UNIFORM COMMERCIAL CODE COMMITTEE

REPORT PREPARED FOR THE SEPTEMBER 13, 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 September 6, 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: September 6, 2011

RE: *DS Machine Products, Inc. v. ThyssenKrupp Bilstein of America, Inc.*, 2011 WL 2935671 (6th Cir. July 22, 2011)

Attached is a recent decision of the Sixth Circuit Court of Appeals decided in late July of this year under Ohio's version of UCC § 2-610 concerning anticipatory repudiation of a contract for the sale of goods in the automotive industry. Note that the decision has been designated by the Sixth Circuit as "Not for Publication" and features a lively dissent by Judge Boyce Martin. This decision highlights the risk involved when a seller of goods fails to invoke sellers' remedies under Article 2 of the UCC after a buyer anticipatorily repudiates the sales contract.

I am also enclosing a copy of an email message that I just received from Tom Morris along with a copy of District Judge Rosen's affirmance of Bankruptcy Judge Shapero's decision sustaining the sufficiency of Wells Fargo's description of its collateral in its recorded financing statement. *D&L Equipment, Inc. v. Wells Fargo Equipment Finance, Inc. (In re D&L Equipment, Inc.)*, Case No. 10-14965 (E.D. Mich. Sept. 6, 2011).

Patrick E. Mears

Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals,
Sixth Circuit.
D & S MACHINE PRODUCTS, INC.,
Plaintiff–Appellant,
v.
THYSSENKRUPP BILSTEIN OF AMERICA, INC., Defendant–Appellee.

No. 09–4235.
July 22, 2011.

On Appeal from the United States District Court for the Southern District of Ohio.

Before BATCHELDER, Chief Judge; MARTIN and SUTTON, Circuit Judges.

ALICE M. BATCHELDER, Chief Judge.

*1 Plaintiff D & S Machine Products appeals an award of summary judgment in favor of defendant ThyssenKrupp Bilstein. We AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion.

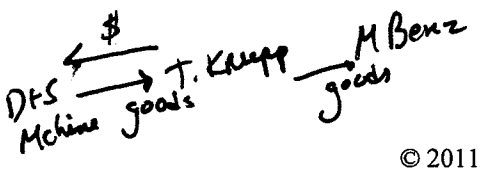
I.

ThyssenKrupp Bilstein ("Bilstein") provides parts for Mercedes Benz automobiles, among others. Bilstein purchased certain component parts from D & S Machine Products: M-class parts and non-M-class parts (the "M-class" referring to Mercedes M-class automobiles). For the non-M-class parts, Bilstein issued a purchase order to D & S, which serves as the fully integrated contract—this is not in dispute. For the M-class parts, there is some dispute as to what constitutes the actual contract. Ultimately, however, this dispute does not affect the resolution of this appeal.[FN1]

FN1. The district court found that certain writings between the parties—i.e., the July 2005 purchase orders (replaced by the October 2005 purchase orders, which D & S denies receiving), the January 2006 invoices, and the February 2006 e-mail—established all the essential terms of the agreement and served as a written contract.

D & S protests that finding and contends that the contract actually at issue is the oral contract that preceded any of the writings. For purposes of resolving this appeal, we will accept—without deciding—D & S's contention and begin our analysis with D & S's description of the oral contract. Consequently, the dispute as to what constitutes the actual contract (and the district court's resolution thereof) does not affect the analysis or ultimate decision herein.

D & S sued Bilstein in diversity in federal court in Ohio, claiming: (1) breach of contract for the M-class parts; (2) breach of contract for the non-M-class parts; and (3) fraud in the inducement (i.e., by contracting for the M-class parts, Bilstein had allegedly induced D & S to purchase an expensive piece of machinery). Bilstein moved for summary judgment on all three claims. The district court granted summary judgment to Bilstein on the fraud-in-the-inducement claim on the basis that it was indistinguishable from the breach-of-contract claim, and D & S did not appeal that decision. The district court originally denied summary judgment on the breach-of-contract claims, but later reconsidered and granted Bilstein summary judgment on all claims. D & S appealed.



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II.

Because this is an appeal of a grant of summary judgment, we conduct a *de novo* review, *Walton v. Ford Motor Co.,* 424 F.3d 481, 485 (6th Cir.2005), and draw all reasonable inferences in favor of D & S, the non-moving party, *see Anderson v. Liberty Lobby, Inc .,* 477 U.S. 242, 255 (1986). And accepting D & S's version of the facts *in toto,* we must conclude that Bilstein is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c).[FN2]

FN2. The Supreme Court, through congressional authorization, *see* 28 U.S.C. § 2072, revised Federal Rule of Civil Procedure 56 ("Summary Judgment"), effective December 1, 2010. Because Bilstein filed its motion for summary judgment prior to December 1, 2010, the version of Rule 56 that was in effect at that time governs this appeal.

According to D & S, beginning in the spring to early summer of 2005, these two parties had an *oral* contract for the M-class parts.[FN3] D & S describes the contract this way:

FN3. We accept for present purposes that this was an oral "contract" (as described by D & S) and ignore any suspicion that this was actually just negotiations between merchants pending a written purchase order. We will also ignore the statute-of-frauds and parol-evidence issues that would otherwise warrant more thorough analyses. *See also* fn. 1, *supra.*

Subject matter: D & S would produce the M–Class parts initially using slower and less cost-effective CNC machines, and then, on a faster and more efficient Hydromat machine.

Price: Bilstein would temporarily pay D & S higher per-part rates while D & S produced the M–Class parts on CNC machines [i.e., the 'CNC prices'], but pricing would drop to 'production prices' [i.e., the 'Hydromat prices'] after production was transitioned to the Hydromat [machine].

Start date: D & S would start producing parts immediately.

Quantity: D & S had a contract for the life of the part or alternatively for at least five years.

Equipment: D & S agreed to purchase a Hydromat machine in exchange for the promise of Bilstein using D & S for five years or life of the program.

***2** Appellant's Brief, p. 33 (record citations omitted). D & S began to produce the parts using the CNC machines and Bilstein paid for those parts at the CNC prices. D & S also purchased the Hydromat machine, as promised, and by January 2006 was producing the parts using the Hydromat machine and charging Bilstein the lower Hydromat prices. On February 9, 2006, D & S sent Bilstein an email confirming the new prices. This practice lasted for approximately six weeks.

On March 23, 2006, "Bilstein presented D & S with an ultimatum—produce the M–Class parts at [even lower] prices[, specifically prices] that D & S had rejected on two previous occasions, or Bilstein would resource the parts to a European supplier." Appellant's Reply Brief, p. 4. D & S rejected this ultimatum and, on April 20, 2006, wrote to Bilstein: "Due to th[is] threat ..., D & S will stop producing the [M-class parts] as of April 21, 2006 and discontinue shipment of these products until this matter is resolved and Bilstein agrees to uphold the original agreement." [FN4]

FN4. Had D & S actually "discontinued shipment," the outcome of this appeal would have been markedly different. With this letter, D & S put Bilstein on notice that it considered Bilstein's ultimatum a repudiation of the agreement and expressly warned Bilstein that it would exercise its right to treat that repudiation as a breach by discontinuing shipment.

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> It is also noteworthy that Bilstein sent a reply letter the following day, April 21, 2006, disputing certain claims in D & S's letter but stating in pertinent part: "If Bilstein made a commitment to D & S, it will honor that commitment."

But D & S did not discontinue shipment of these M-class parts; D & S continued to ship the parts but invoiced Bilstein at the former, higher CNC prices. Bilstein paid the invoices at the Hydromat prices. On June 30, 2006, D & S sent an email to Bilstein asserting that Bilstein's failure to pay the CNC prices rendered it in breach of contract and warned that it would not ship any more parts unless Bilstein paid the difference in full by July 7, 2006. Bilstein did not pay the difference and D & S did not ship any more parts. Bilstein asked D & S to retract its repudiation and when D & S did not respond, Bilstein said it considered the agreement terminated.

On October 23, 2006, Bilstein wrote to D & S canceling the non-M-class contracts because "Bilstein can no longer reasonably rely on D & S as a supplier." D & S filed suit on October 26, 2006, claiming that Bilstein breached the M-class parts contract by failing to pay the CNC prices and by obtaining another supplier when D & S refused to ship parts at the Hydromat prices. D & S later added a claim that Bilstein also breached the non-M-class parts contract by terminating it in bad faith (i.e., in retaliation for D & S's refusal to capitulate to its request for lower M-class part prices).

In granting summary judgment to Bilstein, the district court concluded that D & S was at fault for breaching the contract "when it unilaterally raised the price of the parts and then stopped shipment on June 30, 2006." The court reasoned:

> The problem with D & S's actions was that *even if the agreement between the parties was for the life of the part* [as D & S contends], there was no basis for D & S to revert to the higher, CNC prices for the parts. The evidence in the record—both the documents and the oral testimony—reveal[s] that the parties agreed that the CNC pricing was temporary and that the prices would be lowered once the Hydromat was tooled. Thus, even if Bilstein had [improperly] terminated the contract in the spring of 2006 (which it did not) and if such a termination had entitled D & S to a remedy, that remedy would have involved damages based on the 'current manufacturing' [i.e.,] lower Hydromat price, not the temporary CNC price.

***3** On appeal, D & S does not address this reasoning or even attempt to explain or justify its insistence on the CNC prices. In fact, in its reply brief, D & S specifically disclaimed any reliance on the CNC pricing (though without addressing the foregoing), asserting:

> 6. *D & S does not claim on appeal that it is entitled to enforce the CNC prices for the duration of the life of the part.*

Bilstein argues that even if the parties agreed to a long-term, life-of-the-part agreement for the M–Class parts, D & S is only entitled to recover damages based on the lower Hydromat pricing. (Bilstein's Br. 28.) D & S does not argue otherwise on appeal. (See generally D & S's Appeal Br.)

Appellant's Reply Brief, p. 17 (italicized heading in the original). Therefore, D & S has left the district court's actual analysis and reasoning unchallenged on appeal.

Instead, D & S contends that, by concluding that D & S breached the contract, the district court erred because Bilstein had already breached (i.e., anticipatorily repudiated) the contract when it issued the lower-price-or-we're-going-to-Europe ultimatum at the March 23, 2006 meeting.

Under the Ohio statute on anticipatory repudiation, Ohio Rev.Code § 1302.68(B), if a buyer "repudiates the contract with respect to a performance not yet due," the aggrieved seller may resort to

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any of the seller's remedies, including withholding delivery of the goods, *see* § 1302.77(A).

> It is not necessary for repudiation that performance be made literally and utterly impossible. *Repudiation can result from action which reasonably indicates a rejection of the continuing obligation* .... Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. *However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.*

Ohio Rev.Code § 1302.68, Official Comment 2 (emphasis added). D & S insists that Bilstein's "ultimatum" (to "produce the M–Class parts at prices that D & S had rejected on two previous occasions, or [else] Bilstein would resource the parts to a European supplier," Appellant's Reply Brief, p. 4.) was a " *statement of intention not to perform except on conditions which go beyond the contract,* " and therefore an anticipatory repudiation of the contract that justified its actions.

But the problem with D & S's theory is that "[s]uch a repudiation ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such.' " *Franconia Assocs. v. United States,* 536 U.S. 129, 143 (2002) (quoting *Roehm v. Horst,* 178 U.S. 1, 13 (1900)); *accord Gilmore v. Am. Gas Mach. Co.,* 129 N.E.2d 93, 95 (Ohio Com.Pl.1952) ("To make a renunciation as a breach, the other party must treat it as a breach and act upon it." (citation and quotation marks omitted)); *see also Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.,* 594 F.3d 285, 292 (4th Cir.2010). But here, even after the ultimatum (i.e., the alleged anticipatory repudiation), D & S continued to deliver M-class parts and submit invoices to Bilstein for them, which Bilstein paid (albeit at the contracted-for Hydromat prices rather than the CNC prices that D & S was then demanding).[FN5] Because D & S did not treat the repudiation as a breach, it did not ripen into one. *See Franconia,* 536 U.S. at 143.

> FN5. The dissent proposes that D & S's act of unilaterally raising the price sufficed to treat the repudiation as a breach because this act was clearly inconsistent with the terms of the contract. We see two flaws in this proposition.
>
> In the letter that D & S sent to Bilstein on April 20, 2006, alerting Bilstein that it considered Bilstein's ultimatum a repudiation of the agreement, D & S stated unequivocally that it would " *discontinue shipment* " of the parts until the matter was resolved (i.e., until "Bilstein agree[d] to uphold the original agreement"). D & S did not state, suggest, or even imply that it might take some other type of action (e.g., unilaterally raise the price) as a means of exercising its right to treat that repudiation as a breach. Therefore, D & S's act of unilaterally raising the price did not alert Bilstein that it was exercising its right to treat the repudiation as a breach. Rather, from Bilstein's perspective, D & S merely breached the contract without explanation. We cannot agree—at least under the facts of this case—that it was enough that D & S's actions were inconsistent with the contract terms in a way that was different from the warning and unpredicted by the warning letter. To act on the repudiation in this case, and convert it into a breach, D & S was obliged to follow through on the particular action that it had forewarned in the April 20 letter (i.e ., to discontinue shipment).
>
> Moreover, as a matter of Ohio law, it is not enough that D & S's actions were merely inconsistent with the contract terms. Under Ohio Revised Code §

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> 1302.68(B), if a buyer "repudiates the contract with respect to a performance not yet due," the seller may resort to any of the "seller's remedies" listed in § 1302.77. Unilaterally raising the price is not included among those remedies; nor is there anything remotely similar. If we were to allow the seller to resort to any remedy of its own design (or, as the dissent proposes, any action inconsistent with the terms of the contract), we would be re-writing § 1302.68(B) to exclude its express limitation to "seller's remedies" listed in § 1302.77.

***4** The district court was correct to conclude that D & S cannot recover because D & S was the party that originally breached the contract and D & S has not overcome that conclusion on appeal. Furthermore, because D & S was at fault for breaching the M-class parts contract, Bilstein was justified in believing D & S to be unreliable and therefore terminating the non-M-class parts contract. *See* Ohio Rev.Code § 1302.67, Official Comment No. 3 ("Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question.... Thus a buyer who falls behind in 'his account' with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance." (paragraph break omitted)).

III.

For the non-M-class parts, the district court also held that "D & S is entitled under the general terms and conditions to its outstanding receivables on product received and accepted by Bilstein ." R. 55 at 18. D & S argues that the court erred by limiting this award to outstanding receivables because, under the terms of the contract for the non-M-class parts, Bilstein was also required to pay the "reasonable direct out-of-pocket damages incurred by [D & S] in connection with Products covered by this Purchase Order and not shipped prior to cancellation or change and a reasonable profit based on such costs." R. 32–21 at ¶ 15(b). Bilstein does not respond to this claim on appeal, and we note that in its October 23, 2006, termination letter, Bilstein essentially sided with D & S on this point. *See* R.32–51 at 3 (agreeing to pay D & S all "reasonable direct out-of-pocket damages" including a "reasonable profit" for "all [non-M-class] parts manufactured ... but not shipped").

We reverse the district court's holding limiting D & S's recovery to outstanding receivables and direct Bilstein to compensate D & S for the unshipped non-M-class parts in an amount consistent with the terms of its agreement and Ohio Revised Code § 1302.77.

IV.

Because we find that Bilstein is entitled to judgment as a matter of law, we **AFFIRM** the judgment of the district court in part, but because the parties' agreement provides for a remedy different from that provided by the district court, we **REVERSE** that part of the decision and **REMAND** for further proceedings consistent with this opinion.

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part and dissenting in part.

As the district court initially observed, there is a disputed issue of fact at nearly every juncture of this complex, commercial transaction. I join part III of the majority opinion, discussing the contract for the non-M-class parts. However, I dissent from the majority's analysis of the contract for M-class parts because I believe it incorrectly imposes additional requirements on what a party to a contract must do in order to elect to treat the other party's anticipatory repudiation as a breach of the agreement. At the very least, the majority's interpretation is not supported by Ohio law.

***5** Although this transaction involved two sophisticated parties, it was memorialized in a very unsophisticated manner. Due to the lack of complete writings, it is an understatement to say that this case presents disputed issues of fact. Don't take

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my word for it: look at the majority opinion, which cannot even make it through the first page without stopping to acknowledge that there is a question of fact as to what the terms of the agreement between the parties are. This, mind you, in a breach of contract action. We can discern, however, that the agreement called for D & S to make and supply parts for Bilstein. How many parts and for how long a time period we cannot say for certain. While the majority's theory renders these disputed issues immaterial, viewing the facts in a light most favorable to D & S, the nonmoving party, I do not see any theory on which summary judgment could be granted in favor of Bilstein. Therefore, I would reverse the grant of summary judgment.

The majority explains that these questions of fact are immaterial because even accepting Bilstein's request for a price reduction as a repudiation, which we must when considering the facts in a light most favorable to D & S as the non-moving party, D & S did not elect to treat it as a breach. However, I believe that D & S took sufficient actions inconsistent with the agreement between the parties to show that it treated Bilstein's repudiation as a breach.

Ohio follows the rule that "[a] repudiation of a contract before the time for performance gives the adverse party the option to treat the entire contract as broken and to sue for breach of contract, and there is no necessity in such case for a tender of performance or compliance with conditions precedent, or to wait for the time for performance to arrive." *Wren Reese, Inc. v. Structural Concrete Prods., Inc.,* 362 N.E.2d 269, 273 (Ohio Ct.App.1975); *see also Se. Land Dev. Ltd. v. Primrose Mgmt. L.L.C.,* 2011–Ohio–2341, 2011 WL 1944307, at ¶ 11 (Ohio Ct.App. May 16, 2011); *Farmers Comm'n Co. v. Burks,* 719 N.E.2d 980, 990 (Ohio Ct.App.1998). As the majority points out, in addition to suing for breach of contract, if the non-breaching party is a seller of goods, it may also resort to any of the seller's ordinary remedies. Ohio Rev.Code §§ 1302.68, 1302.77. Consistent with these remedies, and particularly relevant in this case, Ohio law recognizes that the non-breaching party may rely on the other's anticipatory repudiation as a defense against a subsequent claim for breach of contract. *Daniel E. Terreri & Sons, Inc. v. Mahoning Cnty. Bd. of Comm'rs,* 2003–Ohio–1227, 786 N .E.2d 921, at ¶ 44 (Ohio Ct.App.2003).

While Ohio affords the non-breaching party a wide array of remedies, none, understandably, allow the non-breaching party to demand payment in excess of the contract price as D & S did. Here, after Bilstein's alleged repudiation, D & S continued to ship parts but reverted to billing for them at the substantially higher, CNC prices it initially charged when it first began production. While there is some uncertainty about many of the contract terms, there is no question that the contract obligated D & S to charge the lower, Hydromat prices. D & S's decision to charge more is neither consistent with the contract nor a permissible seller's remedy in Ohio. However, although D & S had no right to receive this demand, it does show that D & S elected to treat Bilstein's repudiation as a breach.

***6** The majority appears to correctly observe that Ohio follows the rule in most other jurisdictions that "a repudiation ripens into a breach prior to the time for performance only if the promisee elects to treat it as such." *Franconia Assocs. v. United States,* 536 U.S. 129, 143 (2002) (internal quotation marks and citation omitted); *see Se. Land Dev.,* 2011–Ohio–2341, 2011 WL 1944307, at ¶ 11; *Gilmore v. Am. Gas Mach. Co.,* 129 N.E.2d 93, 95 (Ohio Com.Pl.1952). However, the majority, in my view incorrectly, places additional requirements on what a party must do to acknowledge that it is treating an anticipatory repudiation as a breach.

Without identifying any authority in Ohio law, the majority states that because D & S continued to ship products and submit invoices, albeit at prices above the contract price, it did not treat the repudiation as a breach. [FN1] However, in reaching this conclusion I believe that the majority overlooks the

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importance of D & S's decision to bill at higher prices after Bilstein's repudiation.

FN1. As explained above, the majority correctly notes that D & S's decision to raise the price is not a permissible seller's remedy in Ohio. However, the dispositive issue at this stage is whether D & S elected to treat Bilstein's repudiation as a breach, not whether its demands were a permissible seller's remedy. While section 1302.77 sets forth a seller's exclusive remedies in this type of situation, it says nothing to how an aggrieved seller may establish that it has elected to treat a repudiation as a breach.

The question of whether a party treated a repudiation as a breach is ordinarily a question of fact and is not often discussed in detail in written opinions. The limited authority on this issue, however, confirms that a party need not do much to establish that it has elected to treat a repudiation as a breach. *See Bu–Vi–Bar Petroleum Corp. v. Krow,* 40 F.2d 488, 493 (10th Cir.1930) (explaining that the injured party need not bring suit to treat a repudiation as a breach and that "[a] change of position ... manifesting such election is sufficient, and notice of election to treat the repudiation as a breach is not necessary"); *Wren Reese,* 362 N.E.2d at 270–71, 273 (holding that contractor treated seller's repudiation as a breach where it found a different supplier in response to demands for a price increase). In contrast, if a party continues to perform under the contract or seeks specific performance of the contract, courts have generally found that it failed to treat a repudiation as a breach. *See, e.g,, ESPN, Inc. v. Office of Comm'r of Baseball,* 76 F.Supp.2d 383, 388 (S.D.N.Y.1999) (finding that party did not accept the breach where it continued to perform pursuant to the contract terms for one year after the breach); *Profile Invs. No. 25, LLC v. Ammons E. Corp.,* 700 S.E.2d 232, 238 (N.C.App.2010) (holding that the non-repudiating party did not accept the repudiation when it sent letters demanding that the repudiating party proceed with the contract and filed a complaint seeking specific performance); *but see also* Restatement (Second) of Contracts § 57 ("The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation.").

The purpose of requiring that the non-breaching party treat the repudiation as a breach before it ripens into one is to prevent strategic behavior. The non-repudiating party cannot hold the other's repudiation as a trump card ready to play at its convenience if it becomes beneficial to do so at some future point. However, that is not what we have in this case. Because D & S had no basis to charge Bilstein higher prices, doing so was not consistent with any interpretation of the contract. It was, perhaps, a proposal for a new contract. If D & S had resorted to a permissible seller's remedy, such as failing to ship product, that unquestionably would have been sufficient to show that it treated Bilstein's repudiation as a breach.[FN2] Charging an exorbitant price is no different than halting shipments when determining if a party treated a repudiation as a breach.[FN3] This is because both are inconsistent with the terms of the repudiated contract. In fact, on this point the majority agrees—the majority acknowledges that billing above the contract price was inconsistent with the agreement. But, because D & S took these actions in response to Bilstein's anticipatory repudiation, I would hold that it raises a material question of fact as to whether D & S elected to treat the repudiation as a breach.

FN2. The majority also states that D & S had to stop shipping products in order to treat Bilstein's repudiation as a breach because that was the action it initially said that it would take when Bilstein repudiated. However, the majority identifies nothing in Ohio law, or the law of any other state, that imposes such a requirement. Because I do not believe that such a requirement exists, or would be wise, D &

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S's decision to change its course of action is immaterial.

FN3. D & S's decision, I can only assume, arose out of the unique factual situation in this case where Bilstein allegedly repudiated the contract even though it needed the parts and D & S suspected that Bilstein had no other supplier.

*7 In my view, a party can elect to treat a repudiation as a breach by taking actions inconsistent with the terms of the contract. Those actions need not be the statutorily available remedies and need only be enough to show that it is not continuing to perform under the agreement. In this case, by attempting to charge Bilstein more than the contract price, D & S, at minimum, raised a material question of fact as to whether it elected to treat Bilstein's repudiation as a breach. Therefore, I would reverse the grant of summary judgment and remand the matter to the district court for a factfinder to resolve the many questions of fact that surround this transaction.

C.A.6 (Ohio),2011.
D&S Machine Products, Inc. v. Thyssenkrupp Bilstein of America, Inc.
Slip Copy, 2011 WL 2935671 (C.A.6 (Ohio))

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Mears, Patrick

From: Thomas R. Morris [Morris@SilvermanMorris.com]
Sent: Tuesday, September 06, 2011 4:20 PM
To: Mears, Patrick
Subject: FW: Activity in Case 2:10-cv-14965-GER-MAR D and L Equipment, Incorporated Judgment
Attachments: order d.ct. affirming b. ct ruling D&L v. WF 9.6.11.pdf

Pat:

Last December I sent to you an opinion by Judge Shapero of the EDM bankruptcy court called *In re D&L Equipment Inc.* In that opinion, the bankruptcy court held that the financing statement relied upon by Wells Fargo, which described the collateral as "equipment financed by CIT . . . ", was sufficient to perfect a security interest in items not financed by CIT and instead financed by Wells Fargo.

Today, Judge Rosen of the Eastern District of Michigan issued an opinion affirming Judge Shapero's ruling. It is attached for your information.

I believe that this ruling is important because marks new bounds for UCC collateral descriptions. You circulated Judge Shapero's opinion to the UCC committee so I thought that you might be interested in the fact that it was affirmed on appeal. I don't yet know whether an appeal to the court of appeals will be filed.

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-----Original Message-----
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Sent: Tuesday, September 06, 2011 3:09 PM
To: cmecfadmin@mied.uscourts.gov
Subject: Activity in Case 2:10-cv-14965-GER-MAR D and L Equipment, Incorporated Judgment

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

D & L Equipment Inc.,

Debtor.
_____/

Case No. 10-14965
Hon. Gerald E. Rosen

D & L Equipment Inc.,

Appellant,

v.

Wells Fargo Equipment Finance, Inc.,

Appellee.
_____/

Bankr. Case No. 10-72623
Chapter 11
Hon. Walter Shapero

OPINION AND ORDER AFFIRMING
BANKRUPTCY COURT'S OPINION REGARDING SUFFICIENCY
OF COLLATERAL DESCRIPTION IN FINANCING STATEMENT

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on September 6, 2011

PRESENT: Honorable Gerald E. Rosen
Chief Judge, United States District Court

I. INTRODUCTION

In the present appeal arising from a Chapter 11 bankruptcy proceeding, Debtor/Appellant D & L Equipment Inc. challenges a December 1, 2010 opinion and accompanying December 9, 2010 order in which the Bankruptcy Court ruled that a Uniform Commercial Code ("UCC") financing statement filed by Appellee Wells Fargo

Equipment Finance, Inc. ("Wells Fargo") sufficiently identified Wells Fargo's interest in the portion of Debtor's inventory financed by Wells Fargo after it stepped into the shoes of a prior lender. Following a hearing on this matter, the Bankruptcy Court permitted the parties to file post-hearing briefs, and then issued a written opinion deciding the issue in favor of Wells Fargo. Debtor contends that the Bankruptcy Court erred in this ruling, and that the financing statement relied on by Wells Fargo (and the court below) should be deemed effective, at best, to perfect Wells Fargo's security interest in the items financed by the prior lender, but not the items subsequently financed by Wells Fargo.

Having reviewed the parties' written submissions and the pertinent portions of the record on appeal, the Court finds that oral argument would not significantly aid the decisional process, and that it is appropriate to resolve this appeal "on the briefs." *See* Local Rule 7.1(f)(2), Eastern District of Michigan. For the reasons set forth below, the Court affirms the Bankruptcy Court's ruling in all respects.

II. FACTUAL AND PROCEDURAL BACKGROUND

Debtor/Appellant D & L Equipment Inc. ("Debtor") owns a fleet of industrial crushing, screening and conveying equipment, and it sells and leases this equipment for use primarily in road construction and improvement. On May 4, 2000, Debtor and The CIT Group/Equipment Financing, Inc. ("CIT") entered into a security agreement, under which CIT agreed to provide commercial floor plan financing to Debtor for its use in acquiring stone crushing equipment for its inventory. To secure repayment, Debtor granted CIT a security interest in the stone crushing equipment acquired through this

financing.

To perfect its security interest, CIT filed a UCC-1 financing statement with the Michigan Secretary of State on September 30, 2005, naming CIT as the secured party and describing the collateral as follows:

> Equipment and inventory financed by The CIT Group/Equipment Financing, Inc., which are held for sale or lease, or which are returned goods, together with all present and future attachments, accessories, substitutions, replacements, accessions and additions thereto, instruments, accounts, rental and contract rights now existing or hereafter arising with respect to the foregoing and all cash and non cash proceeds thereof.

(Appellee's Br., Exhibit 1.)

In 2007, Appellee Wells Fargo Equipment Finance, Inc. ("Wells Fargo") stepped into CIT's shoes as a secured creditor when it purchased CIT's interest in the floor plan financing arrangement with Debtor. On October 17, 2007, Wells Fargo filed a UCC-3 amendment to the above-cited financing statement with the Michigan Secretary of State, identifying itself as the secured party. The collateral description, however, was not amended, but continued to reference equipment and inventory "financed by [CIT]."

In January of 2008, Debtor and Wells Fargo executed certain amendments and supplements to the financing arrangement, through which Wells Fargo agreed to continue to provide Debtor with financing to acquire additional equipment for its inventory. More recently, on April 26, 2010, Wells Fargo filed a UCC-3 continuation statement with the Michigan Secretary of State to prevent its security interest from lapsing. Again, the collateral description in this continuation statement was not amended, and the language at

issue has remained unchanged since the original UCC-1 financing statement filed by CIT.

Shortly before Debtor filed for bankruptcy protection on October 25, 2010, it defaulted under the terms of the security agreement by failing to make the required payments. Wells Fargo brought suit in state court to recover possession of the equipment financed under the security agreement, and on October 19, 2010, the state court entered an order granting Wells Fargo possession of the collateral.

After Debtor filed its bankruptcy petition, Wells Fargo filed a motion with the Bankruptcy Court, seeking an order that would either prohibit Debtor from continuing to use the equipment in which Wells Fargo claimed a security interest or, alternatively, require Debtor to make "protection" payments to Wells Fargo as a precondition to the use of this equipment. In response to this motion, Debtor disputed that the security interest claimed by Wells Fargo was properly perfected as to certain items in Debtor's inventory — namely, the equipment that had been financed by Wells Fargo, as opposed to CIT. Upon considering this question, the Bankruptcy Court held that the financing statement and associated UCC filings reflecting the security interests of Wells Fargo and its predecessor, CIT, sufficiently identified the collateral that was subject to these security interests, and thus served to perfect Wells Fargo's interest as to all of the equipment financed by either CIT or Wells Fargo. Debtor now appeals from this ruling.

III. ANALYSIS

A. The Standards Governing This Appeal

In the present appeal, Debtor challenges the Bankruptcy Court's ruling on a purely legal question — namely, whether Wells Fargo properly perfected its security interest in the items in Debtor's inventory financed by either Wells Fargo or its predecessor, CIT. To the extent that the resolution of this issue turns upon facts, the pertinent facts are not in dispute. Accordingly, because this appeal implicates only questions of law, this Court reviews *de novo* the Bankruptcy Court's resolution of these legal issues. *See First National Bank of Barnesville v. Rafoth (In re Baker & Getty Financial Services, Inc.)*, 974 F.2d 712, 717 (6th Cir. 1992).

B. The UCC Filings Made by Wells Fargo and Its Predecessor, CIT, Were Sufficient to Provide Notice of Wells Fargo's Security Interest, and Any Errors or Omissions Did Not Render These Filings Seriously Misleading.

1. The Contents of a Valid UCC Financing Statement

Because this appeal turns upon the adequacy of the UCC filings made by Wells Fargo and its predecessor, CIT, the Court begins with a brief survey of the UCC provisions that define the contents of a valid UCC financing statement. First, § 9-502 of the UCC provides that "a financing statement is sufficient only if it does all of the following: (a) [p]rovides the name of the debtor[;] (b) [p]rovides the name of the secured party or a representative of the secured party[; and] (c) [i]ndicates the collateral covered by the financing statement." Mich. Comp. Laws § 440.9502(1). Next, § 9-504 states that "[a] financing statement sufficiently indicates the collateral that it covers" if it provides "[a] description of the collateral pursuant to section 9[-]108." Mich. Comp. Laws § 440.9504. This latter UCC provision, in turn, states that "a description of personal or real

property is sufficient, whether or not it is specific, if it reasonably identifies what is described," Mich. Comp. Laws § 440.9108(1), and collateral is deemed to be "reasonably identifie[d]" if it is described by reference to "a type of collateral defined in the uniform commercial code," Mich. Comp. Laws § 440.9108(2)(c).[1]

Beyond these specific requirements, it is clear from the pertinent UCC provisions and their accompanying commentary that the UCC has "adopt[ed] the system of 'notice filing.'" Mich. Comp. Laws § 440.9502 cmt. 2. Thus, it is sufficient that a financing statement "indicates merely that a person may have a security interest in the collateral indicated," and "[f]urther inquiry from the parties concerned will be necessary to disclose the complete state of affairs." Mich. Comp. Laws § 440.9502 cmt. 2. The commentary to UCC § 9-502 further states:

> Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement under which the collateral changes from day to day. However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a single item of equipment), a financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing

[1]The terms used in the financing statement at issue here to describe the collateral — *i.e.*, "[e]quipment" and "inventory" — qualify as "type[s] of collateral defined in" the UCC. *See* Mich. Comp. Laws § 440.9102(1)(gg) (defining "[e]quipment"); Mich. Comp. Laws § 440.9102(1)(vv) (defining "[i]nventory").

> statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed.

Mich. Comp. Laws § 440.9502 cmt. 2. Finally, and more generally, § 1-102 of the UCC provides that the "act shall be liberally construed and applied to promote its underlying purposes and policies," Mich. Comp. Laws § 440.1102(1), and one of the "[u]nderlying purposes and policies" identified in § 1-102 is to "simplify, clarify and modernize the law governing commercial transactions," Mich. Comp. Laws § 440.1102(2)(a).

2. The Filings in This Case Satisfied the UCC Standard of "Notice Filing" by Alerting Third Parties to the Need for Further Inquiry as to Which Items of Equipment and Inventory Were Subject to Wells Fargo's Security Interest.

Returning to the particular UCC filings at issue here, all are agreed that the UCC-3 amendment filed by Wells Fargo after it purchased CIT's interest in the floor plan financing arrangement with Debtor sufficed to identify Wells Fargo as the secured party of record in place of CIT. *See* Mich. Comp. Laws § 440.9512(2) ("If an amendment of a financing statement that provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record."). The sole point of dispute here, then, is whether the collateral description contained in CIT's initial UCC-1 financing statement — a description that was never changed in Wells Fargo's subsequent UCC filings — operated to notify others that Wells Fargo's acknowledged security interest was limited only to equipment and inventory that had been "financed by [CIT]," or whether this description instead provided

sufficient notice that Wells Fargo's security interest extended to the additional equipment and inventory that was financed by Wells Fargo after it stepped into CIT's shoes.

The parties have not identified any court rulings that address precisely these circumstances, but instead seek to appeal by analogy to cases that arose from somewhat different facts. First, Wells Fargo points to — and the Bankruptcy Court likewise relied upon — the decision in *Allis-Chalmers Credit Corp. v. Tri-State Equipment, Inc. (In re Tri-State Equipment, Inc.),* 792 F.2d 967, 969, 972 (10th Cir. 1986), in which the Tenth Circuit held that an admittedly "poorly drafted" financing statement was nonetheless sufficient to put others on notice of a possible security interest that warranted further inquiry. The financing statement at issue encompassed both the debtor's inventory of new and used equipment and the "proceeds therefrom," but these references to "new and used equipment" and "proceeds" were followed by the language "manufactured by or offered for sale by [plaintiff] Allis-Chalmers Corporation." *Tri-State Equipment,* 792 F.2d at 969. Thus, while it was clear that the financing statement disclosed creditor Allis-Chalmers' security interest in debtor Tri-State's inventory of new and used equipment manufactured or sold by Allis-Chalmers, it was less clear whether the statement sufficiently disclosed Allis-Chalmers' interest in a particular type of "proceeds" obtained by Tri-State through its sales of equipment from its inventory — namely, equipment that Tri-State had accepted as trade-ins during the course of these sales, but that was ***not*** manufactured by Allis-Chalmers. The "key question" before the court, then, was "what was modified by the phrase 'manufactured by or offered for sale by Allis-Chalmers'" —

i.e., whether this phrase applied only to the "inventory" portion of the collateral description, or to the "proceeds" portion of this description as well. 792 F.2d at 970.

Upon considering this issue, the court acknowledged that the language of the financing statement remained ambiguous under any reading, so that it was necessary to determine the effect of a financing statement when its language "has several [possible] meanings." 792 F.2d at 971. At the threshold of this inquiry, the court observed that the UCC has adopted a "simple system of notice filing," under which "a proper financing statement will show merely that the secured party who has filed *may* have a security interest in the collateral described." 792 F.2d at 971 (internal quotation marks and citations omitted) (emphasis in original). This system, the court explained, places a burden on "later creditors to protect themselves by getting full information on any prior agreements flagged by the minimal financing statement filing." 792 F.2d at 971.

The court then surveyed the case law of the forum state (Colorado) and other jurisdictions to ascertain how these general principles of notice filing had been applied to vague or ambiguous financing statements:

> . . . [T]he settled rule in Colorado is that the description in the filing need only put other *creditors on notice of a possible security interest in the collateral* in question. Most other courts are also now willing to find a description that is unclear or susceptible to more than one distinct meaning sufficient in circumstances in which the description would put other creditors on notice of the need for further inquiry.

792 F.2d at 971 (internal quotation marks and citations omitted) (emphasis in original).

Applying these standards, the court held that the collateral description in the Allis-Chalmers financing statement, while ambiguous, was "sufficient to put [other creditors] on notice of a possible Allis-Chalmers security interest in the contested Tri-State trade-ins," including trade-in equipment collected as "proceeds" but not manufactured by Allis-Chalmers. 792 F.2d at 972; *see also International Harvester Credit Corp. v. Nicholls (In re Richards),* 455 F.2d 281, 284 (6th Cir. 1972) (holding that a financing statement that described collateral by initials and serial numbers, without indicating what the initials stood for, was sufficient to "put any interested person on inquiry that [creditor] International Harvester Co. had a security interest in the property described"); *First Bank v. Eastern Livestock Co.,* 837 F. Supp. 792, 801 (S.D. Miss. 1993) ("[A] financing statement, though ambiguous, may nevertheless provide adequate notice to a prospective purchaser or lender that such party should make further inquiry to ascertain the extent of the collateral covered by a secured party's agreement with the debtor.").

Next, Wells Fargo directs the Court's attention to cases in which the courts placed importance upon a financing statement's reference to types of collateral that are expressly defined in the UCC itself. As noted earlier, UCC § 9-108 provides that a collateral description "reasonably identifies the collateral" if it references "a type of collateral defined in the uniform commercial code," Mich. Comp. Laws § 440.9108(2)(c), and the terms "[e]quipment" and "inventory" used in the financing statement at issue here are, in fact, defined elsewhere in the UCC, *see* Mich. Comp. Laws §§ 440.9102(1)(gg), 440.9102(1)(vv). In reliance on this UCC provision, the court in *Canfield v. Small*

Business Administration (In re Tebbs Construction Co.), 39 B.R. 742, 745-47 (Bankr. E.D. Va. 1984), held that a financing statement that described the collateral as "items of machinery and equipment . . . as set forth in the attached security agreement" was sufficient to put third parties on notice of a possible security interest, even though no security agreement had been attached to the financing statement. In support of this holding, the court reasoned that "the failure to further describe collateral where a description as to type alone would be sufficient does not cause the financing statement to be invalid." *Tebbs Construction,* 39 B.R. at 747; *see also In re Stegman,* 1974 WL 21717, 15 U.C.C. Rep. Serv. 225 (S.D. Fla. July 23, 1974) (holding that a financing statement's reference to "various equipment, see Schedule 'A' attached hereto," was sufficient despite the failure to attach the schedule, where the reference alone "should have put a reasonable searcher on notice that the desired information could be obtained by inquiry of the creditor or the debtor"); *cf. I.A. Durbin, Inc. v. Jefferson National Bank (In re I.A. Durbin, Inc.),* 46 B.R. 595, 600 (Bankr. S.D. Fla. 1985) ("Where a secured creditor elects to describe specific property rather than 'types,' *i.e.,* inventory, accounts receivable, equipment, general intangibles, etc., the creditor is perfected only to the property so described and not to other property of the same type.").

These decisions — and, of course, the UCC provisions upon which they rely — provide ample support for the Bankruptcy Court's ruling in this case. As this body of law makes clear, it is enough that CIT's and Wells Fargo's UCC filings put interested parties on notice of a possible security interest in Debtor's equipment and inventory, such that

they would perceive the need to inquire further into the precise nature and extent of this security interest. Plainly, CIT's initial filing disclosed that some of this equipment and inventory — namely, the portion financed by CIT — was subject to a security interest. Moreover, Wells Fargo's subsequent filings disclosed that it had stepped into the shoes of CIT as the secured party. Given the nature of the security interest — an interest that categorized Debtor's equipment and inventory depending on whether it had been acquired through financing — any interested party naturally would have to make an inquiry to determine which items of equipment and inventory were subject to this interest, because the relevant characteristic of any given item — financed or not — would not be revealed through simple inspection.

As the Bankruptcy Court observed, (*see* Bankr. Ct. 12/1/2010 Op. at 4), any such inquiry surely would have divulged that Wells Fargo, upon stepping into CIT's shoes, had continued to operate under the floor plan financing arrangement established by its predecessor CIT. Under this arrangement, Wells Fargo continued to advance funds used by Debtor to acquire additional inventory. This discovery, in turn, would certainly have suggested the possibility, at least, that Wells Fargo's security interest extended not only to the inventory financed by CIT, but also to the items of inventory financed by Wells Fargo after it assumed CIT's role as secured party, and further inquiry into this possibility would have revealed that Wells Fargo did, in fact, hold a security interest in all of the

inventory financed by itself or its predecessor, CIT.[2] Indeed, it seems clear that any interested parties did, in fact, receive adequate notice from CIT's and Wells Fargo's UCC filings, and that they undertook the necessary inquiry triggered by this notice — as Wells Fargo states without contradiction, "there was never any misunderstanding among Debtor's many secured creditors as to which items of Debtor's inventory were covered by" the UCC filings. (Appellee Br. at 6.) Finally, and as confirmed by the above-cited case law, because CIT's initial UCC filing referenced types of collateral expressly defined in the UCC itself — namely, equipment and inventory — this filing "reasonably identifie[d] the collateral," Mich. Comp. Laws § 440.9108(2)(c), and a failure to further specify the particular items of equipment and inventory subject to this security interest did not serve to invalidate CIT's and Wells Fargo's UCC filings.

The cases cited by Debtor are not to the contrary. First, Debtor notes the recognition in the case law that "[t]he presence of qualifying language in a financing statement functions to limit the scope of perfection of the secured creditor's security interest." *In re Holladay House, Inc.,* 387 B.R. 689, 695 (Bankr. E.D. Va. 2008). Yet, the "qualifying language" here — "financed by CIT" — is readily distinguishable from the limiting language in the decisions cited by Debtor. In *Mason v. Heller Financial Leasing, Inc. (In re JII Liquidating, Inc.),* 341 B.R. 256, 274-275 (Bankr. N.D. Ill. 2006), for example, the court held that a security interest was perfected only as to the sixteen

[2]Debtor does not challenge the validity of Wells Fargo's underlying security interest, but only the sufficiency of the UCC filings to provide notice of this interest.

pieces of equipment specifically identified in a financing statement, and not the "hundreds" of other items of equipment not listed in this filing. Similarly, in *CLC Equipment Co. v. Brewer (In re Value-Added Communications, Inc.),* 139 F.3d 543, 545 (5th Cir. 1998), the financing statements at issue referenced "equipment and personal property covered by" a specified equipment lease, and the court held that "[t]he express language of the financing statements covers no more than the items" listed in this lease. *See also I.A. Durbin,* 46 B.R. at 600-01 (addressing a financing statement that "limit[ed] its description to intangible property rights encumbered by a mortgage on seven specifically described parcels of property," and concluding that a third party reviewing this financing statement "could justifiably interpret it as evidencing an existing security agreement only in those assets specifically described in the real property mortgage"); *In re Aragon Industries, Inc.,* 1973 WL 21377, 14 U.C.C. Rep. Serv. 1218 (S.D. Fla. Nov. 21, 1973) (holding that a financing statement identifying four forklifts by their serial numbers did not cover two forklifts with "serial numbers in no way related to those" listed in the financing statement, where "the serial number was the *only* way to identify" the forklifts subject to a security interest).

In each of these cases, the limiting language in a financing statement not only specified the particular items that were subject to a security interest, but also obviated the need for further inquiry. This language, by its very nature, permitted an interested party to conclusively determine whether a given item fell within or outside the specified class — *e.g.,* whether the item was among the listed pieces of equipment, *JII Liquidating,* 341

B.R. at 274-275, or had one of the specified serial numbers, *Aragon Industries,* 1973 WL 21377. Here, by contrast, the language at issue, "financed by CIT," did not describe a self-evident characteristic that encompassed or excluded the various items in Debtor's inventory, but instead invited additional inquiry to determine which items in this inventory Debtor had obtained through its floor plan financing. As explained earlier, this inquiry would have revealed that some items in Debtor's inventory had been obtained through financing provided by CIT's properly identified successor-in-interest, Wells Fargo. This, in turn, would have given rise to the obvious question whether these items financed by Wells Fargo ***also*** were subject to a security interest, and further inquiry would have answered this question in the affirmative. Because the language here necessitated an inquiry that would have disclosed Wells Fargo's security interest, rather than foreclosing the need for an inquiry or channeling an interested party's attention away from asking the questions that would reveal this interest, the Court finds that the bulk of the cases cited by Debtor are readily distinguishable.

One of the cases identified by Debtor, however, lends somewhat more support to its position. In *Holladay House,* 387 B.R. at 693, the financing statement at issue described the collateral by reference to an "Attached List," and this list, in turn, provided that the creditor's security interest encompassed "[a]ll inventory, furniture and furnishings of every kind . . . *delivered to consignee at any time by consignor pursuant to a consignment agreement."* (Emphasis in original.) The court found that this language limited the creditor's "perfected security interest to the inventory that it delivered to the

Debtor," but did not perfect the creditor's "security interest in all of the other inventory owned by the Debtor." *Holladay House,* 387 B.R. at 695-96. Although the underlying security agreement granted the creditor a somewhat broader security interest encompassing more items in the debtor's inventory, the financing statement made no reference to this underlying agreement, and the court opined that "[t]he mere existence of a financing statement does not trigger a duty for third parties to inquire into the terms of the underlying security agreement." 387 B.R. at 696. Rather, absent incorporation of or reference to an underlying security agreement, the court opined that "a reasonable title searcher is under no duty or obligation to do anything but rely upon the indication of collateral in the financing statement." 387 B.R. at 696.

In *Holladay House,* as here, a broader reference to "inventory" was limited by language specifying the ***means*** by which the inventory came into the debtor's possession. Here, the means in question is "financ[ing] by CIT," while the financing statement in *Holladay House* referenced delivery to the debtor pursuant to a consignment arrangement between the parties. In Debtor's view, then, just as the creditor's perfected security interest in *Holladay House* was limited to inventory delivered through this consignment arrangement, Wells Fargo's perfected security interest in this case should be limited to inventory "financed by CIT."

While this argument has some merit, the Court finds that it ultimately fails to carry the day. Nothing in the financing statement in *Holladay House* suggested the possibility that the creditor had a security interest in any inventory beyond that delivered to the

debtor pursuant to the parties' consignment agreement. Here, in contrast, while CIT's initial UCC filing, viewed in isolation, would limit this creditor's perfected security interest to those items in Debtor's inventory that it had financed, this initial UCC filing must be viewed in the context of subsequent filings in which Wells Fargo gave notice that it had stepped into the shoes of CIT. As the Bankruptcy Court observed, the "cumulative effect" of CIT's and Wells Fargo's UCC filings was to notify third parties — or, at a minimum, alert them to the possibility — that Wells Fargo had assumed CIT's role in the floor plan financing arrangement through which Debtor acquired additional inventory. (Bankr. Ct. 12/1/2010 Op. at 4.) Unlike in *Holladay House,* then, the ***arrangement*** through which items in Debtor's inventory became subject to a security interest — *i.e.,* acquisition through floor plan financing — remained the same before and after the transition from CIT to Wells Fargo as secured creditor, with only the identity of this secured creditor having changed. As Wells Fargo concedes, it cannot claim a perfected security interest in any items that were added to Debtor's inventory through arrangements or means other than the floor plan financing scheme initiated by CIT and assumed by Wells Fargo. Yet, because CIT's and Wells Fargo's UCC filings, viewed collectively, would give notice to third parties that inventory obtained by Debtor through a CIT/Wells Fargo floor plan financing arrangement was — or at least might be — subject to a security interest, the Court finds that these filings do not suffer from the deficiency identified in *Holladay House.*

Finally, while Wells Fargo admittedly could have avoided any possible confusion

by amending the collateral description to encompass items financed by ***either*** CIT or Wells Fargo, the Bankruptcy Court correctly observed that any such error or omission did not automatically render Wells Fargo's filings deficient under the UCC system of notice filing. Rather, under UCC § 9-506(1), "[a] financing statement substantially satisfying the requirements of [Article 9] is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading." Mich. Comp. Laws § 440.9506(1).

Here, as in *Tri-State Equipment,* 792 F.2d at 972, although Wells Fargo could have more clearly described the extent of its security interest, its failure to do so was not "seriously misleading," as its UCC filings would not have "stop[ped] future creditors from making the further inquiries they were obligated by the U.C.C. to make." Instead, and as discussed earlier, CIT's initial UCC filing accurately disclosed the mechanism — *i.e.,* a financing arrangement — through which a security interest would arise, and this disclosure, by its very nature, necessitated an inquiry to identify which items in Debtor's inventory had been acquired through this arrangement. Moreover, Wells Fargo's subsequent filings accurately identified this creditor as CIT's successor, thereby alerting third parties to the need to include Wells Fargo in any inquiry. Finally, and as noted earlier, Wells Fargo points to the brute fact that, so far as the record discloses, Debtor's other secured creditors evidenced no confusion or misunderstanding as to which items of Debtor's inventory were covered by CIT's and Wells Fargo's UCC filings. This record provides ample support for the Bankruptcy Court's conclusion that the defects in Wells

Fargo's filings did not render them "seriously misleading."

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Bankruptcy Court's December 1, 2010 opinion and accompanying December 9, 2010 order are AFFIRMED in all respects.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: September 6, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 6, 2011, by electronic and/or ordinary mail.

s/Ruth A. Gunther
Case Manager