurred only *after* the KIS wire had been formed into springs and stress relieved with electrical resistance. To put it differently, Amstek asks how an embrittlement phenomenon that is supposed to be present as soon as quenching is completed could fail to result in breakage (1) during the spring coiling process, (2) under snap-ring pliers testing conducted after the coiling process but before stress relief, and (3) during pliers testing even after both coiling and stress relief by oven baking.

Krauss's response, as offered by Wallbank, is somewhat incomplete. Although Krauss does not use the term "stress induced austenite transformation" in the relevant declaration, *see* docket no. 87-6, it appears to be his position that quench embrittlement alone would not have rendered the wire weak enough to break during the coiling or pliers testing processes, but that only the added stresses of coiling and stress relief in wire with excessive austenite-that is, stress-induced austenite transformation-would lead to breakage.

On its face, this explanation contains nothing that would require a reasonable trier of fact to reject it. Adopting such a theory would mean believing Krauss's implication that process called "stress relieving" actually *increases* the stresses in some kinds of wire, and one would ordinarily expect this sort of counterintuitive result to be addressed somewhat more squarely than it is in the materials submitted from Dr. Krauss. Nevertheless, neither Krauss nor Wallbank is maintaining that stress relief results in embrittlement in all or even most wire. Instead, their position is that it exacerbates embrittlement only in wire that contains defectively high levels of retained austenite. This is not inherently implausible.

More seriously, however, Krauss's theory would fail to predict the results that were actually observed in this case. In particular, Krauss appears to state that *any* kind of stress relief process will cause transition carbide precipitation in the martensite created when a high-austenite wire is coiled into a spring, with the resultant tension making the difference between breakage and non-breakage in the spring. This fails to explain the unanimous testimony of all the witnesses involved that springs made from KIS wire did *not* break when stress-relieved in an oven, although they did break when subjected to electrical resistance stress relief. In fact, it is undisputed that the electrical resistance tempering process heats the spring ends-the areas where the breakage occurred-to a temperature significantly lower that of the spring center, and below the oven temperature in the alternative stress relief process. Accordingly, as it is stated in the record, Krauss's theory might lead one to expect that oven stress-relief would cause *more* contraction of the martensite at the springtips, and thus lead to more embrittlement, than would electrical resistance tempering. In fact, the observed facts were more consistent with the opposite result.

*12 This discrepancy between the predictions of Wallbank's theory of causation and the observed behavior of the wire in question is undoubtedly a very serious weakness in Wallbank's case. The Court is unwilling, however, to conclude that it would completely prevent a reasonable finder of fact from returning a verdict for Wallbank. Wallbank has adduced testimony from an expert witness that purports to explain, step by step, how the KIS wire became embrittled. This theory is facially plausible and also would predict the breakage that actually occurred in this case. While it apparently would have also predicted *other* breakage of KIS wire that did not occur here, that breakage is not directly in issue in this action. Accordingly, the Court regards this weakness in Krauss's theory as perhaps damaging but not entirely destroying its ability to establish the causation element of Wallbank's case. Summary judgment is not appropriate on this basis.

MERCHANTABILITY AND ELECTRICAL RESISTANCE STRESS RELIEF

Amstek's final argument goes solely to Wallbank's merchantability claim. Mich. Comp. Laws § 440.2314(2) provides, in relevant part, that in order to be merchantable goods must be at least such as

> (a) pass without objection in the trade under the contract description; and
>
> ...
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved
> ...

Amstek claims that because springs made from KIS wire do not break when stress-relieved in an oven, its wire would "pass without objection in the trade" and would be "fit for the ordinary purposes" for which steel spring wire is used. In contradiction, Wallbank suggests that the sheer volume of its own production of springs should preclude any such finding. Wallbank also appears to argue that the

KIS wire was unmerchantable because (1) the retained austenite levels in the production wire were higher than those in the initial samples Amstek had provided to Wallbank, and (2) the retained austenite levels were higher than permitted by the contract.

1. *"Pass Without Objection in the Trade" and "Fit for Ordinary Purposes"*

To the extent that Wallbank claims that the KIS wire did not "pass without objection in the trade," or was not "fit for the ordinary purposes for which such goods are used," the outcome of this motion turns primarily on just how rare electrical resistance stress relief is in the steel spring trade. Specifically, summary judgment for Amstek will be appropriate if a reasonable finder of fact would be unable to conclude that Wallbank's stress relief process is common enough that steel spring wire that broke in response to such stress relief would be objected to in the trade, or be regarded as unfit for the purpose of making springs.

In this regard, Amstek has adduced evidence that Wallbank is the only user of KIS wire that ever complained about retained austenite levels in its wire, decl. of Sun-Young Lim ("Lim decl."), docket no. 81-11, ¶ 18; decl. of Loren Godfrey ("Godfrey decl."), docket no. 81-12, ¶ 8, and that Amstek's own experts know of no spring maker other than Wallbank that uses electrical resistance, Lim decl. at ¶ 19; Godfrey decl. at ¶ 3. Wallbank, by contrast, notes that it has produced more than five billion springs for the automotive industry since the year 1982, all of which were stress relieved with its electrical resistance process. Decl. of Melvyn Wallbank, docket no. 85-3, ¶ 10. Further, Melvyn Wallbank states that "[e]lectrical resistance stress relieving of spring packs has been the standard method used by the two main suppliers of transmission springpacks in the North American market since it was introduced in the 1970's." *Id.* at ¶ 8. Wallbank also notes that the technique has been the subject of a published article, *see* Richard J. Lesko, *A New Approach in Stress Relieving Springs,* Springs Magazine, May 1974, at 47, docket 85-3 at p. 6, as well as having been patented, *see* U.S. Patent No. 3,935,413 (filed May 30, 1974), docket no. 85-7. Finally, Wallbank notes that its customers have instructed it not to use KIS wire, and argues that this obviously demonstrates the wire's unmerchantability.

*13 Again, the evidence adduced by Wallbank in support of this claim exhibits serious weaknesses. The Court does not regard the number of springs manufactured by Wallbank, the article and patent on electrical resistance stress relief, or the customer rejections of springs made from KIS wire to be probative of the issue at hand. The article and the patent demonstrate merely that the process existed and was known to some number of experts in the field. They have little or no tendency to show that it was in wide enough use in the trade that wire that was incompatible with it would not satisfy the requirements of § 440.2314. Likewise, without knowing the volume of worldwide production in the trade, a recitation of the number of springs produced by Wallbank does not demonstrate the standard or non-standard nature of its processes. Finally, the undisputed evidence is that if Wallbank had used an oven-heating stress relief process, the springs would not have broken and there would have been no cause for its customers to ask it not to use KIS wire. Thus, the rejections of springs made from KIS wire highlight the importance of the commonness or rarity of electrical resistance stress relief, but they are not helpful in resolving the issue. This leaves only Melvyn Wallbank's statement that the two main suppliers of springpacks in the North American market have used electrical resistance stress relief for more than 30 years. Even this statement is not as clear as it could be: it does not name the two main suppliers, and it fails to provide any sense of the size of the North American transmission springpack market in comparison to the worldwide market for steel springs.[FN11]

FN11. It is possible that the relevant "trade," for purposes of applying § 440.2314, would be the springpack in-

> dustry only, rather than the steel-spring industry as a whole. There is, however, simply no evidence in the record on this question. Nor does the record disclose any reason to doubt that all steel springs must be stress relieved in some way, since they all obviously are exposed to coiling stresses. As a result, no reasonable finder of fact could find on this record that transmission springs are so different from other steel springs that their manufacture constitutes its own "trade."

In this instance, the Court does regard these weaknesses as fatal to Wallbank's claim. On this record, the portion of steel spring production that takes place using electrical resistance, both in North America and worldwide, is simply unknown. Wallbank's evidence does not sufficiently establish this fact, nor does it necessarily contradict Amstek's evidence that Wallbank's process is relatively unique. Accordingly, at a minimum this record would not permit a trier of fact to come to any meaningful conclusion as to whether a spring making process involving electrical resistance stress relief is an ordinary purpose to which steel spring wire is put, or whether wire that was incompatible with that process would pass without objection in the trade. For that reason, insofar as Wallbank's merchantability claim relies on Mich. Comp. Laws § 440.2314(2)(a) and (c), the Court concludes that Wallbank has adduced insufficient evidence to support it, and that summary judgment in favor of Amstek is appropriate.

II. *§ 440.2314(2)(d)*

Wallbank also argues that the wire delivered by Amstek did not "run, within the variations permitted by the agreement," within the meaning of Mich. Comp. Laws § 440.2314(2)(d). Wallbank bases this contention on its suggestion that the initial samples provided by Amstek did not have excessive levels of retained austenite, and on the simple fact that, according to Wallbank, the level of retained austenite in the KIS wire was in fact *not* "within the variations permitted by the agreement."

*14 Amstek correctly notes that the first of these arguments is really an attempt to resurrect Wallbank's express warranty claim, on which the Court has already granted summary judgment. The Court's earlier decision was based on Wallbank's failure to adduce any evidence whatsoever as to the characteristics of the initial samples provided by Amstek. Opinion and Order of May 4th, 2009, docket no. 94, pp. 33-34. There is no evidence to suggest that every spring made from high-austenite steel broke after electrical resistance stress relief; in fact it appears that a substantial number did not. Therefore, even if the initial samples did not break, as Wallbank suggests, this is not probative of whether the production wire delivered by Amstek had different technical characteristics. The Court accordingly finds no reason to revisit its earlier conclusion on this issue.

Wallbank's other argument is that since Mich. Comp. Laws § 440.2314(2)(d) requires that merchantable goods must "run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved," then Amstek's wire was not within the variations permitted by the agreement with respect to its retained austenite levels; and so Amstek accordingly breached the implied warranty of merchantability.[FN12] It appears, then, that Wallbank's position is that the delivery of goods that do not conform to the contract specifications for their physical characteristics would create *per se* liability both on the contract and for breach of an implied warranty of merchantability.

> FN12. Wallbank does *not* argue that the variations in retained austenite levels from one reel of KIS wire to another violated the implied warranty of merchantability, and the Court therefore will not decide whether such a claim would be viable.

It is not clear to the Court what advantage there might be to giving two different legal names to a

single theory of recovery. Nevertheless, the facial meaning of the "within the variations permitted by the agreement" language in § 440.2314 does indicate that the parties may contract for a different range of variations than would otherwise be required by the implied warranty of merchantability, and that the violation of such a contractual provision would also violate the warranty. The official comments to § 2-314 of the Uniform Commercial Code, of which Mich. Comp. Laws § 440.2314 is an enactment, suggest as much. Uniform Commercial Code, § 2-314 cmt. 11 ("within the variations" language is a "reminder" that usages of trade often "permit substantial variations" in the quality of goods). At least one other court has apparently adopted a theory similar to the one advanced here by Wallbank. *See Custom Decorative Moldings, Inc. v. Innovative Plastics Tech., Inc.*, no. Civ-A-17592, 2000 WL 1273301, at *6 (Del.Ch. Aug.30, 2000). Accordingly, the Court will permit Wallbank to proceed with its merchantability claim, only on the basis of Mich. Comp. Laws § 440.2314(2)(d), and only insofar as it claims that the wire delivered by Amstek was physically out of conformity with the technical specifications of the contract between the two.

CONCLUSION AND ORDER

*15 Although its evidence shows substantial weaknesses, Wallbank has raised questions of fact as to whether the wire that broke at Allison's facility was KIS wire, whether it contained excessive levels of retained austenite, and whether such a defect could have caused the breakage observed in this case. On the other hand, Wallbank has failed to adduce evidence that would permit the trier of fact to conclude that its processes for manufacturing springs are an "ordinary use" to which steel spring wire is put, or that wire that failed when subjected to those processes would be objected to in the trade.

WHEREFORE, it is hereby **ORDERED** that defendant's motion for summary judgment is **GRANTED IN PART,** with respect to Count II of the Complaint (breach of implied warranty), except insofar as plaintiff asserts that the wire's physical nonconformity with contract specifications also amounted to a breach of an implied warrant of merchantability. Insofar as the motion has been granted, Count II is **DISMISSED WITH PREJUDICE.** The motion is **DENIED IN PART,** with respect to all remaining counts.

SO ORDERED.

E.D.Mich.,2009.
PJ Wallbank Springs, Inc. v. Amstek Metal LLC
Not Reported in F.Supp.2d, 2009 WL 2230752 (E.D.Mich.), 70 UCC Rep.Serv.2d 368

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615 F.Supp.2d 589, 68 UCC Rep.Serv.2d 852
(Cite as: 615 F.Supp.2d 589)

H

United States District Court,
E.D. Michigan,
Southern Division.
METROPOLITAN ALLOYS CORPORATION, Plaintiff,
v.
CONSIDAR METAL MARKETING, INC., Defendant.

Case No. 06-12667.
April 30, 2009.

Background: Manufacturer of zinc-based alloys brought action against marketer and distributor of zinc arising from defendant's alleged failure to perform in accordance with an oral commitment to supply zinc to plaintiff. The District Court, Gerald E. Rosen, Chief Judge, 2007 WL 2874005, granted in part and denied in part defendant's motion to dismiss. Plaintiff amended its complaint, asserting state-law fraud, breach of contract and promissory estoppel claims. Defendant moved for summary judgment.

Holdings: The District Court held that:
(1) genuine issues of material fact as to whether verbal commitment was barred by statute of frauds under Michigan Uniform Commercial Code (UCC) precluded summary judgment on manufacturer's breach of contract claim, and
(2) genuine issues of material fact precluded manufacturer's promissory estoppel claim.

Granted in part and denied in part.

West Headnotes

[1] Frauds, Statute Of 185 ⚿152(1)

185 Frauds, Statute Of
185X Pleading
185k151 Pleading Statute as Defense
185k152 Necessity
185k152(1) k. In General. Most Cited Cases

Frauds, Statute Of 185 ⚿158(1)

185 Frauds, Statute Of
185XII Evidence
185k158 In General
185k158(1) k. Presumptions and Burden of Proof. Most Cited Cases
The statute of frauds is an affirmative defense upon which defendant bears the burden of proof.

[2] Federal Civil Procedure 170A ⚿2510

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2510 k. Sales Cases in General. Most Cited Cases
Under Michigan law, genuine issues of material fact as to whether verbal commitment purportedly made between sales manager of distributor of zinc and president of manufacturer of zinc-based alloys was barred by statute of frauds under Michigan Uniform Commercial Code (UCC), or was subject to exception from statute based on estoppel, precluded summary judgment for distributor on manufacturer's breach of contract claim. M.C.L.A. § 440.2201(1).

[3] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases
To establish a claim of promissory estoppel under Michigan law, Plaintiff must show: (1) a promise; (2) that defendant should reasonably have expected to induce action of a definite and substantial character on Plaintiff's part; and (3) that in fact pro-

duced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided.

[4] Federal Civil Procedure 170A ⇐2510

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2510 k. Sales Cases in General. Most Cited Cases

Genuine issues of material fact as to how definite and clear promise was by distributor's sales manager to provide quantity of zinc to manufacturer of zinc-based alloys, whether sales manager should have expected manufacturer to enter into third-party contract as a result of the promise, and that manufacturer reasonably relied on promise in entering into third-party contract, precluded summary judgment for distributor on manufacturer's promissory estoppel claim under Michigan law.

*590 Clifford J. Devine, De Vine & Kohn, Southfield, MI, Jonathan D. Ordower, Frasco Caponigro Wineman & Scheible, PLLC, Bloomfield Hills, MI, for Plaintiff.

Elizabeth L. Sokol, Law Offices of Elizabeth L. Sokol, PLLC, Royal Oak, MI, Frederick A. Berg, Rebecca M. Decoster, Kotz, Sangster, Wysocki and Berg, P.C., Detroit, MI, for Defendant.

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

GERALD E. ROSEN, Chief Judge.

I. *INTRODUCTION*

By opinion and order dated September 25, 2007, 2007 WL 2874005, the Court granted in part and denied in part a motion to dismiss brought by Defendant Considar Metal Marketing, Inc. In the wake of this ruling, Plaintiff Metropolitan Alloys Corporation filed a first amended complaint on November 27, 2007, asserting state-law claims of fraud, breach of contract, and promissory estoppel. Each of these claims arises from Defendant's failure to perform in accordance with an alleged oral commitment to supply Special High Grade ("SHG") zinc at an agreed-upon premium over the average price of SHG zinc on the London Metal Exchange.

With the discovery period having concluded, Defendant now renews its challenge to Plaintiff's claims in this case. Specifically, by motion filed on December 1, 2008, Defendant seeks summary judgment in its favor on each of the three claims asserted in Plaintiff's first amended complaint, arguing (i) that Plaintiff's fraud claim lacks legal and factual support, (ii) that Plaintiff's breach of contract claim is barred by the statute of frauds, and (iii) that Plaintiff has failed as a matter of law to establish any of the three elements of a claim of promissory estoppel. In a December 29, 2008 response to this motion, Plaintiff consents to the dismissal of its fraud claim, but contends that issues of fact remain as to the viability of its remaining claims. Defendant then filed a January 12, 2009 reply in further support of its motion.

Having reviewed the parties' written submissions in support of and opposition to Defendant's motion, the accompanying exhibits, and the record as a whole, the Court finds that the pertinent facts and legal contentions are sufficiently presented in these materials, and that oral argument would not assist in the resolution of this motion. Accordingly, the Court will decide Defendant's motion "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings on this motion.

II. *FACTUAL BACKGROUND*

The basic facts underlying the parties' dispute in this case are set forth in some detail in the Court's earlier opinion on Defendant's motion to dismiss, *see Metropolitan Alloys Corp. v. Considar Metal Marketing, Inc.*, No. 06-12667, 2007 WL 2874005 (E.D.Mich. Sept. 25, 2007), and need not be recounted at length here. Instead, the Court

briefly summarizes these facts, and then addresses the deposition testimony of the principal witness for each party.

*591 Plaintiff Metropolitan Alloys Corporation is a Michigan-based manufacturer of zinc-based alloys for customers which, in turn, use these metal alloys to make automobile components and other zinc-based metal products. Defendant Considar Metal Marketing, Inc. is a Canadian corporation that markets and sells zinc and other metals, including the "Special High Grade" ("SHG") zinc that is the subject of the parties' dispute here.

The price of zinc fluctuates in accordance with the market price at which it is traded on the London Metal Exchange ("LME"). Zinc sellers, such as Defendant, sell at the LME price plus a premium, which reflects such factors as local market conditions, manufacturing and transportation costs, and ordinary supply and demand.

Plaintiff's claims in this case rest upon the assertion that Defendant's sales manager, Joanne Felkers, made a verbal commitment in April of 2005 that Defendant would supply Plaintiff with 200 to 400 metric tons of SHG zinc each month between January and September of 2006, at a premium of 3.5 cents per pound over the average LME price during a specified ten-week period prior to each quarter in which the parties engaged in these transactions. According to Plaintiff, these quantity and pricing terms reflected a "request for quote" ("RFQ") issued by one of its customers, Fishercast Global Corporation. Upon receiving a purported commitment from Defendant to supply the requested quantities of SHG zinc at the requested price, Plaintiff responded to Fishercast's RFQ in late April of 2005, and was informed a short time later that its bid had been accepted. In late July of 2005, however, Ms. Felkers called Plaintiff's president, Murray Spilman, and advised him that Defendant would not provide SHG zinc at the allegedly agreed-upon price.

As its principal factual support for these allegations, Plaintiff points to the deposition testimony of its president, Mr. Spilman. Specifically, Mr. Spilman testified that he called Ms. Felkers on or around April 15, 2005 and informed her of the RFQ issued by Plaintiff's customer, Fishercast. (*See* Defendant's Motion, Ex. 2, Spilman Dep. at 183-85.) According to Mr. Spilman, Ms. Felkers responded that she and Defendant were familiar with this customer, and that Defendant would be willing to supply Plaintiff's requirements for this customer in the event that its bid was accepted. (*See id.* at 185.) Mr. Spilman further testified (i) that Ms. Felkers specifically offered, on behalf of Defendant, to supply between 200 and 400 metric tons of SHG zinc per month at Plaintiff's election, (ii) that he and Ms. Felkers agreed upon a 3.5-cent premium for these purchases, and (iii) that he accepted Ms. Felkers's offer on these points. (*See id.* at 185-87.) [FN1]

FN1. In light of this deposition testimony, the Court is at a loss as to how Defendant can tenably complain that Plaintiff has "mischaracterize [d]" or "misstate[d]" the record through its assertion that Mr. Spilman "accepted [Defendant's] offer" to supply the requirements of the Fishercast RFQ at a 3.5-cent premium. (Defendant's Reply Br. at 2 n.1.)

According to Mr. Spilman, upon learning in mid-May of 2005 that Plaintiff was the successful bidder on the Fishercast contract, he promptly called Ms. Felkers and informed her that Plaintiff had won the bid. (*See id.* at 191.) In response, Ms. Felkers told him that Defendant would "send us a contract." (*Id.*) [FN2] Shortly thereafter,*592 Ms. Felkers advised Mr. Spilman that credit insurance would be needed in connection with the parties' proposed deal, and that Defendant's insurer would be in contact with Plaintiff to obtain the necessary information. (*See id.* at 192.) In early July of 2005, Ms. Felkers informed Mr. Spilman that "the credit was in place," and she once again promised that Defendant "would be preparing the contract" memorializing the parties' agreement. (*Id.* at 196-97.)

FN2. Again, Defendant inexplicably protests that Plaintiff has mischaracterized this testimony by stating that Ms. Felkers "promised to send a contract." (*See* Defendant's Reply Br. at 2 n.1.)

When no such written document was forthcoming, Mr. Spilman repeatedly called Ms. Felkers in mid-July of 2005 to inquire about this matter. Mr. Spilman eventually was able to reach Ms. Felkers during this period, and was told that Defendant "had a lot of contracts that they had to get out," that Defendant "would get to it as soon as possible," and that the contract should be forthcoming "soon." (*Id.* at 197-98.) On or around July 27, 2005, however, Ms. Felkers called Mr. Spilman and advised him that Defendant was not going to supply SHG zinc in accordance with the terms previously discussed by the parties. (*See id.* at 199-200.) According to Mr. Spilman, Ms. Felkers stated that she had been "overruled by Graham White," Defendant's sales director, and that there was "nothing she could do about it." (*Id.* at 200-01.) [FN3] Although Defendant subsequently agreed to provide a more limited quantity of SHG zinc during the first quarter of 2006, at the same 3.5-cent premium discussed by the parties and on a "[t]ake it or leave it" basis, (*id.* at 201), Plaintiff alleges in its complaint that it was forced to look to other suppliers and pay higher prices in order to meet the remainder of its obligations under the Fishercast contract.

FN3. Mr. Spilman testified that at no time in his prior discussions with Ms. Felkers did she advise him that she needed to obtain Mr. White's approval of the premium she had discussed and purportedly agreed upon in the course of their mid-April conversation. (*See id.* at 198-99.)

In contrast to the testimony of Mr. Spilman on these points, Ms. Felkers's deposition testimony presents a somewhat (though not entirely) different view of the parties' interactions in the spring and summer of 2005. First, Ms. Felkers confirmed at her deposition that Mr. Spilman contacted her on or around April 15, 2005 to obtain a quote on a "certain amount of zinc which I thought would be going to the Fisher[cast] bid." (Defendant's Motion, Ex. 6, Felkers Dep. at 29.) She acknowledged that Mr. Spilman specifically referenced the Fishercast bid during this conversation, but noted that any zinc sold by Defendant to Plaintiff need not have been applied toward this bid and that Plaintiff "could have done other things with it." (*Id.*) Ms. Felkers further testified that because Mr. Spilman was interested in purchasing a "range" of quantities of zinc, rather than a fixed quantity each month, she "wouldn't have quoted him on any kind of range," but would have insisted upon a definite quantity. (*Id.* at 29-31.) [FN4] In addition, she questioned Mr. Spilman's assertion that they discussed a 3.5-cent premium, and instead opined that "we talked ***593** about 4 cents" as a premium. (Felkers Dep. at 30.) More generally, Ms. Felkers disputed Plaintiff's claim that the parties entered into any sort of an agreement in mid-April of 2005, and instead characterized her telephone call with Mr. Spilman as a preliminary conversation. (*Id.* at 34-35.)

FN4. In particular, as Ms. Felkers explained at her deposition, (*see id.* at 29-33), and as Defendant discusses at greater length in the brief in support of its motion, (*see* Defendant's Motion, Br. in Support at 5), it is Defendant's usual policy to enter into a separate transaction with a "hedge partner" whenever it enters into an agreement to sell zinc in the future at a price set in advance of the purchase date. This "hedging" protects against price fluctuations in the period between Defendant's execution of such an agreement and its subsequent sales in accordance with the terms of the agreement. According to Defendant, the requisite "hedging" arrangement cannot be made unless Defendant and its customer have agreed upon a specific quantity to be sold.

As noted by Plaintiff, Ms. Felkers's testimony

is not entirely clear as to whether, or at what point, she advised Mr. Spilman that she needed the approval of her superiors in order to enter into an agreement on Defendant's behalf. At one point during her deposition, Ms. Felkers testified that, if asked, she would have informed Mr. Spilman that "anything that we had agreed to or discussed would have to be confirmed by my boss," but she could not recall whether Mr. Spilman had raised any such questions about her authority. (*Id.* at 36.) Later, however, she testified that she expressly informed Mr. Spilman, during at least one of their conversations, that his request for a 3.5-cent premium would have to be approved by Defendant's sales director, Graham White. (*See id.* at 40-41, 61.) Ms. Felkers acknowledged, however, that she has the authority to sign contracts on Defendant's behalf,[FN5] and that nothing in these documents discloses any limits upon her authority to do so. (*See* Felkers Dep. at 38-40.)

> FN5. In fact, Plaintiff points out that Ms. Felkers signed the contract under which the parties agreed to a more limited sale of SHG zinc during the first quarter of 2006. (*See* Plaintiff's Response, Ex. 4.)

As to the parties' contacts in July of 2005, Ms. Felkers's account once again differs in some respects from Mr. Spilman's recollection of these conversations. In particular, while Ms. Felkers recalled the conversation in which she informed Mr. Spilman that Defendant had secured the credit insurance that would permit the parties' proposed transaction to go forward, she insisted that "there was no deal at that time," and that the parties "were still negotiating [a] premium." (*Id.* at 60.) Ms. Felkers further testified that when Mr. Spilman expressed his desire in a mid-July telephone conversation to proceed with a 3.5-cent premium, she responded that she "would speak to my boss about whether that was something we wanted to do." (*Id.* at 61-62.) After Mr. White informed her that this premium was "too low," she advised Mr. Spilman that Defendant would not agree to this price term, but that her company would consent to a more limited sale of 125 metric tons of zinc at a 3.5-cent premium during each of the first three months of 2006. (*Id.* at 62-67; *see also* Plaintiff's Response, Ex. 4 (contract memorializing this more limited sale).)

Dissatisfied with this outcome, Plaintiff commenced the present action in this Court on June 16, 2006, seeking to recover the additional expenses and other costs it incurred in obtaining substitute supplies of SHG zinc to meet its obligations to Fishercast. Following the Court's resolution of Defendant's motion to dismiss, Plaintiff filed a first amended complaint in which it has asserted state-law claims of fraud, breach of contract, and promissory estoppel. Upon the conclusion of a full period of discovery, Defendant now seeks summary judgment in its favor on each of these claims.[FN6]

> FN6. As noted earlier, Plaintiff does not oppose the dismissal of its fraud claim, leaving only its breach of contract and promissory estoppel claims to be addressed in the present opinion.

III. *ANALYSIS*

A. The Standards Governing Defendant's Motion

Through the present motion, Defendant seeks summary judgment in its favor on *594 each of Plaintiff's three state-law claims. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As the Supreme Court has explained, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265

(1986).

[1] The governing standard is somewhat different where, as here, the moving party bears the burden of proof as to one of the issues raised in its motion. Specifically, Defendant's challenge to Plaintiff's breach of contract claim rests upon the statute of frauds, an affirmative defense upon which Defendant bears the burden of proof. *See TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 547 (6th Cir.1981); *Dresser v. Cradle of Hope Adoption Center, Inc.*, 358 F.Supp.2d 620, 631 (E.D.Mich.2005). To secure an award of summary judgment in its favor on this affirmative defense, Defendant's "showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.1986) (internal quotation marks, citation, and emphasis omitted); *see also Dresser*, 358 F.Supp.2d at 631.

In deciding a motion brought under Rule 56, the Court must view the evidence in a light most favorable to the nonmoving party. *Pack v. Damon Corp.*, 434 F.3d 810, 813 (6th Cir.2006). Yet, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but "must-by affidavits or as otherwise provided in [Rule 56]-set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2). Moreover, "the mere existence of a scintilla of evidence that supports the nonmoving party's claims is insufficient to defeat summary judgment." *Pack*, 434 F.3d at 814 (alteration, internal quotation marks, and citation omitted). Finally, as to Defendant's appeal to the statute of frauds, "summary judgment in favor of the party with the burden of persuasion is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir.2002) (internal quotation marks, citation, and alterations omitted). The Court will apply these standards in resolving Defendant's motion.

B. Issues of Fact Remain as to Whether Plaintiff's Breach of Contract Claim Is Barred by the Statute of Frauds.

[2] As noted above, Plaintiff's claims in this case rest upon a verbal commitment purportedly made by Defendant's sales manager, Joanne Felkers, that Defendant would supply Plaintiff's SHG zinc requirements under its Fishercast contract at a price reflecting the LME market price plus a 3.5-cent premium. Plaintiff acknowledges that the terms of this alleged agreement are not set forth in any writing signed by Defendant. Citing this absence of a written agreement, Defendant argued in its initial motion to dismiss that Plaintiff's breach of contract claim was barred by the statute of frauds, but the Court found that Plaintiff's allegations were sufficient to establish an estoppel-based exception to the usual requirement of a written agreement. Defendant now renews its statute of frauds challenge, arguing that Plaintiff's appeal to principles of estoppel would, at best, entitle it to proceed under a *595 theory of promissory estoppel, and not under a breach of contract theory. The Court rejects this contention, on much the same grounds identified in its earlier ruling on Defendant's motion to dismiss.

As a proposed sale of goods, the parties' alleged agreement in this case would be governed by Michigan's enactment of the Uniform Commercial Code ("UCC"). [FN7] Under § 2-201 of the UCC, "a contract for the sale of goods for the price of $1,000.00 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." Mich. Comp. Laws § 440.2201(1). In this case, there is no question that the transaction at issue was for an amount far in excess of $1,000, and Plaintiff does not claim that the terms of this transaction were ever memorialized in any writing signed by Defendant. Accordingly, the UCC's statute of frauds would bar Plaintiff's breach of contract claim here, absent some legally valid and factually supported basis for relaxing the usual statutory requirement of a writing signed by Defendant.[FN8]

FN7. As was the case in the briefing on Defendant's earlier motion to dismiss, the parties once again agree that Michigan law governs their dispute.

FN8. As Defendant points out, apart from the UCC's statute of frauds, Michigan law more generally requires a writing signed "by the party to be charged with the agreement, contract, or promise" where, as here, the parties' alleged agreement, "by its terms, is not to be performed within 1 year from the making of the agreement." Mich. Comp. Laws § 566.132(1)(a). The alleged agreement in this case was reached in April of 2005, but contemplated sales extending through September of 2006.

Yet, as discussed in the Court's September 25, 2007 opinion, principles of estoppel provide one potential avenue for Plaintiff to overcome a statute of frauds defense. In particular, the Court noted the decision of the Michigan Court of Appeals in *Fairway Machinery Sales Co. v. Continental Motors Corp.*, 40 Mich.App. 270, 198 N.W.2d 757, 758 (1972), in which the defendant interposed a UCC statute of frauds defense and the plaintiff responded by "plead[ing] an estoppel which might prevent defendant from asserting the defense of statute of frauds." In remanding the case for trial, the Court of Appeals cited the existence of "genuine issues" as to a number of "material facts" bearing upon the plaintiff's appeal to principles of estoppel, including whether the defendant had made statements "constitut[ing] an acceptance of the [plaintiff's] bid and a promise to confirm this bid in writing." *Fairway Machinery Sales*, 198 N.W.2d at 758.

As explained in the Court's earlier ruling, this Michigan appellate decision, if followed here, would permit Plaintiff to avoid the bar of the UCC's statute of frauds. Plaintiff here, like the plaintiff in *Fairway Machinery Sales*, allegedly was assured that Defendant would provide written confirmation of its purported verbal commitment to supply SHG zinc under the terms discussed by the parties' representatives, but this written confirmation was never forthcoming. Moreover, Plaintiff has now produced evidence in support of its estoppel-based response to Defendant's statute of frauds defense-namely, the testimony of its president, Mr. Spilman, that Defendant's sales manager, Joanne Felkers, promised on more than one occasion to prepare and provide a written contract memorializing the parties' oral agreement. Under this record, then, Plaintiff seemingly has produced sufficient evidence from which a trier of fact could conclude that it has established the form of estoppel recognized by the Michigan Court of Appeals in *Fairway Machinery Sales*.

***596** Against this backdrop of Michigan law and this Court's prior decision in this very case, it presumably would behoove Defendant to suggest a legal or evidentiary basis for the Court to deviate from its earlier ruling on this point. Yet, Defendant does not even attempt such an argument in the brief in support of its present motion. Instead, Defendant contends that by virtue of Plaintiff's appeal to principles of estoppel, Plaintiff's breach of contract claim should be "recharacterized" as a promissory estoppel claim-and, therefore, merged with the claim of promissory estoppel that Plaintiff already has expressly asserted in count III of its first amended complaint. As a threshold matter, however, there is no hint in the decision relied upon by Plaintiff and the Court, *Fairway Machinery Sales*, that the court in that case "converted" or "recharacterized" the plaintiff's breach of contract claim into a claim of promissory estoppel. Rather, the court explained that the plaintiff's invocation of principles of estoppel served the more limited purpose of "prevent[ing] defendant from asserting the defense of statute of frauds." *Fairway Machinery Sales*, 198 N.W.2d at 758. As explained in the ruling on Defendant's motion to dismiss, this Court is obliged to follow the rulings of the Michigan Court of Appeals on matters of Michigan law "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise," *Ziebart International Corp. v. CNA Insurance Cos.*, 78 F.3d

245, 250-51 (6th Cir.1996) (internal quotation marks and citations omitted), and Defendant has made no effort to dissuade this Court from adhering to the decision in *Fairway Machinery Sales.*[FN9]

> FN9. Against this backdrop, it is ironic that Defendant would chide Plaintiff for "fail[ing] to address" the argument that Plaintiff's breach of contract claim has been "transform[ed]" into a claim of promissory estoppel by virtue of Plaintiff's invocation of principles of estoppel. (Defendant's Reply Br. at 3.) As Plaintiff correctly observes in its response to Defendant's present motion, (*see* Plaintiff's Response Br. at 7), essentially the same matter already had been addressed in Plaintiff's response to Defendant's earlier motion to dismiss, as well as in the Court's ruling on this earlier motion, and yet Defendant has made no effort in the present motion to suggest why a different result might now be warranted.

More importantly, the decision of the Michigan Court of Appeals in that case rests upon the well-recognized distinction-a distinction completely overlooked in Defendant's present motion-between using estoppel as an "equitable shield" and invoking principles of estoppel "offensive[ly]" as a basis for a recovery "in the absence of a contract." David J. Gass, *Michigan's UCC Statute of Frauds and Promissory Estoppel,* 74 Mich. B.J. 524, 525-26 (1995). In this case, Plaintiff is using principles of estoppel both defensively-to overcome Defendant's statute of frauds defense-and offensively-through a separate claim of promissory estoppel that provides an alternative avenue of recovery in the event that Plaintiff's breach of contract claim fails for lack of an enforceable contract. These separate appeals to principles of estoppel rest upon two entirely distinct promises: (i) the underlying verbal commitment to sell SHG zinc, which forms the basis for Plaintiff's claim of promissory estoppel, and (ii) the promise to reduce this commitment to writing, which forms the basis for Plaintiff's defensive use of estoppel to overcome Defendant's statute of frauds defense. Under these circumstances, there is simply no basis for "converting" or "recharacterizing" Plaintiff's defensive use of estoppel into an affirmative claim of promissory estoppel.[FN10]

> FN10. Similarly, there is no basis for Defendant's complaint that Plaintiff failed to properly "plead" the defensive form of estoppel that would permit it to overcome a statute of frauds defense. (*See* Defendant's Reply Br. at 3.) Plaintiff was under no obligation to anticipate and plead around this affirmative defense. *See Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 901 (7th Cir.2004). In any event, Defendant can hardly claim any prejudice or unfair surprise, where this defensive form of estoppel was addressed by the parties and the Court alike at the very outset of this case, in the context of Defendant's motion to dismiss.

*597 The Michigan courts have recognized and permitted this defensive use of estoppel to overcome a statute of frauds defense, without insisting upon the "conversion" of an underlying breach of contract claim into a claim of promissory estoppel. Apart from the ruling in *Fairway Machinery Sales,* the Michigan Court of Appeals held in a more recent case that the statute of frauds did not apply because the "plaintiff was equitably estopped from denying the validity of" the parties' oral agreement, in light of the evidence that, through "words and actions," the plaintiff had "induced defendant to believe that it had assented to" this oral agreement. *Kelly-Stehney & Associates, Inc. v. MacDonald's Industrial Products, Inc.,* 254 Mich.App. 608, 658 N.W.2d 494, 498, 500 (2003), *vacated on other grounds,* 469 Mich. 1046, 677 N.W.2d 838 (2004). Similarly, in *Oxley v. Ralston Purina Co.,* 349 F.2d 328, 331-336 (6th Cir.1965)-the case upon which the Michigan Court of Appeals chiefly relied in *Fairway Machinery Sales*-the Sixth Circuit extens-

ively surveyed the decisions of Michigan and other courts, and concluded that the Michigan courts would permit the defensive use of the doctrine of equitable estoppel to overcome a statute of frauds defense to a breach of contract claim.

More generally, in *Opdyke Investment Co. v. Norris Grain Co.*, 413 Mich. 354, 320 N.W.2d 836, 840 (1982), the Michigan Supreme Court explained that "estoppel and promissory estoppel have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of" the statute of frauds. Nothing in this language, or elsewhere in this decision, reflects the Court's belief that these two forms of estoppel are one and the same, or that an appeal to principles of estoppel necessarily "converts" a breach of contract claim to a claim of promissory estoppel. To the contrary, in that very case, the Court first addressed the plaintiff's breach of contract claim, along with the defendant's statute of frauds defense, and then separately determined that the plaintiff had also stated a viable claim of promissory estoppel which, because of its reliance on a "noncontractual promise," necessarily fell "outside the scope of the statute of frauds." *Opdyke*, 320 N.W.2d at 842.

The cases cited by Defendant do not warrant a different conclusion. In two of these cases, the courts made no effort to distinguish between the defensive use of principles of estoppel and an affirmative claim of promissory estoppel. *See Clark v. Coats & Suits Unlimited*, 135 Mich.App. 87, 352 N.W.2d 349, 354 (1984); *Schipani v. Ford Motor Co.*, 102 Mich.App. 606, 302 N.W.2d 307, 310 (1981). In any event, there was no need in either of these cases-or in the third case cited by Defendant, *Niles Industrial Services, Inc. v. AlliedSignal, Inc.*, No. 1:92:CV:600 (W.D.Mich. Jan. 13, 1994) (attached as Exhibit 28 to Defendant's motion)-to distinguish between these two forms of estoppel, because the promises upon which the plaintiffs relied to overcome a statute of frauds defense were precisely the same as the promises presented as grounds for their separate claims of promissory estoppel. *See Clark*, 352 N.W.2d at 354-55; *Schipani*, 302 N.W.2d at 310-11. Here, in contrast, Plaintiff's defensive invocation of principles of estoppel rests upon a separate*598 promise-namely, that Defendant would provide a written contract memorializing the parties' oral agreement. It is this separate promise upon which Plaintiff relies to equitably estop Defendant from asserting a statute of frauds defense, and *Fairway Machinery Sales* expressly permits the defensive use of estoppel under precisely these circumstances.

To be sure, the courts-both in Michigan and elsewhere-have expressed some reservations about using principles of estoppel to carve out judge-made exceptions to the statute of frauds. In *Kelly-Stehney*, 658 N.W.2d at 499, for example, the Michigan Court of Appeals "question[ed] the wisdom of such judicially created exceptions to the statute of frauds as equitable estoppel, ratification, and part performance," and expressed a preference for "deferring to the Legislature to address through the legislative amendment process any perceived inequity in the statute of frauds." [FN11] Similarly, in *Consolidation Services, Inc. v. KeyBank National Association*, 185 F.3d 817, 822-23 (7th Cir.1999), the Seventh Circuit observed that "it would be bootstrapping" to allow proof of an oral promise to reduce an oral agreement to writing "to take [the underlying oral agreement] out of the statute of frauds," and opined that "the better view" is that such a promise "is unenforceable." If this Court were writing on a blank slate, it might well share in this reluctance to permit oral statements to overcome the legislative command that certain agreements are not enforceable unless set forth in writing.

> FN11. As Plaintiff points out, an equitable estoppel exception to the UCC's statute of frauds could be viewed as legislatively approved, rather than wholly judge-made, where § 1-103 of the UCC expressly permits the use of "principles of law and equity," including "estoppel," as a

> "supplement" to the UCC's provisions "[u]nless displaced by the particular provisions of this act." Mich. Comp. Laws § 440.1103.

Yet, as evidenced by the above-cited rulings of the Michigan courts-and, in particular, the decision in *Fairway Machinery Sales*-this Court is ***not*** writing on a blank slate as to this issue. Rather, this case law illustrates the continued willingness of the Michigan courts to apply principles of estoppel to overcome a statute of frauds defense. Defendant has failed to identify any basis to depart from these precedents, and Plaintiff has produced sufficient evidence to raise genuine issues of material fact as to the availability of the defensive form of estoppel in this case. Accordingly, Defendant is not entitled to summary judgment in its favor on its statute of frauds defense to Plaintiff's breach of contract claim.

C. Plaintiff Has Identified a Sufficient Evidentiary Basis for Its Claim of Promissory Estoppel.

As the final challenge advanced in its motion, Defendant contends that Plaintiff has failed to produce sufficient evidence to establish any of the three elements of a claim of promissory estoppel. The Court cannot agree.

[3][4] To establish a claim of promissory estoppel under Michigan law, Plaintiff must show (i) a promise, (ii) that Defendant "should reasonably have expected to induce action of a definite and substantial character" on Plaintiff's part, and (iii) that "in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v. Nationwide Mutual Insurance Co.*, 235 Mich.App. 675, 599 N.W.2d 546, 552 (1999). In challenging Plaintiff's showing as to the first of these elements, Defendant contends that the verbal commitment purportedly made by its sales manager, Ms. Felkers, was not ***599** sufficiently "definite and clear" to sustain a claim of promissory estoppel, *see State Bank of Standish v. Curry*, 190 Mich.App. 616, 476 N.W.2d 635, 637 (1991), where "the quantity of zinc to be supplied was yet to be determined and the pricing formula that [Plaintiff] alleges was promised required hedging." (Defendant's Motion, Br. in Support at 29.) Yet, while Plaintiff specified a range of 200 to 400 metric tons of SHG zinc that it wished to purchase each month, rather than a fixed monthly quantity, it can hardly be argued that this range alone rendered the alleged promise fatally indefinite or the promised quantity "yet to be determined," particularly where Ms. Felkers acknowledged her awareness that Defendant was being asked to meet Plaintiff's requirements under the Fishercast RFQ. Moreover, even assuming that Defendant's internal policies called for hedging under the circumstances of the transaction discussed by the parties, Plaintiff's president, Mr. Spilman has testified that Ms. Felkers's verbal commitment was unconditional,[FN12] and did not turn upon Defendant's ability to satisfy any prerequisites such as hedging, credit insurance, or the like.[FN13]

> FN12. The Court does not share Defendant's view, as stated in its reply brief, that Mr. Spilman's testimony on this point was "equivocal." (Defendant's Reply Br. at 4.) Rather, he expressly affirmed (i) Ms. Felker's specific statement of Defendant's willingness to supply the 200-400 tons of SHG zinc per month required under the Fishercast RFQ, and (ii) her offer of pricing at a 3.5-cent premium, which he accepted. (Spilman Dep. at 185-87.)

> FN13. Ms. Felkers's testimony on this subject is not necessarily to the contrary. She did not claim, for example, that she ever told Mr. Spilman that she could not make a firm commitment until Defendant first made the necessary hedging arrangements. Indeed, nothing in the record suggests that Defendant's hedging policy would have posed a particular obstacle to this (or any other) deal. Rather, Ms. Felkers testified only that she "wouldn't have quoted

> [Plaintiff] on any kind of [quantity] range," in light of Defendant's policy that the transaction proposed by Plaintiff would "ha[ve] to be hedged and to do that, you need a firm quantity." (Felkers Dep. at 30.) Mr. Spilman has testified, of course, that Ms. Felkers *did* quote a price for the quantity range sought by Plaintiff, and this disputed question must be left for the trier of fact to resolve. In any event, Ms. Felkers's testimony is a bit inconsistent on this point, as she stated later at her deposition that she resisted Mr. Spilman's request for a 3.5-cent premium, and instead told him that a 4-cent premium would be appropriate. (*See id.* at 33.) Evidently, then, she was not altogether unwilling to discuss pricing, despite Plaintiff's desire for quantities of SHG zinc that might vary from month to month, and despite the need to hedge this proposed transaction.

Turning to the second element of a claim of promissory estoppel, Defendant argues that it could not have anticipated Plaintiff's purported reliance on Ms. Felkers's alleged verbal commitment, in light of the standard practice of both parties to reduce their agreements to writing. Yet, any uncertainty introduced by the failure to immediately memorialize Defendant's commitment in writing surely was mitigated by Ms. Felkers's ***express promise, on more than one occasion***-at least according to Plaintiff, through the testimony of Mr. Spilman-that such a written contract would be forthcoming. These repeated assurances, if credited by the trier of fact, surely would signal Defendant's awareness that Plaintiff believed the parties had reached an agreement and was acting accordingly. Indeed, one such assurance, according to Mr. Spilman, came in direct response to Mr. Spilman's call to Ms. Felkers informing her that Plaintiff's bid for the Fishercast business had been accepted. Accepting this testimony as true, it suggests Ms. Felkers's understanding that the parties had reached an agreement which needed only to be memorialized in writing, as opposed to her belief that further negotiations***600** were necessary in light of Plaintiff's successful Fishercast bid. Moreover, Ms. Felkers testified to her own view that, once she has negotiated with a customer and reached an agreement on the terms of a transaction, she considers this a "verbal agreement" and a contract even before it is reduced to writing. (Felkers Dep. at 101-03.) Defendant can hardly claim surprise that Plaintiff might share this view.

Finally, Defendant contends that any reliance on Ms. Felkers's alleged verbal commitment would not have been reasonable, where this assurance purportedly was contingent upon various future developments-including Plaintiff's successful bid on the Fishercast business, Defendant's procurement of credit insurance, and the need to make appropriate arrangements for hedging-and where Mr. Spilman purportedly acknowledged at his deposition that any deal is "tentative" until it is reduced to writing. (*See* Defendant's Motion, Br. in Support at 32.) FN14 The Court already has addressed Defendant's claim as to the purportedly "conditional" nature of Ms. Felkers's alleged verbal commitment, and need not repeat this discussion here.FN15 It bears emphasis, however, that as these purported conditions were met-i.e., once Plaintiff's Fishercast bid was successful and Defendant had secured credit insurance-Mr. Spilman has testified that Ms. Felkers did not back away from her commitment or pursue further negotiations, but instead renewed her promise that a written contract would be forthcoming. Similarly, to the extent that Mr. Spilman acknowledged at his deposition that it is sometimes necessary to "reconfirm" a supplier's pricing to account for possible market fluctuations while Plaintiff is negotiating a deal with one of its customers, (*see* Spilman Dep. at 206-07), his testimony indicates that Ms. Felkers provided any such necessary confirmation once he informed her that Plaintiff had been awarded the Fishercast business. A trier of fact could conclude that this alleged assurance provided a basis for Plaintiff's reasonable reliance, even if any reliance prior to this point might not have been

reasonable.

FN14. Once again, the Court observes that Defendant's proposed reading of this deposition testimony is questionable. In the passage quoted in Defendant's brief, (*see id.*), Mr. Spilman opines that a contract exists once the parties "come to a meeting of the minds," without in any way indicating that this "meeting of the minds" must be reduced to writing to be legally enforceable.

FN15. The Court notes that a good deal of the factual account in Defendant's brief in support of its summary judgment motion is devoted to a discussion of Defendant's internal policies and practices on such matters as hedging, credit insurance, and the like. Plainly, however, such internal practices cannot bear upon the reasonableness of Plaintiff's reliance unless Plaintiff was made aware of these practices and their impact upon the verbal commitment allegedly made by Ms. Felkers. While Defendant has cited portions of Mr. Spilman's testimony as establishing his awareness of at least some of these practices-*e.g.*, his general familiarity with hedging, (*see* Spilman Dep. at 186-87)-Defendant has not identified anything in this testimony, or elsewhere in the record, that forges any link between these practices and the specific commitment allegedly made by Ms. Felkers to Mr. Spilman, such that Mr. Spilman's reliance on this assurance could be deemed as a matter of law to be unreasonable. Rather, it must be left for the trier of fact to decide whether Mr. Spilman's reliance could not have been reasonable, in light of his knowledge of how transactions are negotiated and finalized by Defendant and by suppliers generally.

IV. *CONCLUSION*

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's December 1, 2008 motion for summary judgment (docket # 44) is GRANTED IN PART, as to ***601** Plaintiff's claim of fraud, and is otherwise DENIED.

E.D.Mich.,2009.
Metropolitan Alloys Corp. v. Considar Metal Marketing, Inc.
615 F.Supp.2d 589, 68 UCC Rep.Serv.2d 852

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Not Reported in F.Supp.2d, 2009 WL 1913415 (E.D.Mich.), 70 UCC Rep.Serv.2d 96
(Cite as: 2009 WL 1913415 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Betty CRAWFORD, a.k.a. Betty Simpson, Plaintiff,
v.
JP MORGAN CHASE BANK, NA, Defendant.

No. 08-CV-12634.
June 30, 2009.

Anthony A. Yezbick, Anthony A. Yezbick Assoc., Birmingham, MI, for Plaintiff.

D. Lee Khachaturian, Dickinson Wright, Detroit, MI, for Defendant.

ORDER GRANTING MOTION TO DISMISS (# 9) AND DENYING MOTION TO AMEND (# 18)

GEORGE CARAM STEEH, District Judge.

*1 Plaintiff brings the present lawsuit against JP Morgan Chase Bank, NA ("Chase") alleging that defendant, in dishonoring a $200,000 cashier's check, breached Mich. Comp. Laws Ann. § 440.3409, § 440.3413, § 440.3412, § 440.3411. Plaintiff also alleged common law claims of breach of contract and promissory estoppel, as well as violation of the Expedited Funds Availability Act ("EFAA"), 12 USCS § 4001. Plaintiff now moves pursuant to Fed.R.Civ.P. 15(a) to amend her first amended complaint to add a common law claim of unjust enrichment. Defendant has filed the present motion to dismiss plaintiff's amended complaint pursuant to Fed. R. Civ. P 12(b)(6) alleging causes of action asserted by plaintiff either fail to state a claim upon which relief may be granted or are barred by the applicable statute of limitations.

FACTUAL BACKGROUND

This is a case stemming from a check issued to plaintiff by a company, Entech, drawn on an account at Bank One, a predecessor to defendant JP Morgan Chase Bank, NA. On or about August 2, 2002, Entech issued a $200,000 check ("Original Check") to plaintiff Betty Crawford ("Crawford"), a Florida resident.

On or about August 2, 2002, Crawford went to a Chase branch in Bloomfield Hills, Michigan, and presented the Original Check for payment. Chase honored the Original Check and issued a $200,000 cashier's check ("Cashier's Check") made payable to Crawford. When Crawford returned home to Florida and deposited the Cashier's Check in her local bank, it was dishonored by Chase and returned unpaid.

Although the Cashier's Check was dishonored in August 2002, Crawford did not file her complaint in Oakland County Circuit Court until May 22, 2008, asserting four causes of action against Chase, all premised on provisions of the Uniform Commercial Code as adopted in Michigan ("UCC"), which addresses negotiable instruments.

Chase removed the case to federal court on June 20, 2008 and filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Crawford then filed an amended complaint adding common law claims for breach of contract and promissory estoppel, as well as violation of the Expedited Funds Availability Act ("EFAA"), 12 USCS § 4001.

The Court held oral argument on Chase's motion on Feb. 24, 2009, at which time Crawford agreed to dismiss the EFAA claim on grounds that it was barred by the relevant statute of limitations.

STANDARDS FOR DISMISSAL UNDER RULE 12(B)(6) AND RULE 15(A)

Rule 12(b)(6) allows the Court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. Under the Supreme Court's recent articulation of the Rule 12(b)(6) standard in *Bell Atlantic v. Twombly*, 550 U.S. 554, 556, 127 S.Ct. 1955, 1964-65, ---L.Ed.2d

----, ---- (2007), the Court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. To survive a Rule 12(b)(6) motion to dismiss, plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitations of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters v. City of Cleveland,* 502 F.3d 545, 548 (6th Cir.2007) (quoting *Bell Atlantic,* 127 S.Ct. at 1964-65) (internal citations and quotations omitted). Even though the complaint need not contain detailed factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Id.* (citing *Bell Atlantic,* 127 S.Ct. at 1965).

*2 A motion to dismiss a claim as barred by the statute of limitations may be granted when the Court can determine from the face of the complaint that a claim is time-barred. *Hoover v. Langston Equipment Assoc., Inc.,* 958 F.2d 742, 744 (6th Cir.1992).

Rule 15(a) provides that the Court should freely grant leave to amend when justice so requires. The Supreme Court has explained that "[i]n the absence of any apparent or declared reason 'such as ... futility of amendment' leave to amend should be freely granted." *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

ANALYSIS

Defendant's motion to dismiss raises four primary questions regarding Crawford's complaint: First, whether plaintiff has standing to enforce the Original Check; second, assuming plaintiff's standing, whether Chase paid the Original Check upon delivery of the Cashier's Check; third, whether Counts III and IV alleging wrongful non-payment of the cashier's check are time-barred; and, fourth, whether supplemental common law claims for breach of contract, promissory estoppel and unjust enrichment are preempted by the UCC.

I. Does the plaintiff have standing to enforce the Original Check under Mich. Comp. Laws Ann. § 440.3309?

Chase argues that plaintiff does not have standing to enforce the Original Check under Mich. Comp. Laws Ann. § 440.3409 because she is not in possession of the Original Check.

Sections 440.3309 and 440.3418(4) identify circumstances under which a person not in possession of an instrument can enforce it:

> § 3309 reads: (1) A person not in possession of an instrument is entitled to enforce the instrument if (I) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, *(ii) the loss of possession was not the result of a transfer by the person or a lawful* seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. (emphasis added)
>
> § 440.3418(4) applies: If an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (1) or (2), the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

Defendants contend that under these provisions Crawford does not have standing to enforce the Original Check because (1) Crawford is not in possession of the Original Check, (2) she is not its drawer or payer, and (3) she has not alleged the Original Check was mistakenly paid by Chase. Therefore, defendant argues, Crawford does not fall within Mich. Comp. Laws Ann. § 440.3301(iii) ("a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3309 or 3418(4)"), and because of this has no

standing to enforce the Original Check, having transferred her rights in the Original Check to Chase upon endorsement and delivery.

*3 Crawford cites no authority in a response that contends "[i]t is not reasonable to suggest Plaintiff must somehow have current possession of a check that was admittedly negotiated in good faith, accepted, and exchanged for defendant's Cashier's Check. If this was the case, the provisions of MCLA 440.3301 would always be unenforceable because similarly situated obligees would never have physical possession of the check that was necessarily negotiated to create the very acceptor obligations at issue." Crawford also does not cite any authority in arguing that she is not attempting to enforce the Original Check, but the obligations of an acceptor under Mich. Comp. Laws Ann. § 440.3413 (the obligation to pay an accepted draft is owed to the drawer, an endorser payor, or a "person entitled to enforce the draft").

Crawford does not have standing to bring a claim on Counts I and II because Mich. Comp. Laws Ann. § 440.3301 only permits enforcement of the Original Check by those in possession of an instrument, or by those not in possession, but with rights to enforce pursuant to § 3309 or 3418(4). She is not in possession of the instrument, and does not meet the requirements of sections 440.3309 or 440.3418(4) because her loss of possession was the result of a valid transfer and no mistake is alleged.

II. Did Chase pay the Original Check upon delivery of the Cashier's Check?

Even if Crawford were found to have standing to enforce the Original Check, defendant's obligations as an acceptor of the Original Check were satisfied by issuing a cashier's check. Mich. Comp. Laws Ann. § 440.3310(1) provides that, "Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation."

By issuing a cashier's check, a bank accepts its obligation to pay the cashier's check, not the underlying check that was exchanged for it. *See Department of Treasury v. Bank of the Commonwealth,* 111 Mich.App. 533, 556, 314 N.W.2d 688 (1981) (holding that bank accepted the cashier's check by issuing it); *see also Henderson Glass v. Remes Glass, Inc.,* 136 B.R. 132, 136-37 (W.D.Mich.1992) (observing that when a bank issues a cashier's check, it constitutes acceptance of that cashier's check) (internal citations omitted).

Crawford argues that "payment" as required by Mich. Comp. Laws Ann. § 440.3414 is not accomplished unless a bank follows through with the transfer of funds represented by the cashier's check, but fails to cite authority in support of this proposition regarding the facts at hand. In *Munson v. American National Title Bank and Trust Company of Chicago,* 484 F.2d 620 (7th Cir.1972), for instance, the ruling upholds a defendant bank's right to stop payment on a cashier's check. *Pennsylvania v. Curtis National Bank of Miami Springs, Florida,* 427 F.2d 395 (5th Cir.1970) notes that a cashier's check purchased for adequate consideration, unlike an ordinary check, stands on its own foundation as an independent unconditional and primary obligation of the bank. *Id.* at 399-400. *Munson* and *Curtis,* both cited by plaintiff, speak to obligations related to cashier's checks, not obligations related to whatever underlying means were used to fund cashier's checks.

*4 Because defendant's obligation upon the Original Check was satisfied by issuance of the Cashier's Check, Crawford fails to state a claim upon which relief can be granted on Counts I and II.

III. Are Counts III and IV time-barred under Mich. Comp. Laws Ann. § 440.3118(4)?

In Counts III and IV, Crawford brings claims under Mich. Comp. Laws Ann. § 440.3412 (obligation of an issuer to pay a note or cashier's check) and § 440.3411 (wrongful refusal to pay a cashier's check).

Chase argues that because Crawford can only assert claims based upon the Cashier's Check, Counts III and IV should be barred by the three-year statute of limitations under Mich. Comp. Laws Ann. § 440.3118(4). Plaintiff does not address this argument specifically, and instead relies upon her assertion that the six-year statute of limitations under § 440.3118(6) should apply because Chase has not paid the Original Check.

Section 440.3118(4)provides:

> (4) An action to *enforce the obligation of the acceptor of* a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced without 3 years after demand for payment is made to the acceptor or issuer. (emphasis added)

Section 440.3118(6) provides:

> (6) An action to enforce the obligation of a party *to pay an accepted draft,* other than a certified check, must be commenced (I) within 6 years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within 6 years after the date of acceptance if the obligation of the acceptor is payable upon demand. (emphasis added)

This potential conflict was anticipated in a 1995 law review article, *Uniform Commercial Code Revised Article 3 and Amended Article 4: How Michigan Law Might Change.* The authors wrote the following while discussing the potential statute of limitations ambiguity in this area:

> Despite the care given to drafting the revised code, there may be a conflict between Articles 3 and 4 and their respective limitation provisions. Specifically, § 4-111 states that all actions arising under it must be within three years of the date the action accrues. Sections 3-118(c)-(f) refer to enforcement actions against such parties as acceptors, and those obligated to pay cashier's checks. These parties are often banks. Sections 3-118(c)-(f) call for limitation periods ranging from six to ten years. However, if the court determines that a customer's action arises under Article 4 provisions, then the limitation period is three years. This may produce an arguably unjustified conflict in the operation of the Article 3 and Article 4 provisions.
>
> For example, consider the situation where a bank's customer purchases a cashier's check and remits it to a third party. The bank later wrongfully dishonors the check. If the third party brings an action for consequential damages arising from the wrongful dishonor, the applicable section would be 3-118(d) allowing the action if begun within six years of demand. *If the hypothetical remitter, the payor bank's customer brings an action for wrongful dishonor, the action would presumably be governed by Article 4 § 4-402 and the limitation period in § 4-111 would apply.* Therefore, the bank's customer, the remitter under Article 3, would be subject to Article 4's three-year statute of limitation. By operation of § 4-102(1), which calls for conflicts between Article 3 and Article 4 to be resolved in favor of Article 4, § 4-111 control where the plaintiff is the remitter, that is, the bank's customer. Clark C. Johnson and Tonie M. Franzese-Damron, *Uniform Commercial Code Revised Article 3 and Amended Article 4: How Michigan Law Might Change,* 74 Mich. B.J. 538, 541 (1995) (internal citations omitted) (emphasis added).

*5 Since the Court has ruled above that plaintiff cannot sue on the Original Check, Crawford is limited to suing on the Cashier's check, which is covered by the three-year statute of limitations under Mich. Comp. Laws Ann. § 440.3118(4). Because defendant's obligation upon the Cashier's Check is time-barred, Crawford fails to state a claim upon which relief can be granted on Counts III and IV.

IV. Are supplemental common law claims for breach of contract, promissory estoppel and unjust enrichment preempted by the UCC?

Chase argues that the UCC preempts common law claims for breach of contract and promissory estoppel in Counts V and VI. Such preemption, if found, would also apply to the claim for unjust enrichment that plaintiff seeks to add through her motion to amend. Crawford cites *Schering-Plough Heathcare Products, Inc. v. NBD Bank, N.A.*, 890 F.Supp. 651 (E.D.Mich.1995), *aff'd.*, 98 F.3d 904 (6th Cir.1996) for the proposition that, "a drawee may be liable apart from the instrument based upon contract or tort theory of recovery."

UCC § 1-103 allows the continued application of all supplemental bodies of law unless they are explicitly displaced by the UCC, raising the possibility that common law claims can be brought in an area primarily governed by the UCC.

There are no Sixth Circuit decisions precisely on this point. The Third Circuit has held that a common law claim is displaced when the UCC "provides a comprehensive remedy for parties to a transaction." *New Jersey Bank v. Bradford, Inc.*, 690 F.2d 339, 346-47 (3rd Cir.1982). A comprehensive remedy is one that would be rendered meaningless by allowance of common law claims. *Id.* The UCC also displaces the common law when, "reliance on the common law would thwart the purposes of the Code." *Id.* Relying primarily on *Bradford,* the court in *Bucky v. Wachovia Bank,* 591 F.Supp.2d 773, 779 (E.D.Pa.2008) (internal citations omitted), put forward a two-part test for evaluating when a common law claim should be allowed in an area normally controlled by the UCC: "Parallel Code and common law claims may be maintained except in circumstances where (1) the Code provides a comprehensive remedial scheme, and (2) reliance on the common law would undermine the purposes of the code."

The UCC as adopted in Michigan expressly sets out the duties and obligations of banks as they relate to cashier's checks. "The issuer of a ... cashier's check ... is obliged to pay the instrument (1) according to the terms at the time it was issued." Mich. Comp. Laws Ann. § 440.3412. If the issuer of a cashier's check wrongfully "refuses to pay a cashier's check," "the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment." Mich. Comp. Laws Ann. § 440.3411. Furthermore, as discussed previously, Mich. Comp. Laws Ann. § 440.3118(4) also provides that "An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within 3 years after demand for payment is made to the acceptor or issuer."

***6** Because the UCC as adopted in Michigan provides a comprehensive remedial scheme in relation to the duties and obligations related to the issuance of cashier's checks, and because reliance on the common law would undermine the purposes of the code, the UCC preempts common law claims for breach of contract, promissory estoppel and unjust enrichment in this area. Crawford fails to state a claim upon which relief can be granted on Counts V and VI. In addition, plaintiff's proposed amended complaint asserting a claim of unjust enrichment is futile on the same grounds.

CONCLUSION

For the reasons stated in this opinion, all plaintiff's claims are DISMISSED. In addition, Crawford's proposed amended claim for unjust enrichment is DENIED as futile.

E.D.Mich.,2009.
Crawford v. JP Morgan Chase Bank, NA
Not Reported in F.Supp.2d, 2009 WL 1913415 (E.D.Mich.), 70 UCC Rep.Serv.2d 96

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
W.D. Michigan,
Southern Division.
WHITESELL CORPORATION, Plaintiff,
v.
WHIRLPOOL CORPORATION, Whirlpool Mexico S.A. de C.V., and Joseph Sharkey, Defendants,
and
Whirlpool Corporation, Counter-Plaintiff,
v.
Whitesell Corporation, Counter-Defendant.

No. 1:05-CV-679.
Nov. 4, 2009.

Dennis Egan, Butzel Long PC, Bloomfield Hills, MI, Michael George Latiff, Paul Matthew Mersino, Philip J. Kessler, Robin Luce Herrmann, Thomas D. Noonan, Butzel Long PC, Detroit, MI, for Plaintiff.

John R. Trentacosta, Scott T. Seabolt, Vanessa L. Miller, Foley & Lardner LLP, Detroit, MI, Douglas E. Wagner, Gregory Matthew Kilby, Sarah Riley Howard, Warner Norcross & Judd LLP, Grand Rapids, MI, for Defendants.

MEMORANDUM OPINION AND ORDER

ROBERT HOLMES BELL, District Judge.

*1 This matter comes before the Court on Defendant Whirlpool Corporation's motion in limine to exclude parol evidence (Dkt. No. 606). For the reasons that follow, this motion will be denied.

Defendant asks this Court to "preclude Whitesell from introducing evidence of prior or contemporaneous statements or representations that vary or contradict the terms of the 2002 SAA." (Dkt. No. 606, 2.) Defendant also asserts that it "anticipates that Whitesell will seek to introduce evidence that Whirlpool made representations about parts on Exhibit B-2 being under contract with other suppliers" and "other representations allegedly made by Whirlpool, generally consistent with Whitesell's fraud claim," and that this evidence should be excluded because it is irrelevant. (*Id.* at 1.)

The Court reads Defendant's motion primarily as a request to enforce Rule 402 of the Federal Rules of Evidence, which prohibits the introduction of irrelevant evidence, and as a request to enforce Mich. Comp. Laws § 440.2202, which prohibits the introduction of parol evidence to vary the terms of an integrated agreement, subject to some exceptions. Defendant need not file a motion to ask the Court to enforce the law. Beyond broadly stating that the Court will honor Rule 402 and the parol evidence rule, Defendant's motion leaves little for this Court to decide at the present time. Defendant has not identified any particular piece of evidence to which the Court can fully and fairly apply Rule 402 and the parol evidence rule, taking into account all of the relevant inquires associated with the proper application of those two rules. *See* McCormick on Evidence § 52 (Kenneth S. Broun ed., 6th ed.2006) (asserting that motions in limine are encouraged "[u]nless the resolution of the motion requires a prediction of the state of the evidence at the later trial"). Of course, Defendant is free to object to the admissibility of Plaintiff's evidence as Plaintiff attempts to introduce it during trial.

The one issue presented by Defendant's motion that does lend itself to resolution at this early stage is whether the 2002 SAA is a fully integrated or partially integrated agreement. While Mich. Comp. Laws § 440.2202 permits evidence of additional consistent terms to supplement or explain the terms of a partially integrated agreement, such evidence may not be used to supplement or explain the terms of a fully integrated agreement.[FN1] The 2002 SAA

contains a merger clause which states:

> FN1. Whether consistent additional terms may be used to explain or supplement a written agreement has no bearing on whether a course of dealing or usage of trade may be used to explain or supplement a written agreement, which is a different inquiry. Mich. Comp. Laws. 440.2202(a) provides that a course of dealing and usage of trade, as those terms are defined by the Michigan commercial code, may always be used to explain or supplement the terms of both partially and fully integrated agreements.

The parties acknowledge and agree that, although there are no oral agreements or understandings between them affecting the subject matter of this Agreement, the relationship between the parties is not, and will not be, governed exclusively by the terms of this Agreement, but may be governed by Purchase Orders, development agreements, EDI agreements and confidentiality agreements which agreements may exist as of the date of this Agreement or may be entered into during the term of this Agreement. The parties acknowledge and agree that all understandings of the parties hereto with regard to their relationship must be set forth in writing, and that no oral agreements shall be effective unless and until reduced to writing.

*2 (2002 SAA § 16.2.) Thus, the integration clause itself acknowledges that the 2002 SAA is not a fully integrated agreement. Evidence of consistent additional terms may be used to supplement or explain the terms of the 2002 SAA. Nevertheless, evidence of *oral* additional terms, even if consistent, may *not* be used to supplement or explain the terms of the 2002 SAA, because the integration clause explicitly provides that any terms used to supplement the 2002 SAA must be reduced to writing.

Accordingly,

IT IS HEREBY ORDERED that Defendant's motion in limine to exclude to exclude parol evidence (Dkt. No. 606) is **DENIED** without prejudice.

W.D.Mich.,2009.
Whitesell Corp. v. Whirlpool Corp.
Not Reported in F.Supp.2d, 2009 WL 3718200 (W.D.Mich.), 70 UCC Rep.Serv.2d 382

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 3190415 (E.D.Mich.), 71 UCC Rep.Serv.2d 82
(Cite as: 2009 WL 3190415 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
STEEL STRIP WHEELS, LTD., Plaintiff,
v.
GENERAL RIGGING, LLC, a Michigan limited liability company, Francis Blake, Sr., Francis Blake, Jr., and Patrick Blake, Defendants.

No. 08-cv-13737.
Sept. 30, 2009.

West KeySummary**Fraud 184 16**

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k16 k. In General. Most Cited Cases

A buyer of industrial presses established as a matter of law that owner and employees of the seller committed fraud under Michigan law based on silent fraud or deliberate misrepresentations, which induced the buyer to enter into additional undertakings. Each individual defendant knew the presses had been sold to a third party, and each defendant knew that the buyer was making preparations to dismantle and ship the presses after they had been sold to the third party. None of the defendants disclosed that fact to the buyer, and the record indicated that their actions facilitated the belief that the presses were available to be shipped.

Michael C. Simoni, Todd A. Holleman, Miller, Canfield, Detroit, MI, for Plaintiff.

Daniel G. Helton, Detroit, MI, for Defendants.

OPINION & ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GERALD E. ROSEN, Chief Judge.

I. *INTRODUCTION*

***1** Plaintiff Steel Strip Wheels, Ltd. is a manufacturer of wheels for trucks and automobiles based in India. It commenced this action on August 29, 2008, asserting claims of breach of contract, fraud, and conversion against corporate Defendant General Rigging, LLC ("General Rigging"), a Michigan industrial equipment dealer. The complaint was later amended to include individual Defendants Francis Blake, Sr., Francis Blake, Jr. and Patrick Blake, all Michigan residents. Plaintiff's claims arise out of General Rigging's repudiation of a contract binding it to sell seven industrial presses to Plaintiff. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a)(2).

This case is presently before the court on a Motion for Summary Judgment filed by Plaintiff on February 4, 2009. Plaintiff argues that (1) the corporate Defendant breached the contract by selling and shipping two of the seven presses promised to Plaintiff to another company; (2) the individual Defendants knowingly withheld the fact that the company breached the contract for the purpose of misleading Plaintiff to modify the terms of the contract and complete the sale of the remaining five presses; and (3) the corporate Defendant wrongfully withheld and continues to withhold $75,000 owed to Plaintiff. In response, General Rigging admits that it owes Plaintiff $75,000, but otherwise argues that the repudiation of the agreement was justified by Plaintiff's failure to provide contractually required open top containers for shipment without adequate assurances that it would timely perform. General Rigging further argues that Plaintiff's fraud claim is barred by the economic loss doctrine.

Having reviewed the parties' written submissions in support of and opposition to Plaintiff's mo-

tion, the accompanying exhibits, and the record as a whole, the Court finds that the pertinent facts, allegations, and legal issues are sufficiently presented in these materials, and that oral argument would not assist in the resolution of Plaintiff's motion. Accordingly, the Court will decide this motion "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings.

II. *FACTUAL BACKGROUND*

At the time of the events in this case, Plaintiff was building a new manufacturing facility in India, for which it needed industrial presses. Plaintiff's machinery agent learned of several used presses for sale by General Rigging that could fulfill these needs. On or about June 30, 2008, Plaintiff's representative, A.V. Unnikrishnan and his machinery agent, Prabhakar Shukla, met with General Rigging's representatives at the company's Detroit offices. At the time, General Rigging was owned and run by Francis Blake, Jr. Mr. Blake in turn employed his father, Francis Blake, Sr., and his brother, Patrick Blake, both of whom were involved in negotiating new contracts and sales. Upon meeting with Mr. Unnikrishnan and Mr. Shukla, Francis Blake, Jr. showed Mr. Shukla several 1000-ton presses available in General Rigging's Detroit inventory. The following day, the parties also inspected two 1600-ton presses, which were stored in a shuttered factory building in South Bend, Indiana.

*2 On July 2, 2008, Plaintiff's representatives met with Francis Blake, Sr. over four to six hours to negotiate the terms of a sales contract. In the end, the parties reached an agreement which was memorialized in an invoice prepared by Francis Blake, Jr. The invoice outlined the sale of seven presses: five 1000-ton presses for $90,000 each and two 1600-ton presses for $172,500 each. In addition, the invoice indicated that Plaintiff would pay $10,000 to cover packing charges for each press. The invoice required a deposit of $175,000 by wire transfer, due before July 15, 2008. Subsequently, installment payments for each press would be due upon shipment. The invoice specified that General Rigging was responsible for securing the presses "in a seaworthy manner for ocean shipment.... All parts to be loaded into open top containers or into skids for break bulk per requirements." (Pl.'s Mot. for Summ. J. Ex. 1.) Plaintiff was responsible for supplying open top containers for packing and for all local freight and ocean shipment. (*Id.*) Finally, the invoice stated that all presses would be shipped by September 30, 2008.

Both Francis Blake, Jr. and Francis Blake, Sr. testified that a critical issue for General Rigging during the negotiation process was the time of performance: the Blakes hoped to begin shipping right away. At deposition, both said that Plaintiff's representatives claimed to be able to obtain open top shipping containers within a week of signing the invoice and repeatedly assured the Blakes that a contract with a shipping company was already in place. (Francis Blake, Jr. Dep. 16:13-24; Francis Blake, Sr. Dep. 24:21-25.) By contrast, Mr. Unnikrishnan testified that he told General Rigging's representatives at the close of negotiation that he would *begin* contacting shipping companies upon returning to India, and that dismantling and packing could conceivably begin within fifteen or twenty days. (A.V. Unnikrishnan Dep. 46:7-12, 47:3-9.) He denied that any specific date was given for when the open top containers would arrive in Detroit and South Bend, where the presses were to be dismantled; he did however testify to telling the Blakes that Plaintiff had a relationship with Kuehne+Nagel, a shipping company that usually handled Plaintiff's exports. (A.V. Unnikrishnan Dep. 47:15, 47:21-48:13.)

In the weeks that followed, several shipping companies including Kuehne+Nagel contacted General Rigging to prepare price quotes for Plaintiff. General Rigging claims to have only learned that Plaintiff did not already have a shipping contract in place at this time. (Def.'s Br. in Opp'n 7.) [FN1] On July 23, 2008, Patrick Blake sent an email to Mr. Unnikrishnan urging him to hire a shipping company as soon as possible: "We need to

have the containers available to begin packing on Monday, July 28th." (Def.'s Br. in Opp'n Ex. 4.) In response, Mr. Unnikrishnan wrote that he hoped to have a shipping arrangement finalized by the end of July. (*Id.*) In the meantime, General Rigging sent a crew to South Bend to begin the dismantling of the 1600-ton presses. (Def.'s Br. in Opp'n 7.) A crew at the Detroit facility was allegedly left idle without the requisite containers to begin packing the 1000-ton presses. (*Id.*) Towards the end of July, Kuehne+Nagel's Ocean Manager in Detroit, Tammy Loeman, visited General Rigging's Detroit facility to inspect the five 1000-ton presses and meet with Francis Blake, Sr. and Patrick Blake.

> FN1. The sole affidavit submitted in support of General Rigging's Brief in Opposition to Plaintiff's Motion for Summary Judgment is an affidavit of "Francis A. Blake." Both Messrs. Francis Blake, Jr. and Sr., have the middle initial "A," however the affiant indicates that he is "in charge of negotiating contracts and assisting Rigging in the pursuit of business opportunities." (Blake Aff. ¶ 1.) Based on other evidence in the record, it appears that the affiant is the elder Francis Blake. Beyond this, the affidavit offers only a blanket adoption of the statement of facts as outlined in General Rigging's Brief. (Blake Aff. ¶ 2) ("I have read the Statement of Facts section of General Rigging's Brief.... Based upon my participation in the events and my review of relevant documents, I have personal knowledge of the facts set forth therein and aver that they are true and accurate to the best of my knowledge.")
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> This is a questionable practice, at best, in the context of a dispositive motion, as it converts the personal knowledge requirement of Rule 56(e)(1) of the Federal Rules of Civil Procedure into a mere formality. Although the Court is certainly aware that lawyers routinely draft affidavits for their lay clients, the virtual circumvention of the personal knowledge requirement here by summary blanket adoption makes the Court's job of insuring the affiant is in fact competent to testify to all of the matters in the affidavit all the more difficult because the Court is forced to search the statements drafted by General Rigging's counsel in its brief and assume that *all* are based on the personal knowledge of a single witness. Nevertheless, the Court has made an attempt to corroborate General Rigging's statement of facts/Francis Blake, Sr.'s "affidavit" where possible, giving General Rigging as the non-moving party the benefit of the doubt. Where, as in this instance, the Court is unable to find corroborative evidence in deposition testimony and other evidence in the record, it is forced to cite simply to General Rigging's Brief in Opposition. However, for purposes of this Opinion, it does not appear that material questions of fact turn on the few instances where these statements cannot be thus corroborated.

*3 On July 28, 2008, Patrick Blake again wrote to Mr. Unnikrishnan:

> Have you hired a shipping company yet? We must have container [sic] in our facility this week. Please advise by return email as soon as possible. If we do not receive containers this week [we] will not be able to make your schedule and we have a[sic] offsite job scheduled after September 30th that will required all our employees.

(Def.'s Br. in Opp'n Ex. 5.) The next day, Plaintiff and Kuehne+Nagel signed a letter of intent, indicating that shipment of the seven presses was a "time bound project" and that the presses should be "lifted" from General Rigging's Detroit and South Bend locations before August 25, 2008.

(Pl.'s Mot. for Summ. J. Ex. 8.) It did not address the need for open top containers. (*Id.*) By email dated July 29, Mr. Unnikrishnan wrote to Patrick Blake, "We have engaged M/s. Kune+Nagal [sic], who will be in touch with you." (*Id.*) General Rigging contacted Kuehne+Nagel in an attempt to make arrangements for the delivery of the open-top containers only to learn that Kuehne+Nagel was not yet formally under contract with Plaintiff. (Def.'s Br. in Opp'n 8.)

On August 4, 2008, Francis Blake, Sr. emailed Mr. Unnikrishnan again:

> I am very troubled by the lack of progress on the shipment of the presses. During negotiations when you requested for payment after loading you assured me that containers would arrive within one week. It has been 30 days and you have not contracted a shipping company. We do not have any commitment for containers or for trucks for skidded items. We require 30 to 45 days from the date the first containers arrive to pack these presses. This delay has caused a cash flow problem for our company. We made the deal with you with the understanding that the presses would be shipped in a timely manner with no delays. I can offer the following solutions: (1.) Cancel the deal for the two 1600-ton presses and renegotiate the deal for the 1000-ton presses. (2.) Wire transfer Payment in full for the seven presses tomorrow. (3.) Cancel the deal and we will return your deposit. These options are not negotiable. I require a response this evening or I will cancel our deal and return your deposit.

(Pl.'s Mot. for Summ. J. Ex. 10.) In an email directed to Patrick Blake the following day, Mr. Unnikrishnan responded:

> I am very sorry to say there was no commitment from my side to place the containers within a weeks [sic] time. I fully agree to honor the mutually agreed terms as per the agreement between the two company [sic]. I am finalising [sic] the terms with the logistic [company] and shall arrange to lift the stuffs [sic] at the earliest possible. I seek your cooperation in this regard. In case you can arrange the logistics upto [sic] Chennai, iam [sic] ready to accept CIF Chennai terms also.

(Pl.'s Mot. for Summ. J. Ex. 11.)

On the morning of August 5, 2008, General Rigging reinitiated contact with one of its existing customers, Titan International, Inc. ("Titan"). Titan and General Rigging had previously discussed the sale of the two 1600-ton presses prior to General Rigging's negotiations with Plaintiff. General Rigging informed Titan that the 1600-ton presses were available for sale; it did not inform Titan of the contract with Plaintiff, explaining only that liens on the presses had been discharged and that the presses were now available "free and clear." (Pl.'s Mot. for Summ. J. Ex. 12.) On August 6, 2008, General Rigging issued an invoice to Titan for the sale of the presses, at a price of $225,000 each, plus $45,000 each to load them onto Titan's trucks. Titan wired full payment to General Rigging on August 8, 2008, and the 1600-ton presses were delivered to Titan's Illinois facility by late August.

*4 Meanwhile, Plaintiff and Kuehne+Nagel finalized a shipping contract on August 5, 2008 for $550,000, covering the logistics of transporting the seven presses overseas. Mr. Unnikrishnan wrote to Patrick Blake to inform him of this news and of the fact that a Kuehne+Nagel official would be contacting General Rigging for further details. On August 6, 2008, Patrick Blake emailed Tammy Loeman to inquire about the availability of open-top shipping containers. She responded that Kuehne+Nagel had located three and that she was searching for more. No additional open-top shipping containers were ever located and Ms. Loeman ultimately sent written confirmation that there would be insufficient open top containers to ship the presses. Ms. Loeman, along with Plaintiff's representatives, sought an alternative solution. By mid-August Ms. Loeman informed General Rigging that she had arranged for Great Lakes Packing Company ("Great Lakes") to place the dismantled presses in ordinary ocean ship-

ping containers. Plaintiff would pay Great Lakes directly for this service.

On August 8, 2008, Mr. Shukla traveled to South Bend, Indiana to oversee the dismantling of the 1600-ton presses. At the time, nobody from General Rigging's offices informed Mr. Shukla or Ms. Loeman of the sale of those presses to Titan, executed two days prior, although they continued to make arrangements for shipment of all seven presses. As late as August 12, 2008, Patrick Blake provided the weight and dimensions of the (already sold) 1600-ton presses upon Mr. Shukla's request. On August 14, 2008, Mr. Shukla and Ms. Loeman met with Patrick Blake to discuss a detailed shipping plan for all seven presses. Based on the ongoing concerns about Plaintiff's ability to deliver shipping containers and General Rigging's cash flow problems, Mr. Shukla offered to have Plaintiff make two installment payments of $200,000 for the 1000-ton presses, rather than the previously agreed upon payments due on shipping. Together with the $175,000 already tendered as deposit, these two payments would represent payment in full for the five 1000-ton presses ($500,000) and partial payment for the two remaining 1600-ton presses ($75,000 out of $365,000 due). The new payment plan was approved by Mr. Unnikrishnan on August 20, 2008 and memorialized in two invoices, which described the payments as "Advance of (5) 1000-ton Presses" to satisfy the July 2, 2008 agreement. (Pl.'s Mot. for Summ. J. Ex. 19.) Plaintiff remitted the two $200,000 payments by wire transfer on August 21 and August 29. Still no one from General Rigging informed Plaintiff that the 1600-ton presses were sold and in the process of being shipped to Titan.

By August 25, 2008, General Rigging was making progress on the shipment of the 1000-ton presses. However, when Mr. Shukla again traveled to South Bend to oversee progress there, he noticed that some of the parts of the 1600-ton presses were missing since his last visit. Although General Rigging employees allegedly told Mr. Shukla that the presses had been moved to another location because of space constraints at the South Bend location, upon further investigation, he learned that the parts had been shipped to Titan.

*5 Based on these allegations, Plaintiff commenced this suit on August 29, 2008 asserting state-law claims of breach of contract, fraud, and conversion.

III. *ANALYSIS*

A. The Standards Governing Motions for Summary Judgment

Through the present motion, Plaintiff seeks summary judgment in its favor. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As the Supreme Court has explained, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In addition, where, as here, a party (Plaintiff) seeks an award of summary judgment in his favor on issues as to which he bears the burden of proof, Plaintiff's "showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir.1986) (internal quotation marks, citation, and emphasis omitted).

In deciding a motion brought under Rule 56, the Court must view the evidence in a light most favorable to the nonmoving party. *Pack v. Damon Corp.,* 434 F.3d 810, 813 (6th Cir.2006). Yet, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but "must-by affidavits or as otherwise provided in [Rule 56]-set

out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2). Moreover, any supporting or opposing affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed.R.Civ.P. 56(e)(1). Finally, "the mere existence of a scintilla of evidence that supports the nonmoving party's claims is insufficient to defeat summary judgment." *Pack*, 434 F.3d at 814 (alteration, internal quotation marks, and citation omitted).

B. Breach of Contract Claim

In support of its Motion for Summary Judgment, Plaintiff argues that General Rigging repudiated the contract when it failed to deliver the two 1600-ton presses to Plaintiff as promised. General Rigging concedes that it sold the presses to Titan before time for performance, but argues that the sale was justified to mitigate possible damages from Plaintiff's delay in obtaining shipping containers. Furthermore, General Rigging argues that Plaintiff's misrepresentations about the status of shipping arrangements in the weeks following the July 2, 2008 agreement provided General Rigging with reasonable grounds for insecurity under Mich. Comp. Law § 440.2609, thereby excusing General Rigging's sale of the presses.

1. Plaintiff Did Not Repudiate the Contract Where Alleged Oral Assurances That Plaintiff Would Supply Shipping Containers Within A Week Are Barred By the Parol Evidence Rule and Delays In Arranging Shipment Did Not Substantially Impair the Value of the Contract.

*6 Both parties agree that this case is governed by Michigan's enactment of the Uniform Commercial Code ("UCC"). Under the UCC, a contract for the sale of goods for the price of $1,000 or more is not enforceable unless there exists a writing sufficient to indicate that a contract has been made between the parties and signed by the party against whom enforcement is sought. Mich. Comp. Laws § 440.2201(1). If either party to a contract repudiates the contract with respect to a performance not yet due "the loss of which will substantially impair the value of the contract to the other," the aggrieved party may await performance by the repudiating party, resort to any other remedy for breach and/or suspend his own performance. Mich. Comp. Laws § 440.2610; *see also Stoddard v. Manufacturers. Nat'l Bank of Grand Rapids*, 234 Mich. Ct.App. 140, 163, 234 Mich.App. 140, 593 N.W.2d 630, 640 (1999). Anticipatory repudiation occurs where there is "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." Mich. Comp. Laws § 440.2610 cmt. 1.

Here, while the parties concede that a valid contract was formed under the UCC, they dispute the terms of the contract as a threshold matter. Plaintiff argues that General Rigging cannot rely on Plaintiff's failure to provide open-top container within several weeks of signing the July 2, 2008 agreement where Plaintiff was under no obligation to do so by a set date. General Rigging argues that it gave Plaintiff a discounted price on the presses based on Plaintiff's alleged oral assurances that it could quickly provide shipping containers-General Rigging could then pack and ship the presses, and be paid upon shipment within several weeks. The relevant contract language provides only: "Buyer is responsible to supply open top containers." (Pl.'s Mot. for Summ. J. Ex. 1, p. 2.) While there is no express "time is of the essence" clause, there is also no provision declaring that the invoice was intended to serve as a complete integration of the agreement between the parties. Ultimately, the invoice provides that the presses ship by September 30, 2008, but is silent with respect to the time of performance for Plaintiff's obligation to supply shipping containers. Therefore, the Court must first address whether oral statements made prior to or contemporaneous with the signing of the invoice are admissible to supplement the terms of the agreement.

Michigan courts follow the general rule that

does not permit extrinsic evidence to contradict the terms of a written contract that was intended by the parties to be a complete expression of their agreement. *Johnson Controls, Inc. v. Jay Industries, Inc.*, 459 F.3d 717, 727 (6th Cir.2006) (*quoting CMI-Trading, Inc. v. Quantum Air, Inc.*, 98 F.3d 887, 891 (6th Cir.1996)). The statutory provision regarding parol evidence provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> *7 (a) by course of dealing or usage of trade (section 1205) or by course of performance (section 2208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Mich. Comp. Laws § 440.2202. The commentary to Section 440.2202 further states, in part: "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." Mich. Comp. Laws § 44.2202 cmt. 3.

The invoice in this case appears to have been a final expression of the terms negotiated by the parties on July 2, 2008. Although it lacks an integration clause, the invoice unambiguously delineates price, quantity, schedule of payments, and ultimate time of performance. Thus, to the extent that General Rigging seeks to rely on statements allegedly made in the course of negotiation to change the scope and nature of Plaintiff's obligations, the parol evidence rule forbids consideration of those statements. *See In re Skotzke Estate*, 216 Mich.App. 247, 251-52, 548 N.W.2d 695, 697 (1996).

Moreover, had the parties actually reached an agreement with respect to Plaintiff's purported time of performance to arrange for its obligation to supply open top shipping containers, such a provision-allegedly so integral to General Rigging-would certainly have been included in the written agreement. *See* Mich. Comp. Laws § 44.2202 cmt. 3; *General Motors Corp. v. Alumi-Bunk, Inc.*, No. 270430, 2007 WL 2118796, at *5 (Mich.Ct.App. July 24, 2007), *rev'd in part on other grounds*, No. 135117, 2008 WL 5205678 (Mich. Dec.12, 2008) (excluding oral assurances made alongside contract negotiations as too significant *not* to have been included in written contract under parol evidence rule). In *General Motors*, an unpublished opinion, the Michigan Court of Appeals evaluated a breach of contract claim on an agreement to sell a steeply discounted fleet of trucks to the defendant. The plaintiff, General Motors, argued that it offered the discounted rate with the understanding that the defendant agreed to "modify, or 'upfit,' the vehicles before reselling them, so that they would not compete with other non-modified vehicles on the market." *Id.*, at *1. When the defendant failed to upfit the vehicles as orally promised, and sold them in their normal condition, General Motors filed a complaint alleging breach of an express or implied contract. *Id.* Despite the fact that the agreement between the parties contained no integration clause, the Michigan Court of Appeals found that the "the upfitting requirement was a significant factor and therefore was something that 'if agreed upon ... would certainly have been included in the document.' " *Id.*, at *5.

In this case, General Rigging has made similar allegations: principally, that Plaintiff orally promised to arrange shipment in open top containers quickly and that General Rigging would not have sold the presses at the negotiated price without such a promise. However, given the significance of this apparent condition and the cost of securing nearly thirty open top containers within just a few weeks,

it is significant the otherwise complete agreement conspicuously omits any mention of General Rigging's timing concerns. Francis Blake, Sr. testified that Francis Blake, Jr. himself typed up the terms of the invoice on July 2, 2008 after the parties "negotiated back and forth changing certain items." (Blake, Sr.Dep.22:14-17.) The invoice is very specific with respect to time for payments and ultimate time of performance. On the day the invoice was drafted, the parties made handwritten changes and amendments to it, each initialed and dated. (*Id.*) General Rigging's representatives had ample opportunity to negotiate a time of performance term for Plaintiff's obligation to supply open top shipping containers. Because time of performance clause for Plaintiff's obligations is the type of term that would certainly have been included in the document had the parties agreed upon it and no term was actually included in the invoice beyond the final shipping deadline of September 30, the Court finds that there was no obligation to arrange for supply of open top containers for shipment by a set date.

*8 Finally, even if Plaintiff had an obligation to provide shipping containers in a "timely fashion" as General Rigging argues, delays in obtaining open top containers did not go to the heart of the bargain. The parties arranged for the sale of seven presses to be shipped within three months at a price of $865,000. Frank Blake, Sr. explained that, although General Rigging appeared to have a standing offer from Titan for the two 1600-ton presses, it opted to move forward in its deal with Plaintiff for several reasons. First, Plaintiff was willing to buy both the five 1000-ton presses and the two 1600-ton presses, so General Rigging would benefit from selling seven presses at the same time, rather than merely the two 1600-ton presses. (Blake Sr. Dep. 36:7-8.) Second, although the contract price with Plaintiff for the 1600-ton presses was less than the offer from Titan, Francis Blake, Sr. reasoned that negotiations had already moved forward with Plaintiff and General Rigging would benefit from gaining Plaintiff as a new customer. (Blake Sr. Dep. 36:16-23) ("[W]e assumed this would be a new customer, maybe there was an advantage that we could get some new business.... So I guess it just-we just really didn't care at the time which way it went.") Thus, although General Rigging seeks to characterize the "benefit of the bargain" as loading the presses as quickly as possible to get quick cash, close examination of the record reveals that the bargained for exchange was quite simply the sale of all seven presses to a new customer. Plaintiff remained ready to fully pay the amount as negotiated, and even agreed to change its payment schedule to two $200,000 lump sum payments in response to General Rigging's cash flow concerns. Mr. Shukla and Ms. Loeman continued to work with General Riggings's representatives to arrange for the shipment of the 1600-ton presses, and the evidence indicates that had Plaintiff followed the shipping plan finalized during the month of August, the presses could have shipped by the September 30 deadline.

Based on the foregoing, General Rigging has failed to show that Plaintiff repudiated its obligation under the contract. It strikes the Court that what has really happened here is that General Rigging was strapped for cash and the Titan deal provided an opportunity for a quick, and needed, infusion-but at Plaintiff's expense. The interjection of an early open top container requirement by General Rigging as a supposed integral part of the deal despite its not being included in any contract document further strikes the Court as a post-hoc justification which the record simply does not support.

Rather, the record supports the contrary conclusion. Plaintiff sought to satisfy its obligations within a reasonable time, given the overall scope of the agreement. *See Brady v. Central Excavators, Inc.*, 316 Mich. 594, 608, 25 N.W.2d 630, 635 (1947) ("[W]hen a written contract is silent as to time of performance, a reasonable time is to be presumed without reference to parol evidence."). The record indicates that Plaintiff began securing a shipping contract within several weeks of signing the invoice, that after encountering some difficulty in obtaining open top containers an alternative plan

was developed, and that by mid-August packing and shipping of the 1000-ton presses was well underway. The invoice contemplated alternatives to open top containers ("skids for break bulk") (Pl.'s Mot. for Summ. J. Ex. 1), and had General Rigging permitted Plaintiff to finalize logistics it is clear that the presses could have shipped by the September 30 deadline.

*9 Under such circumstances, no reasonable jury could find that Plaintiff repudiated its obligations under the terms of the contract, where Plaintiff provided evidence that it was in the process of fulfilling this obligation well before the presses were due to ship, and any delays in performance did not substantially impair the value of the contract under Mich. Comp. Law § 440.2610.

3. Plaintiff Did Not Fail to Give General Rigging "Adequate Assurances," Where General Rigging Made No Clear Demands Under Mich. Comp. Laws § 440.2609.

General Rigging argues that Plaintiff's failure to provide adequate assurances of the shipping arrangements in the weeks following July 2, 2008 gave General Rigging grounds under Mich. Comp. Laws § 440.2609 to repudiate the contract. Plaintiff counters that General Rigging's "demand" did not seek adequate assurances that Plaintiff would perform, but rather threatened to cancel the agreement unless Plaintiff paid the full contract price up front. This issue turns on the parties' differing charaterizations of Francis Blake, Sr.'s August 4, 2008 email, which confronted Plaintiff with the "lack of progress" on shipping arrangements. (Pl.'s Mot. for Summ. J. Ex. 10.) Mr. Blake explained that without a commitment of containers for shipping the seven presses, General Rigging could not proceed as originally set out in the contract. Instead, he offered three "solutions," which included cancelling the deal for the two 1600-ton presses, accepting immediate payment for all seven presses, or cancelling the contract altogether. (*Id.*) In light of these facts, the Court finds Plaintiff's argument persuasive-the August 4 email was not a "demand" under Section 440.2609.

This provision permits a party to a contract with reasonable grounds to believe the other party to the contract will not perform to "demand adequate assurance of due performance" and to suspend its own performance, if commercially reasonable to do so. Mich. Comp. Laws § 440.2609(1), (4). "Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards." Mich. Comp. Laws § 440.2609(2). Generally questions of whether a party provided "adequate assurance" and whether the other party had "reasonable grounds for insecurity" to ask for that assurance are fact questions left to the jury. *See id.* cmt. 4; *see also* 1 James J. White & Robert S. Summers, Uniform Commercial Code § 6-2 (4th ed. 2000) ("[T]he trier of fact must normally answer whether grounds for insecurity exist."). However, in some circumstances the Court may determine that as a matter of law, no reasonable jury could find that assurance was inadequate nor that a party had reasonable grounds for insecurity to ask for that assurance. *See By- Lo Oil Co., Inc. v. Partech, Inc.*, No. 00-1148, 11 Fed. Appx. 538, 539 (6th Cir. May 30, 2001).

Assuming *arguendo* that there were reasonable grounds for General Rigging's insecurity,[FN2] the August 4, 2008 email cannot be construed as a demand for adequate assurance of performance. Rather, this contention, dressed up as a legal argument, is simply an extension of General Rigging's post hoc justification for its own premature breach. The email did not seek merely "adequate assurances" of performance-a necessary first step to suspension of performance-but rather comprised a unilateral attempt to alter or cancel the contract. Although the email explained the basis for General Rigging's concerns-namely cash flow problems and the belief that without containers, the presses would not be ready for shipment for another 30 to 45 days-it concluded with an ultimatum. Such a writing is not a "demand" under Section 440.2609. *See*

4 Lary Lawrence, Anderson on the Uniform Commercial Code § 2-609:33 (3d. ed.2009) ("Any communication that does not clearly manifest that a demand for assurance of performance is being made does not satisfy UCC § 2-609."); *Precision Master, Inc. v. Mold Masters Co.*, Nos. 268501, 268938, 2007 WL 2012807, at *4 (Mich.Ct.App. Jul.12, 2007) (holding that letters demanding alteration of actual contractual terms did not constitute merely "adequate assurances" of performance under Section 440.2609(1), but were a unilateral attempt to improve contract provisions); *Petroleo Basileiro S.A., Petrobras v. IBE Grp., Inc.*, No. 93-3305, 1995 WL 326502, at *6 (S.D.N.Y. May 31, 1995) (precluding defendant's reliance on U.C.C. § 2-609 where the defendant's demand proposed to amend the existing contract rather than seek assurances of performance).

> FN2. And, in fact, there might have been grounds for some concern on General Rigging's side, as the record indicates that Plaintiff's representatives repeatedly suggested that shipping arrangements were progressing more quickly than they actually were, giving the impression that open top containers would be available as early as mid to late July. There is no dispute that Plaintiff underestimated the difficulty of obtaining open top containers.

*10 Here, the email made no reference to the UCC and did not explicitly or implicitly request any assurance of performance. Rather, it recited the consequences of the delay and threatened breach absent immediate payment-something General Rigging had no doubt already decided to do to remedy its severe cash crunch, since the next day, August 5, 2008, it reinitiated negotiations with Titan for the 1600-ton presses without revealing the contract on those same presses with Plaintiff (indeed, General Rigging represented to Titan that the presses were "free and clear"), and then, the following day, issued an invoice to Titan for the presses at a price of $225,000 each-as compared to the $172,500 each in the contract with Plaintiff-plus significantly increased shipping fees. The Court will have more to say about this unhappy factual chronology-and that General Rigging failed to disclose the already consummated Titan deal when Plaintiff's representative came to South Bend on August 8, 2008.

Even if read together with emails sent in the preceding weeks which sought updates on Plaintiff's progress in securing a shipping contract and communicated a sense of urgency, nothing in General Rigging's correspondence with Plaintiff can be construed as a demand for adequate assurance as contemplated by the UCC. *See MG Refining & Marketing, Inc. v. Knight Enterprises, Inc.*, No. 94-civ-2512, 1996 WL 229138, 28 U.C.C. Rep. Serv.2d 1239 (S.D.N.Y.1996) (holding that two letters that followed alleged repudiation of contracts did not constitute demand for adequate assurance under New York enactment of UCC § 2-609, where first letter invoked alleged breaches to initiate discussion about terminating the contracts, and the second letter announced the buyer's termination of its performance). Given these facts, no reasonable jury could find that Mr. Unnikrishnan's response-stating that there it was under no obligation under the terms of the contract to supply containers within one week and that Plaintiff was in the process of finalizing logistics with Kuehne+Nagle-constituted inadequate assurances.

The Court readily concludes that General Rigging cannot establish that Plaintiff had an obligation to provide shipping containers within a set time frame, or that Plaintiff's alleged repudiation of its obligations substantially impaired the value of the contract. Neither can General Rigging show that it made a demand for adequate assurances, such that Plaintiff's response that it would continue to honor the terms of the contract could be deemed an inadequate answer. Therefore, as a matter of law, General Rigging cannot avail itself of the remedies set out in either Section 440.2610 (anticipatory repudiation) or Section 440.2609 (demand for adequate assurances). There remain no genuine issues of ma-

terial fact with respect to General Rigging's breach: the parties entered into a valid contract, under which General Rigging was required to sell two 1600-ton presses to Plaintiff, shipped by September 30, 2008. By selling the presses to Titan in August, General Rigging rendered its own performance impossible.[FN3] Failure to deliver the promised goods constituted a clear breach. The Court therefore grants Plaintiff's summary judgment motion as to General Rigging's liability on the breach of contract claim.[FN4]

FN3. General Rigging argues in passing that "the [1600-ton] presses are easily replaced with other available presses," and that General Rigging made numerous "offers to provide cover for the 1600-ton presses." (Def.'s Br. in Opp'n 3.) This is simply another post-hoc rationale for its breach. There is no evidence in the record that General Rigging actually had access to two 1600-ton presses with the specifications Plaintiff needed and that it had the capacity to dismantle and ship those presses by September 30, 2008. Moreover, the sale of the 1600-ton presses and subsequent failure to inform Plaintiff of this repudiation provided more than sufficient grounds for Plaintiff to suspend its own performance and sue immediately for breach of contract, pursuant to Mich. Comp. Laws § 440.2610.

FN4. Plaintiff further claims that there is no genuine issue of material fact as to its damages for General Rigging's breach. However, the issue has not been comprehensively briefed. Therefore, the Court withholds judgment, addressing only the issue of liability in this Opinion.

C. Fraud

***11** In addition to alleging breach of contract, Plaintiff claims that the individual defendants, Francis Blake, Jr., Francis Blake, Sr. and Patrick Blake, are individually liable to Plaintiff for fraudulently misleading the company into modifying the payment terms of the contract by failing to disclose the fact that General Rigging sold the 1600-ton presses to Titan. General Rigging argues that any fraud claim is barred by the economic loss doctrine, though it does not dispute that the individual defendants concealed or deliberately remained silent about the sale of the presses to Titan, while Plaintiff continued to make arrangements for their shipment. The Court finds that the economic loss doctrine does not apply, where the alleged fraud is wholly extraneous to Plaintiff's contract claims. The Court further finds that Plaintiff has established every element of a claim of fraud.

The economic loss doctrine bars a party from recovering in tort economic losses suffered because of a breach of duty assumed only by contract. *Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich.App. 365, 374, 532 N.W.2d 541, 546 (1995) (*citing Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 530, 486 N.W.2d 612, 619 (1992)).[FN5] The doctrine does not however preclude a buyer from seeking tort remedies against a seller in *all* fraud claims. *See id.* For example, the doctrine does not apply where no contractual relationship exists between the parties or when the alleged fraud is extraneous to the contractual claims. *Id.*

FN5. The Michigan Supreme Court explained the basis for this distinction in *Neibarger:*

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an acci-

> dent. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.
>
> 486 N.W.2d at 615.

In this case, Plaintiff's fraud claim is not based on General Rigging's failure to comply with its contractual obligations, but rather on the Blakes' silent fraud or deliberate misrepresentations, which induced Plaintiff to enter into additional undertakings. These additional undertakings-not provided for in the contract-included paying more money than required for the presses actually delivered and continuing to make shipping arrangements when none were warranted. Indeed, well after General Rigging's breach of contract, the Blakes sought to hide the fact that the 1600-ton presses were no longer available, all while renegotiating the terms of the contract for the remaining five presses. As such, the claimed fraud is wholly extraneous to the contractual claims and the economic loss doctrine does not apply.

Under Michigan law, the elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. *M & D, Inc. v. W.B. McConkey,* 231 Mich.App. 22, 27, 585 N.W.2d 33, 36 (1998). In order to establish a claim of silent fraud, there must be some type of misrepresentation, whether by words or action. *Id.,* 585 N.W.2d at 41; *see also Hendricks v. DSW Shoe Warehouse, Inc.,* 444 F.Supp.2d 775, 782 (W.D.Mich.2006). A party who remains silent when fair dealing requires him to speak may also be guilty of fraudulent concealment. *Nowicki v. Podgorski,* 359 Mich. 18, 31-32, 101 N.W.2d 371, 378 (1960); *see also Boumelhem v. Bic. Corp.,* 211 Mich.App. 175, 535 N.W.2d 574, 579 (Mich.Ct.App.1995) ("A misrepresentation of fact may be shown where the defendant had a duty to disclose facts but suppressed them instead.").

*12 Plaintiff has established each element of a fraud claim. All three Blakes were involved in either the negotiation or re-negotiation of the invoice terms. All knew that General Rigging had already sold the 1600-ton presses to Titan, while Plaintiff continued to make arrangements for shipment. Although Plaintiff's machinery agent, Mr. Shukla, was often in General Rigging's Detroit office in August while the details of the shipping arrangement were being worked out, none of the individual defendants informed him of the sale. As late as August 26, 2008, both Francis Blake, Jr. and Francis Blake, Sr. knew that Mr. Shukla was driving to South Bend, Indiana to oversee the dismantling of the 1600-ton presses, but neither defendant informed him that the presses were already being dismantled for delivery to Titan. (Blake Sr. Dep. 91:23-92:6.) Mr. Blake, Sr. only admitted to having sold the presses to Titan after Mr. Shukla confronted him upon returning from South Bend-and, Mr. Blake conceded that he had kept silent about the sale to Titan so that Plaintiff would not back out of the deal on the five remaining 1000-ton presses. (Blake Sr. 92:22-93:1.) Similarly, to continue the ruse, Patrick Blake continued to meet with Ms. Loeman and Mr. Shukla through mid-August, formulating a shipping plan for all seven presses and providing them with information about the weight and dimensions of the presses, all despite knowing that the two 1600-ton presses were already sold to Titan. Based on the belief that General Rigging still planned to sell all seven presses, Plaintiff continued to make shipment arrangements with Kuehne+Nagel. Plaintiff also agreed to modify the payment schedule and advance $400,000 to General Rigging in two lump sums. These advances, in combination with the $175,000 already on deposit, totaling $575,000, exceeded the amount owed for the five 1000-ton presses that were ultimately delivered. Mr. Unnikrishnan testified that had he

known that the 1600-ton presses were not available at the time the payment schedule was renegotiated, he would not have agreed to pay more money than the amount owed for the 1000-ton presses alone.

These facts, undisputed by General Rigging, are sufficient to establish a claim of fraud as a matter of law: (1) the Blakes represented a material fact, i.e., that the presses were still available as promised under the invoice; (2) the representation was false; (3) the Blakes knew it was false when it was made; (4) the Blakes made the representation with the intent that Plaintiff follow through with the rest of the agreement; (5) Plaintiff continued to make shipping arrangements for the 1600-ton presses and entered into renegotiations based on the Blakes' representation; and (6) Plaintiff thereby suffered an injury.[FN6] Accordingly, the Court concludes that Plaintiff has satisfied, as a matter of law, that Francis Blake, Sr., Francis Blake, Jr. and Patrick Blake's are individually liable for fraud.

> FN6. The Court notes that although Plaintiff has shown that it continued to make shipping arrangements for the 1600-ton presses and it overpaid by $75,000, it is unclear what damages if any beyond the return of the overpayment it will gain from this fraud claim. The $75,000 was part of an initial deposit made in mid-July to secure the terms of the contract, well before the fraud occurred. The two additional $200,000 lump sum payments were made expressly for the 1000-ton presses alone, which were ultimately shipped to Plaintiff. Finally, Ms. Loeman testified that Plaintiff did not incur any additional costs from Kuehne+Nagel by making shipping arrangements in August for the 1600-ton presses. Nevertheless, material issues of fact remain with respect to Plaintiff's damages for the fraud claim.

D. Conversion Claim

*13 Finally, Plaintiff asserts that General Rigging converted the $75,000 deposit, held in excess of the $500,000 owed on the five 1000-ton presses actually delivered. General Rigging admits that it received $75,000 as part of the $175,000 deposit due under the invoice and that it has failed to return the money for lack of liquidity. The deposit was not held in escrow or otherwise segregated from General Rigging's other accounts.

Although the economic loss doctrine does not bar Plaintiff's fraud claim, in contrast the Court is unable to see how Plaintiff's conversion claim is distinct from the breach of contract. As discussed in the preceding section, the economic loss doctrine prevents plaintiffs from pursuing an action in tort where there is no duty separate and distinct from a breach of contract. *See Haas v. Montgomery Ward and Co.*, 812 F.2d 1015, 1016 (6th Cir.1987); *see also Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612, 615 (1992); *Wrench LLC v. Taco Bell Corp.*, No. 1:98-CV-45, 2003 WL 21653410, at *3 n. 4 (W.D.Mich. May 01, 2003) (summarizing several federal court decisions which have applied the economic loss doctrine to bar tort claims, such as conversion, where they are mere restatements of contract claims). Here, General Rigging's only duty to Plaintiff with respect to the deposit is set by contract; the parties have no independent relationship and the deposit was tendered under the terms of the invoice, not wrongfully taken. Moreover, General Rigging has not denied its contractual obligation to return the overpaid funds. Thus, Plaintiff has failed to establish an independent legal duty distinct from the duties arising out of the contractual relationship and, accordingly, cannot sustain its claim of conversion. *See Rinaldo's Const. Corp. v. Michigan Bell Telephone Co.*, 454 Mich. 65, 78-79, 559 N.W.2d 647, 656 (1997). The Court accordingly dismisses Plaintiff's claim of conversion.[FN7]

> FN7. Although General Rigging concedes that it owes Plaintiff $75,000, the Court does not reach the question of Plaintiff's damages for General Rigging's breach of

contract, as noted above. *Supra* note 5.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's February 4, 2009 Motion for Summary Judgment (docket # 14) is GRANTED in part as to Defendant General Rigging's liability on the breach of contract claim and as to individual Defendants, Francis Blake, Sr., Francis Blake, Jr. and Patrick Blake's liability on the fraud claim.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED as to General Rigging's liability on the conversion claim, and that the conversion claim is hereby DISMISSED.

E.D.Mich.,2009.
Steel Strip Wheels, Ltd. v. General Rigging, LLC
Not Reported in F.Supp.2d, 2009 WL 3190415 (E.D.Mich.), 71 UCC Rep.Serv.2d 82

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