~~UNDER SEAL~~

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

S&V INDUSTRIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. 15-956-BC
	)	
CARLISLE TIRE & WHEEL CO.; CARLISLE TRANSPORT PRODUCTS, INC.; CTP TRANSPORT PRODUCTS, LLC; CARLISLE FLUID TECHNOLOGIES, INC., and THE CARLSTAR GROUP LLC,	)	
	)	
Defendants.	)	

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MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PURSUANT TO TRCP 56.05 SPECIFYING FACTS WITHOUT SUBSTANTIAL CONTROVERSY; AND ORDERS ON MEDIATION, TELEPHONE CONFERENCE, AND BENCH TRIAL

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This lawsuit is a dispute over the sale of goods. The lawsuit was filed by a supplier of cord fabric, a raw material used by the Defendants in manufacturing tires. The Plaintiff has sued to recover approximately $1.26 million and attorneys' fees for over 400,000 pounds of tire cord the Plaintiff claims the Defendants forecasted and had the Plaintiff order in September 2013 for Defendants to have sufficient inventory by December (the "Sale"). *Complaint*, p. 4, ¶ 16 (June 25, 2015). The Plaintiff alleges that it has received only $204,715.00 in payment for two of the ten tire cord inventory containers ordered, leaving a balance owed of $1,190,407.00 plus recovery of lost interest and storage charges. *Complaint*, p. 7, ¶¶ 37, 40, 41 (June 25, 2015). The Complaint has one cause of action: breach of contract.

The case is presently before the Court on the Defendants' Motion for Summary Judgment seeking dismissal of the entire lawsuit and an award of attorneys' fees and costs.

The Motion asserts essentially two defenses for Defendants' nonpayment and argues these are established in the summary judgment record: (1) the goods in question did not conform to the specifications of the terms of the parties' contracts and under those circumstances the contract terms allow rejection of the goods, which Defendants did; and (2) the terms of the parties' contracts disclaim payment for forecasted goods.

The Plaintiff disputes that the contract terms asserted by the Defendants govern. The Plaintiff asserts that other terms govern the Sale, including course of dealing and

performance. When these other terms are taken into account, the Plaintiff asserts that the Defendants are not able to establish on summary judgment the key points of:

— nonconforming goods,
— effective rejection by Defendants, and
— disclaimer of payment for forecasted goods.

Rulings and Orders

Genuine Issues of Material Fact

The Defendants have organized their Motion around three purchase orders ("POs"): 673417, 673418 and 673819 issued during the course of the events in dispute, and Forecasted Goods, material the Plaintiff purchased to have in storage for Defendants' on-call needs.

The organizational approach the Defendants have taken in their Motion reflects their substantive position. The Defendants view each PO as a new and separate contract between the parties, and that the Defendants are not required to pay for goods not covered by a PO. Moreover, it is the Defendants' position that the terms which govern the Sale are limited to the written terms contained on and incorporated into the POs including the material specifications for determining if the goods are conforming. This view that the Sale terms are limited to the PO terms is evident throughout Defendants' Statements of Undisputed Material Facts ("DSUMFs") where, for example, they allege in paragraphs 23 and 24:

> 23. When SRF [supplier] material arrived at S&V's [Plaintiff's] warehouse facility in the United States, S&V would send Carlstar

> [Defendant] a stock status sheet listing how much material was being kept at S&V's facility, how much was in the process of being shipped, and how much was on order. (Affidavit of Kathy Taylor ("Taylor Aff.") (attached in Appendix I) ¶ 5.)
>
> 24. Carlstar would then offer S&V a purchase order contract based on its current production needs. (Taylor Aff. ¶ 6.) [emphasis added].

The Plaintiff disputes that each PO constitutes a contract and disputes that the terms governing the Sale are the written terms contained on and incorporated into the POs.

The Plaintiff asserts that the Sale terms are broader. The terms not only include the PO terms but are also informed by other documents, and the parties' course of dealing and performance (hereinafter referred to collectively as the "Other Evidence"):

> **RESPONSE:** Disputed. The characterization of the purchase order as "contract" is inaccurate. The course of dealings between the parties evidences a much broader contractual relationship, including Carlisle's binding forecasting of its required inventory and its safety stock requirements, the specifications for the material it sought to purchase, and the price – all of which were agreed upon and form the parties' agreement well in advance of the issuance of purchase orders. (Deposition of Kathryn Taylor ("Taylor Depo.") 69:17–89:3; 92:17–99:1; 126:1–135:3; Taylor Depo. Exs. 5, 6; Deposition of Mahesh Douglas ("Douglas Depo.") 7:17–20:8; 28:1–36:2; Douglas Depo. Exs. 12, 13, 14.). The purchase orders were merely instructions from Carlisle for releases of inventory in the warehouse in specific quantities for specific times – it is disputed that each new purchase order was a new contract between the parties, but rather, was merely the way in which the larger contract between the parties was performed. (Declaration of Mahesh Douglas ("Douglas Dec.") ¶ 29.)

Plaintiff's Response to DSUMF ¶ 24.

The Plaintiff's view is that, for reasons that benefitted the Defendants, the terms of the Sale were that the amount of tire cord the Plaintiff ordered from its supplier was based upon a binding quarterly forecasted amount provided to the Plaintiff by the Defendants as per the parties' agreement that the Plaintiff must maintain the forecasted amount of inventory in its warehouse at all times. That way the Defendants could obtain the exact amount of tire cord it needed in a given week with very short notice.

The Plaintiff's view also is that the conformity of the goods was determined on a basis broader than the PO terms incorporation of a material specification document. Conformity of the goods was determined by a presupply test roll, a "baby roll," in conjunction with the Defendants' material specification document, which, if approved, the baby roll was the specification to which the goods subsequently produced for PO 673417 and the Forecasted Goods must conform.

Plaintiff's view is evident from its pleading, stated *supra* at 1, seeking recovery not with respect to individual POs but for 400,000 pounds of tire core the Defendants had forecasted and which the Plaintiff ordered in September 2013, and is set out in Plaintiff's Amended Statement of Additional Disputed Facts ("PASADFs") 1-15.

This dispute between the parties about the terms of the Sale is fundamental to the outcome of the lawsuit and ruling on Defendants' Summary Judgment Motion. The assumption underlying Defendants' Motion is that the terms of the Sale are limited to the PO terms. If, however, Plaintiff's view of the terms of the Sale as encompassing more

than the PO terms and as including the Other Evidence of documents and the parties' course of dealing and performance is taken into account, virtually all of the Defendants' Motion for Summary Judgment must be denied. If Plaintiff's Other Evidence informs the Sale terms, it presents, under Tennessee Code Annotated sections 47-2-602, 47-2-606 and 47-2-608, genuine issues of material fact for trial on whether the goods were nonconforming, and whether Defendants' actions constitute effective rejection, acceptance and/or revocation of acceptance of nonconforming goods.

It was, therefore, incumbent on the Defendants, to prevail on summary judgment, to establish as a matter of law that the Plaintiff's Other Evidence of documents besides the PO terms, and the parties' course of dealing and performance are inadmissible. Defendants addressed this by asserting the parol evidence rule, an integration and written modification requirement incorporated into the PO terms, a provision disclaiming the Defendants' liability for forecasted goods unless agreed to in writing ("Forecasting Disclaimer"), and Tennessee Code Annotated section 47-2-202 (a Statute of Frauds provision) that Other Evidence is inadmissible because it constitutes prior or contemporaneous, oral, contradictory evidence to the written provisions of the POs. This argument, however, does not go far enough.

The Defendants' Motion does not take into account that to exclude the Other Evidence, the PO written terms must have been intended by the parties as a "final" expression of their agreement; or must be contradictory, not explanatory or supplemental;

or that the Other Evidence does not constitute a waiver. *See* Tennessee Code Annotated sections 47-1-205, 47-1-303, 47-2-202(4), 47-2-207, and 47-2-209. The Defendants' summary judgment motion does not fully address these points, and the Motion does not establish that these statutory provisions are inapplicable. Thus, the result is that the Plaintiff's Other Evidence is admissible for the summary judgment analysis.

Once admissible and considered, this Other Evidence creates genuine issues of material fact on the terms of the Sale. These, in turn, create the following genuine issues of material fact on almost all of the grounds asserted by the Defendants for summary judgment. The Court finds that when the Plaintiff's Other Evidence is considered it creates the following genuine issues of material fact for trial:

— Nonconformity of the goods—There are genuine issues of material fact whether, as asserted by the Defendants, the Original Specification issued by the Defendants set the material specification, as provided by the PO terms, and if so, the COAs for the goods in issue as to PO 673417 and the Forecasted Goods show on their face failure to stay within the shrinkage value of the Original Specification, thereby rendering the goods nonconforming; versus, as asserted by the Plaintiff, whether the Other Evidence shows that the Defendants' actions signifying approval of the Thailand baby roll set it as the material specification to which the subsequent goods in issue produced for PO 673417 and the Forecasted Goods conformed.

— The Other Evidence creates genuine issues of material fact whether the Defendants effectively rejected nonconforming goods and did not signify acceptance.

— If the Defendants prevail at trial that the goods were nonconforming but the Plaintiff prevails on ineffective rejection and/or acceptance by Defendants of nonconforming goods, then there are genuine issues of material fact on whether the Defendants were entitled to revoke the acceptance. To prevail on revocation, the Defendants must prove at trial that the nonconformance shrinkage value of the

> goods substantially impaired the value of the goods to the Defendants by causing an excessively high blister rate, and that the Defendants' acceptance of the goods was reasonably induced by difficulty of discovery before acceptance or by the Plaintiff's assurances.

These genuine issues of material fact which devolve from the disputed Sale Terms preclude summary judgment as to the goods in issue covered by PO 673417 and the Forecasted Goods.

The admission of Other Evidence also precludes summary judgment on the alternative basis asserted by Defendants that the written PO terms disclaim liability for the Forecasted Goods. By creating genuine issues of material fact on the terms of the Sale, the Other Evidence undermines and rebuts the Defendants' defense that the PO terms preclude liability for the Forecasted Goods.

With these genuine issues of material fact present in the record, it is ORDERED that Defendants' Motion for Summary Judgment is denied.

Facts Without Substantial Controversy

There are however some aspects of Defendants' Summary Judgment Motion which have been established without controversy related to POs 673418 and 673819 (ground 2, *infra* at 29) and the constituents of the written terms of the POs. As provided in Tennessee Civil Procedure 56.05 those facts are specified as follows.

POs 673418 and 673819

These POs consist of heavier 1260/12 denier Nylon 6 Goods. DSUMF 134 asserts that the Defendants paid POs 673418 and 673819. DSUMF 134 is based upon paragraph 88 of the Sprow Affidavit (Exhibit A to DSUMF) and Exhibits X and Y to DSUMFs.

The response by Plaintiff to DSUMF 134 does not dispute these two POs were paid. The response disputes the characterization of each PO as a contract.

It is therefore found by the Court that it is uncontroverted on the summary judgment record that payment has been made by Defendants on these two POs.

Summary judgment is not granted, however, as to the characterization of PO 673418 and 673819 each as a contract. As explained above, there are genuine issues of material fact on the terms of the Sale.

Further, at this stage of the proceedings with genuine issues of material fact on Defendants' liability for payment of PO 673417 and the Forecasted Goods, the Court is unable to "true up" the effect on the amount of damages of its finding that the Defendants paid POs 673418 and 673819. That will have to wait until the conclusion of the trial on those issues of damages.

Record Establishes Terms Incorporated Into POs

The Court further finds from the Supplemental Affidavit of Kathy Taylor; Exhibits U, Y and Z to DSUMFs; and DSUMFs 165, 166, and 167 there is no genuine issue of

fact that these POs referenced and incorporated the "CTP Transportation Products, LLC Global Terms and Conditions." As explained by the Defendants:

> S&V contends that there is a dispute as to which terms and conditions applied to these purchase orders. (Resp. Br. 86-88.) Specifically, S&V notes that the "POs in the record contain different terms than the terms [Carlstar] now relies upon, including versions of PO 637417 and PO 637418 that make reference to "The Carlstar Group LLC Terms and Conditions," rather than the "CTP Transportation Products, LLC Terms and Conditions." (Resp. Br. 87.) However, as explained in the attached Supplemental Affidavit of Kathy Taylor, the versions of PO 673417, PO 673418, and PO 673819 that were sent to and accepted by S&V incorporated by reference the "CTP Transportation Products, LLC Terms and Conditions." (*See* Supplemental Affidavit of Kathy Taylor ("Supplemental Taylor Aff.") (attached as Exhibit 5) ¶ 4; *see also* Appendices U, Y, and Z to Carlstar's Opening Brief.)
>
> As Ms. Taylor further explains, the versions of the relevant purchase orders that refer to "The Carlstar Group LLC Terms and Conditions" are simply an artifact of Ms. Taylor's having reprinted the relevant purchase orders at some point after CTP Transportation Products, LLC changed its name to The Carlstar Group, LLC, as the field listing which company's terms and conditions applied had been automatically updated after the name change occurred in the database that stores Carlstar's purchase orders in an electronic format. (Supplemental Taylor Aff. ¶ 5.) Indeed, S&V cannot credibly contend that there is any dispute that "CTP Transportation Products, LLC Terms and Conditions" were the terms and conditions document that were referenced in the copy of PO 673417, PO 673418, and PO 673819 that S&V received from Carlstar, because the copies that S&V produced in this litigation (i.e., bearing S&V production numbers) incorporate "CTP Transportation Products, LLC Terms and Conditions." (*See, e.g.*, S&V 0936 – S&V 0937 (attached as Exhibit 6) and S&V 0938 – S&V 0939 (attached as Exhibit 7).)

Reply In Further Support Of Defendants' Motion For Summary Judgment, pp.26-27 (Sept. 16, 2016).

Accordingly, the following provisions from the CTP Transportation Products, LLC Global Terms and Conditions are found by the Court to be incorporated into and be a part of the terms of the POs:

> (3) Forecasts and Product Shortages: Any forecast provided by CTP is non-binding and not a commitment by CTP to purchase such quantities of the Products unless otherwise agreed upon between the Seller and Buyer in writing. Seller shall promptly notify CTP of any Product shortages or any pending disputes or litigation which may jeopardize Seller's ability to perform under the Agreement.
>
> ****
>
> (7) Inspection / Non-Conforming Shipments: Payment for Products delivered hereunder or acceptance of delivery will not constitute acceptance by CTP of such Products. CTP may inspect 100% or a sample of Products, at CTP's option and may reject all or any portion of a shipment of CTP determines a Product to be defective or nonconforming. Products rejected and Products supplied in excess of quantities called for under an Order may be returned to Seller at Seller's expense. CTP will not be required to make any payment for such Products.
>
> (8) Warranty: Seller warrants that all Products shall: (a) conform to all CTP specifications..., (c) be free from defects in design, workmanship and materials..., [and] (f) be merchantable and fit for the intended purpose...."
>
> ****
>
> (30) Integration and Modification: The Agreement constitutes the entire agreement between CTP and Seller with respect to the Products and Services, and supersedes any prior agreements, understandings, representations and quotations with respect thereto. No modification hereof will be of any effect unless in writing and signed by the party to be bound thereby.[1]

[1] New York Choice of Law Provision—In analyzing the issues presented on summary judgment, the Court has followed the lead of Counsel and applied Tennessee law, including Tennessee's version of the Uniform Commercial Code. Not addressed by either party is the legal effect, if any, of section (27) of the CTP Transportation Products, LLC Global Terms and Conditions which contains a New York choice of law provision which states that "[a]ny dispute arising out of or related to the Agreement will be governed

This finding of uncontroverted fact that the CTP Global terms are incorporated into the POs is, however, very limited. It only clears up that the CTP Global Terms are part of the POs. This finding does not change the above determination that there are genuine issues of material fact under Tennessee Code Annotated sections 47-1-205, 47-1-303, 47-2-202(4), 47-2-207, and 47-2-209 as to the terms governing the Sale.

Attorneys' Fees

It is ORDERED that denial of Defendants' motion for summary judgment precludes an award at this stage of the proceedings of attorneys' fees.

Defendants' Motion To Strike

It is ORDERED that the Defendants' *Motion To Strike Plaintiff's Statement Of Additional Disputed Facts* is denied. Although the Plaintiff's statement of facts on its face is lengthy – 524 facts are listed – the Court finds in the context of this case, the 524 facts are not unreasonable or prejudicial to Defendants. The summary judgment record consists of the testimony of 18 witnesses, numerous exhibits, technical facts, facts of course of dealing, performance and usage, and numerous legal issues. Counsel for Defendants, in their briefing and oral argument, have demonstrated they are very well in command of the numerous details of this case, and Defendants *Reply* ably responded to Plaintiff's 524 Disputed Facts.

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by and construed according to the laws of the State of New York." The legal effect, if any, of this choice of law provision will need to be addressed and ruled upon prior to trial.

Seal

It is further ORDERED that this Memorandum and Order has been placed under seal to provide Counsel time to identify whether any trade secrets are contained herein and whether redactions need to be made before the Memorandum and Order is displayed on the public record. Unless objections are filed by Counsel by January 13, 2017, specifying confidential information contained in the Memorandum and Order, it will be taken out from under seal and displayed on the public record.

Supplement to March 28, 2016 Rule 16 Order

Having determined that there are genuine issues of material fact which require this case to be tried, the Court has referred back to the March 28, 2016 *Second Order Amending Case Litigation Plan*. It shall be supplemented as follows.

It is ORDERED that the case is referred to mediation which shall be completed by March 10, 2017.

It is further ORDERED that on March 29, 2017, at noon, a telephone conference shall be conducted to set deadlines to finish preparation of the case for trial and to select a trial date. The Docket Clerk shall initiate the call.

It is also ORDERED that the Court will set a limited number of hours for each side, exclusive of opening statements and closing arguments, to present direct evidence and to cross examine. An example order of this procedure from another case is attached

as Exhibit A. Counsel are requested in advance of the March 29, 2017 telephone conference to consider how much time they will need to try their case and defend, to be prepared to discuss this during the conference. The reason for the time limitation on presenting proof is that the summary judgment has familiarized the Court well with the facts and issues, this is a bench trial, and the time limits will aid the creation of a comprehendible trial and record for appeal.

Below are the facts and law on which the above summary judgment rulings are based.

Origin of Lawsuit

The following facts are taken from Defendants' Statement of Undisputed Material Facts ("DSUMFs") 1-6, 48-51, 55-96, 109-120 132, 136 and Plaintiff's Amended Statement of Additional Disputed Facts ("PASADFs") 1-15, 135, and are provided merely as context and background for the analysis section which follows. The facts stated in this section do not constitute findings of fact.

Course of Dealing

From 2010 to 2014, the Plaintiff supplied Nylon 6 tire cord fabric to the Defendants for production of specialty tires and wheels for agriculture, construction,

industry and other uses. The Plaintiff obtained the fabric from an overseas producer, SRF Limited.

The Plaintiff asserts that the facts of the parties' dealing over the course of these years were that the Plaintiff purchased the tire cord manufactured by SRF, took title to the material in the United States on behalf of Defendants, and then released that material to Defendants in smaller amounts, as requested, as characterized by Plaintiff as a "just-in-time" basis. The amount of tire cord Plaintiff ordered from SRF was based on a binding quarterly forecasted amount of material that Defendants provided to Plaintiff, and that as part of their agreement, the Plaintiff was required to maintain the forecasted amount of inventory in its warehouse at all times. This arrangement, the Plaintiff asserts, enabled Defendants to obtain the exact amount of tire cord needed in a given week with very short notice instead of Defendants having to order the tire cord directly from SRF many months in advance.

The Plaintiff asserts that a direct relationship between Defendants and the supplier, SRF, was not desirable for Defendants because any delay in the supply chain would negatively impact Defendants' on-time delivery of material and, consequently, its manufacturing process and profitability. If Defendants were to order Nylon 6 tire cord directly from SRF's facility, they would have to wait at least 75 days before the material arrived in its manufacturing plant. The 75-day lead time includes both the required manufacturing time for the Nylon 6 tire cord and the time required to ship the material to the U.S. The Plaintiff dramatically shortened this lead time for Defendants.

The Plaintiff claims facts that in the normal course of dealing, Defendants issued a forecast to Plaintiff of its expected use of tire cord for the upcoming three-month period, and the Plaintiff, relying on that forecast, obtained and paid for the requested material from SRF, then held the material for Defendants until it is needed. This, the Plaintiff asserts, reduced Defendants' total cost of ownership of the tire cord by taking title to the tire cord when it left the port of origin, stocking the tire cord in the Plaintiff's warehouse, pay SRF for the tire cord, and released it to Defendants with as little as five-days' notice. In addition to the reduction in lead-time for obtaining the tire cord, Plaintiff also provided Defendants with the benefit of freeing up its cash flow.

Due to the length of the supply chain to obtain Nylon 6 tire cord, if Defendants placed orders directly with SRF, it would have to know its exact requirements 75 or more days ahead of time and order all the material at once. As a result, Defendants would have to then hold and warehouse the Nylon 6 tire cord that it had paid for but not yet used, resulting in an increase in inventory holding costs and other overhead, and a reduction in the available cash flow.

The Plaintiff asserts that it gave Defendants the benefit of pulling and paying for only the specific quantities it needed on a just-in-time basis by sending the Plaintiff a Purchase Order for those requested quantities shortly before time of need. This business arrangement was particularly beneficial for a non-automotive original equipment manufacturer (OEM) like Defendants, where the demand for tires frequently goes up and

down (as opposed to an automotive OEM that knows exactly how many cars it will produce).

As described above, the Defendants deny the admissibility of these facts of course of dealing, their relevance and the inferences the Plaintiff draws.

SRF's Move From Dubai, India to Thailand

In the beginning of the parties' dealings, SRF produced the Nylon 6 material in Dubai, India. The Nylon 6 material produced in SRF's plant in Dubai from 2011 through early 2014 met Defendants' specifications in every way, including the 5.0%–8.0% specification for shrinkage listed by Defendants as a critical parameter. The Dubai material performed very well, and tires made with it had a blister scrap rate (i.e., the percentage of tires produced that had to be scrapped because they had blisters) that was normal and acceptable for Defendants, i.e., less than 0.5%.

In late 2012 SRF decided to close its Dubai plant and move production of Nylon 6 to Thailand.

Critical to the legal analysis which follows in the next section concerning issues of nonconformity of the goods, rejection and nonacceptance by Defendants of nonconforming goods, are the facts that when the Plaintiff notified the Defendants in 2013 that the Dubai facility was closing and production would be consolidated with another facility in Thailand, the Plaintiff asked if the Thailand plant goods had to be requalified. This inquiry derived from the qualification the Defendants issued on the

Dubai, India plant when the Plaintiff first started supplying the Defendants with material. The Defendants responded in the affirmative and required requalification of the Goods that would be produced in the Thailand facility.

Testing of Thailand Baby Roll

Exhibit C to DSUMFs is the "Carlisle Tire & Wheel Raw Material Purchasing Specification" (the "Original Specification."). On that, shrinkage is item 3.5, and provides for a 5.0%–8.0% range of ASTM 350° F to be tested in accordance with ASTMD-885, 3219. Section 5.1.1 of that ASTM provides as follows:

> If there are differences of practical significance between reported test results for two laboratories (or more), comparative tests should be performed to determine if there is a statistical bias between them, using competent statistical assistance. As a minimum, test samples should be used that are as homogenous as possible, that are drawn from the material which the disparate tests results were obtained, and that are randomly assigned in equal numbers to each laboratory for testing. Other materials with established test values may be used for this purpose. The test results from the two laboratories should be compared using a statistical test for unpaired data. If a bias is found, either its cause must be found and corrected, or future test results must be adjusted in consideration of the known bias.

On February 18, 2013, SRF produced a small roll—called a "baby roll"—of the 840/2 denier Nylon 6 material to send to Defendants' Plant Chemist, Galen Brooks, to be tested for requalification of the Thailand Plant as a new producer of goods upon closure of the Dubai Plant. SRF tested the material characteristics of this baby roll in its laboratory in Thailand.

Although the baby roll was found to meet most of Defendant's material specifications, the shrinkage percentage stated by the Plaintiff for the Thailand baby roll did not fall within the data point range of shrinkage of the Original Specification.

The shrinkage for the 840/2 denier material tested in SRF's Thailand laboratory, was 8.5%. That exceeded the 5.0%–8.0% range of Defendants' Original Specification.

SRF sent a piece of the Thailand baby roll to be retested in its Dubai laboratory. The two plants had different machines and production environments. SRF's Dubai laboratory tested that material as having a shrinkage value of 7.57%, which fell within Defendants' Original Specification range of 5.0%–8.0%.

There was, however, only this one test correlation. No other comparative tests between the Thailand and Dubai plants were performed. One test does not constitute a statistical correlation as provided for, in Section 5.1.1 of ASTMD-885, 3219, quoted above.

The Plaintiff then sent the baby roll to Defendants' Chemist Galen Brooks for approval and requalification of the Thailand plant as a producer of the goods.

Along with the Thailand baby roll, as they had done with all other rolls, SRF and the Plaintiff sent Defendants a certification report. The certification report stated the results of the tests conducted in its Thailand laboratories, including the 8.5% shrinkage result that exceeded the Defendants' material Original Specification.

The certification report, however, also included a footnote that referred to the Dubai Lab results that the material conformed to the Original Specification:

> Shrinkage—We have tested the sample at [Dubai] Lab & the results are in line with current supplies from [Dubai]. Based on the correlation established with Carlisle vs [Dubai] lab, we expect the results to be recording within specification at customer lab.

The Thailand 840/2 denier baby roll and the certification and footnote were sent to Defendants' Plant Chemist at the time, Galen Brooks.

Requalification of Goods to be Produced in Thailand

Mr. Brooks performed the requalification analysis for Defendants. Bates #CSO1000143 is the requalification of the Goods provided by Galen Brooks. The document acknowledges that its purpose is to qualify material from the Thailand plant as equivalent to the material from the India plant.

The Defendants' report from Mr. Galen concludes the "SFR Thailand plant is approved." Because of its significance to the following legal analysis, the requalification report is reproduced as follows:

Product Evaluation

TO: Procurement
FROM: G. Brooks
CC: J. Sprow, K. Taylor, B. Bledsoe

DATE: 9/10/13
ITEM: 65524, 65526

SUBJECT: SRF Fabric from Thailand production facility

PURPOSE: To qualify material from Thai plant and deem equivalent to material from India plant

DETAILS: SRF is moving their production facility from India to Thailand, and prior to the transition being complete, they sent in two baby rolls each of 65524 and 65526 for evaluation. The goal was to determine if the processing and final product from the Thailand plant was equivalent to the material produced in India. The fabric was built into 889335 to check for issues in curing, and 889351 to use for tire tests. The Thailand material was equivalent to the India material within instrumental error. It was noted that more sidewall blisters were observed than is normally seen in either SKU. This was attributed to moisture gassing off of the fabric due to the overseas airfreight and long product qualification process. The SRF Thailand plant is approved for codes 65524 and 65526.

Mixing Instructions: N/A
Mixing Comments by: N/A
Date: N/A

Extrusion Instructions: N/A
Extrusion Comments by: N/A
Date: N/A

Calendar Instructions: N/A
Calendar Comments by: N/A
Date: N/A

Tire Assembly Instructions: N/A
Tire Assembly Comments by: N/A
Date: N/A

Curing Instructions: N/A
Curing Comments by: N/A
Date: N/A

CHECKLIST FOR PRODUCT APPROVAL

Code Name: 65524, 65526
Supplier: SRF Fabric
Purchase Spec Issued: Yes
Approved by: Galen Brooks

Date 3-2-16
Reporter _____ Exhibit #14
Case _____
Deponent Brooks

Events Subsequent to Defendants' Evaluation of Thailand Baby Roll

In addition to Mr. Galen's report of September 10, 2013, approving the SRF Thailand 840/2 denier material for use in the Defendants' Clinton, Tennessee plant, the Plaintiff asserts the following facts as also constituting acts by Defendants signifying acceptance and as acts by Defendants which set the Thailand baby roll as the specification for conformity of subsequently produced goods. These facts are that after Defendants qualified the Thailand plant, the Plaintiff began manufacturing the goods in its Thailand Plant in October 2013. Additionally, attached as Exhibit 11 to the Brooks Deposition is an email Galen Brooks sent to Plaintiff's employee that the reported test values from the Thailand baby roll were acceptable and he did not believe there would be any detrimental effects with the new Thailand Nylon 6. Further facts asserted by the Plaintiff in the summary judgment record are that with respect to the first release of crate shipments from the Plaintiff's warehouse in January 2014, Galen Brooks has testified he reviewed the accompanying COA, and looked at each physical property testing category and put a checkmark by each one to certify the values, including the nonconforming shrinkage value. *See* Exhibit 9 to Brooks Deposition. Moreover, in Plaintiff's Amended Statement of Additional Disputed Facts ("PASADF") 135 is that Defendants chose not to follow their usual qualification procedures of first testing a baby roll then subsequently testing full production rolls.

Other facts asserted by the Plaintiff are that after the approval of the Thailand material specifications, Defendants then provided Plaintiff with a forecasted amount of material that it would need over the next three months, and Plaintiff agreed. The Plaintiff asserts it was the parties' common practice and course of performance that Defendants issued the forecasted amount and required safety stock amount on a quarterly basis, and that Plaintiff relied on, and Defendants intended they rely on, that forecasted amount as binding. The Plaintiff argues that because the material manufactured by SRF was custom-made for Defendants and had no other uses, it would not make sense for Plaintiff to place orders for a million dollars' worth of material if the parties' agreement were simply that Defendants could reject any or all of the material at any time.

The Plaintiff also cites to the fact that the parties agreed on a price for the forecasted material amounts for the next three months, and that price, once agreed upon was a material term that could not be changed regardless of whether the price of the raw materials rose or fell during the quarter. The price for the Thailand Nylon 6 tire cord fabric was set by agreement on after the approval of the Thailand Nylon 6 baby roll and, the Plaintiff asserts, is part of the parties' contract.

Therefore, as of September 2013, the Plaintiff asserts the facts show that the parties had agreed to the material terms of the contract: (1) the price, (2) the quantity, and (3) the quality specifications of the Nylon 6. The Plaintiff further asserts that later, in the performance of that contract, Defendants provided Plaintiff, through the POs with the

specific release requests for certain crate quantities and deliver times that it required for those quantities.

The Plaintiff concludes that course of performance and conduct of the parties in this case recognized the existence of a contact before any PO was issued or any Nylon 6 material was ever shipped to Defendants, and this was consistent with facts of the parties' previous course of dealing.

The Defendants, as described above, deny the admissibility and relevance of this Other Evidence of course of performance and dealing, and sale terms other than those contained in the POs and deny the inferences and conclusions of law the Plaintiff draws from the Other Evidence.

Blistering in Defendants' Production

In January 2014, the Defendants experienced a large spike in the percentage of tires that were curing out blisters. The blistering, they assert, was the result of the goods manufactured in SRF's Thailand plant. By this time, the Plaintiff, it asserts in reliance on the Galen Brooks Product Evaluation and Defendants' approval of the Thailand baby roll, had ordered and begun supplying to the Defendants the goods in issue for which Defendants have not paid.

Alleged Rejection of Nonconforming Goods

In February 2014, the parties exchanged several emails regarding "the defects that Carlisle is experiencing with the fabric produced in Thailand." At page 24 of their August 12, 2016 Summary Judgment Memorandum, Defendants assert that their February 6, 2014 email cancellation of PO 673417 constitutes an effective rejection of nonconforming goods. The email states, "Open PO's 19232 & 19723 that must be canceled and not shipped until there is a resolution to this problem." After that, Defendants ordered no more of these goods and refused to pay for the goods in dispute in the Sale. As quoted above, the Defendants assert that incorporated into the terms of the POs in issue are a CTP Global Terms authorizing the Defendants to reject nonconforming goods:

> Seller warrants that all Products shall: (a) conform to all CTP specifications..., (c) be free from defects in design, workmanship and materials..., [and] (f) be merchantable and fit for the intended purpose....
>
> ****
>
> Inspection/Non-Conforming Shipments: Payment for Products delivered hereunder or acceptance of delivery will not constitute acceptance by CTP of such Products. CTP may inspection [sic] 100% or a sample of Products, at CTP's option and my reject all or any portion of a shipment [if] CTP determines a Product to be defective or nonconforming. Products rejected and Products supplied in excess of quantities call for under an Order may be returned to Seller at Seller's expense. CTP will not be required to make any payment for such Products.

Memorandum In Support Of Defendants' Motion For Summary Judgment, pp. 23-24 (Aug. 12, 2016). DSUMF 123-125.

In the ensuing months, the parties ran tests and explored a good-faith resolution but were unsuccessful. A year later this lawsuit was filed.

Chart of Nonpayment

The goods the Defendants assert were nonconforming consist of the following.

Purchase Order #	# Of Rolls Ordered	# Of Rolls Alleged To Be Nonconforming By Defendants
PO 673238 (Dec. 31, 2013)	— 36 (DUSMF 86)	— 23 (DUSMF 93)
PO 673417 (Jan. 23, 2014)	— 64 (DUSMF 94)/ 840/2 Nylon 6 — 8 rolls delivered by Plaintiff (DUSMF 95) — 56 rolls never delivered by Plaintiff; Defendants cancelled order on February 6, 2014 (DUSMF 125)	— 6 of the 8 rolls delivered were alleged to be nonconforming by the Defendants (DUSMF 95) — Of 56 rolls never delivered that Defendants cancelled; 47 rolls alleged to be nonconforming and 9 rolls were conforming (DUSMF 131)
PO 673418 (Jan. 23, 2014)	— DUSMF 134 – Not Disputed that these rolls were paid for by Defendants	— Unclear whether conformity was at issue
PO 673819 (Mar. 20, 2014)	— DUSMF 134 – Not Disputed that these rolls were paid for by Defendants	— Unclear whether conformity was at issue
Forecasted	— 66 (DUSMF 135)/ 840/2 Nylon 6 — Plaintiff alleges a small number of forecasted rolls of 1260/2 Nylon 6 (DUSMF 137)	— Of 66 rolls, 24 allegedly failed to meet shrinkage specifications; 42 alleged to be nonconforming (DUSMF 136)

Added to the foregoing by Defendants is that they admit that 9 rolls of the forecasted 840/2 denier material under PO 673417 were conforming but claim these were offset by Defendants dispositioning and using a total of 15 nonconforming rolls (DSUMF 126). Also, the Defendants assert that they have paid for heavier 1260/2 denier Nylon 6

under POs 673418 and 673819 (DSUMF 134). Additionally, the Defendants deny liability for any forecasted rolls ordered by the Plaintiff.

Alleged Motivations for Defendants' Nonpayment

Additional context is that the Plaintiff presents the undisputed facts that with respect to Defendants' motivation and inferences that can be drawn from that, at the same time Defendants' approval was being sought by Plaintiff of the SRF Thailand produced Nylon 6 tire cord fabric, a private equity firm acquired the Defendants and looked to implement cost savings measures to increase profitability. The motivation and competing inference the Plaintiff argues is that the strain on resources at Defendants' Clinton plant from the acquisition was ultimately the reason the Defendants ceased working to determine the root cause for the 2014 blistering and refused to pay for the SRF inventory.

The Plaintiff also presents the inference that Defendants' claim of rejection due to nonconformity is a pretext. The real reason for nonpayment is that the Defendants located a cheaper supplier. This inference derives, in part, from facts in the summary judgment record that nonconformity of the goods was not asserted by the Defendants despite receiving, reviewing and approving the COAs on the Goods both before and after the blistering arose. The Defendants dispute the timing of these events and the inferences drawn therefrom.

Competing Facts on Nonconformity of Goods

Further relevant context for the analysis section that follows is that the facts on which the Defendants assert the goods are nonconforming is that the goods do not conform to the Original Specification.

As provided *supra* at page 17, the Original Specification Defendants issued for the goods contained a shrinkage value range of 5.0%–8.0%. The record establishes that with respect to the certification report/Certificate of Authority Analysis ("COA"), which accompanied every roll of the PO 673417 goods in issue and Forecasted Goods in issue, it is apparent on the face of the COAs that the data points listed are in excess of the 5.0%–8.0% shrinkage range of Defendants' Original Specification. Exhibit C to the DSUMFs are the Original Specification. Shrinkage is item 3.5, and provides for a 5.0%–8.0% range. Exhibit T to the DSUMFs are the COAs to the PO 673417 and Forecasted Goods with data points in excess of the 5.0%–8.0% range. These undisputed facts, the Defendants assert, establish that the production rolls of Thailand 840/2 denier Nylon 6 fabric tested in SRF's Thailand laboratory exceeded Defendant's shrinkage specification of 8.0%.

Defendants further assert that as to shrinkage, "conformity" in this case required that the goods be within the 5.0% to 8.0% range of ASTM 350° F, requiring the goods to be tested in accordance with ASTM D-885, 3219 as stated on Exhibit C to DSUMFs. As covered *supra* at 18-19, the one test correlation by SRF of the Thailand and Dubai laboratories was not sufficient under the ASTM to prove whether there was statistical

bias between the laboratories. SRF, therefore, did not establish as scientific or statistically valid correlation between the Thailand and Dubai laboratories.

Defendants also cite to the facts that only the Thailand baby roll was tested in Dubai. The subsequent rolls produced for PO 673417 in issue and the Forecasted Goods in issue were tested in Thailand. The COAs for each of these subsequent rolls contained a data point in excess of the shrinkage value required by the Original Specification.

In contrast, the Plaintiff's position is that on September 9, 2013 after testing and approving the Thailand baby roll of Nylon 6, Defendants approved the material thereby incorporating the specifications for the Thailand baby roll as the agreed upon template for the production of all future supplies of Nylon 6 tire cord fabric to be supplied to Defendants by SRF. Plaintiff's legal theory is that Defendants' approval in September 2013 set the Thailand baby roll as the template of fabric they now say is nonconforming. The Plaintiff argues that the COA approved for the Thailand baby roll constitutes the material specification required of the product to be supplied to Defendants. The terms are part of the party's contract for the sale of goods, and SRF complied with those terms by producing production rolls of Nylon 6 tire cord fabric in conformity with the Thailand baby roll. As detailed *supra* at 19, the baby roll COA contained a footnote which Plaintiff claims adequately informed the Defendants of the difference in the shrinkage value results for Dubai versus Thailand.

The Defendants dispute that they were adequately informed of the discrepancy in the Dubai versus Thailand labs because the Plaintiff's footnote gave the indication that a

statistical correlation between the labs had been established. That alleged indication of statistical correlation, the Plaintiff asserts, is undermined by the very text of the footnote which refers not to a correlation between the Dubai and Thailand labs but a correlation with Defendants' lab. As to the latter, the Plaintiff argues the Defendants could not be uninformed about their own lab, and, therefore, the Plaintiff asserts the Defendants' acceptance of the baby roll was informed and not a basis for revocation of goods.

Motion for Summary Judgment

As noted at the outset, the Defendants' Motion is organized around the three POs issued during the events in question and the Forecasted Goods.

The Defendants' Motion has these four grounds.

1. PO 673417 covers 64 rolls of 840/2 Nylon 6 Goods from the Plaintiff's Thailand plant. The Defendants assert they are not liable for payment of any of these 64 rolls for two reasons:

— Shrinkage nonconformance—Most of the rolls failed to conform to Defendants' shrinkage specification and, therefore, were subject to rejection under the terms of the PO; and

— Offset—Non-payment for some of the rolls of PO 673417 that were conforming is offset by dispositioning and use the Defendants made of some of the nonconforming rolls on another PO.

2. As to POs 673418 and 673819, the Defendants assert they took delivery of and paid for these Goods.

3. As to the Forecasted Goods, the Defendants reassert the defense of rejection of nonconforming goods also asserted as a defense in connection with PO 673417.

Additionally they assert as a defense that the PO terms control. These terms are asserted to be clear and unambiguous that under the CTP Global provisions, quoted above and incorporated into the POs, the Defendants are not required to purchase forecasted material not subject to a purchase order contract, "Any forecast provided by CPT is non-binding and not a commitment by CTP [Defendants] to purchase such quantities of the Products unless otherwise agreed upon between the Seller and Buyer." This argument revives the issues concerning what constitutes the terms of the Sale: the PO terms only or the Other Evidence.

4. Upon prevailing on summary judgment, the Defendants assert they are entitled to recover reasonable attorneys' fees based upon a provision to that effect the Defendants contend is applicable to the parties' dealings.

Summary Judgment Analysis

(1) PO 673417

In their first ground for summary judgment: PO 673417, the Defendants (1) assert as a matter of fact that the summary judgment record establishes that there is no genuine, material issue that the goods in issue were nonconforming for failure to comply with Defendants' written shrinkage specification and (2) argue as a matter of law that

nonconformance is a basis for rejection of goods under the terms and conditions applicable to PO 673417.

Applicable Law

With respect to whether goods are nonconforming, Tennessee Code Annotated section 47-2-106(2) provides, "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." This definition has been explained as not just quantity and quality of goods, but the totality of performance by the contract:

> 'Nonconformity cannot be viewed as a question of the quantity and quality of goods alone, but of the performance of the totality of the seller's contractual undertaking. [Cit.]' *Irrigation Motor etc. Co. v. *529 Belcher,* 29 Colo.App. 343, 347, 483 P.2d 980, 9 UCC Rep. Serv. 60 (1971). 'The concept of nonconformity 'includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract.' [Uniform Commercial Code § 2–714, Comment 2.]' *Ford Motor Credit Co. v. Harper,* 671 F.2d 1117, 1122 (8th Cir.1982).

Esquire Mobile Homes, Inc. v. Arrendale, 182 Ga. App. 528, 528–29, 356 S.E.2d 250, 252 (1987).

With respect to Defendants' assertion of rejection, under Tennessee law, a buyer has three options when it receives nonconforming goods. The buyer can reject, accept, or revoke acceptance. Embedded in each of these are other requirements such to be effective a rejection must occur within a reasonable time. The relevant statutes are quoted as follows.

TENN. CODE ANN. § 47-2-602

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two (2) following sections on rejected goods (§§ 47-2-603 and 47-2-604):

> (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
>
> (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (§ 47-2-711(3)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
>
> (c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (§ 47-2-703).

****

TENN. CODE ANN. § 47-2-606

(1) Acceptance of goods occurs when the buyer:

> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (b) fails to make an effective rejection (§ 47-2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

****

TENN. CODE ANN. § 47-2-608

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

In addition to these statutes, the following case law explains the elements of these statutes. Provided first is case law on the buyer's three options for nonconforming goods of rejection, acceptance or revocation of acceptance.

The contract between the contractor and the supplier is a transaction in goods and is, therefore, governed by the sales article of the Uniform Commercial Code [Tenn. Code Ann. §§ 47-2-101 through 47-2-725 (1979)]. Under the U.C.C., a buyer has a positive duty to accept goods that conform to the contract. *Flowers Baking Co. of Lynchburg v. R-P Packaging, Inc.,* 229 Va. 370, 329 S.E.2d 462, 467 (1985). However, if the goods or the tender of delivery[6] fail to conform to the contract, Tenn. Code

> Ann. § 47-2-601 (1979) permits the buyer (a) to reject the goods, (b) to accept the goods, or (3) to accept any commercial unit and reject the rest.
>
> > FN 6. Tenn. Code Ann. § 47-2-503(1) (1979) described a "tender of delivery" as putting and holding conforming goods at the buyer's disposition and giving reasonable notice to enable the buyer to take delivery.
>
> Tenn. Code Ann. § 47-2-602(1) (1979) requires the buyer to reject nonconforming goods 'within a reasonable time after their delivery or tender' and to 'seasonably" notify the seller of its decision. These requirements are designed to minimize the parties' aggregate economic loss. *J.L. Teel Co. v. Houston United Sales, Inc.,* 491 So.2d 851, 860 (Miss.1986). They also give the seller the opportunity to take protective action like withdrawing the goods and tendering conforming goods, proposing a cure, or beginning negotiations to settle the dispute. *Intervale Steel Corp. v. Borg & Beck Div., Borg-Warner Corp.,* 578 F.Supp. 1081, 1086 (E.D.Mich.1984), *aff'd,* 762 F.2d 1008 (6th Cir.1985); 1 J. White & R. Summers, *Uniform Commercial Code* § 8-3, at 406 (3d ed. 1988); 3 W. Hawkland, *Uniform Commercial Code Series* § 2-602:02 (1984 & 1986 Supp.).

Henley Supply Co. v. Universal Constructors, Inc., No. 88-238-II, 1989 WL 31620, at *5 (Tenn. Ct. App. Apr. 7, 1989).

Rejection under section 47-2-602 and acceptance under section 47-2-606 are related in the sense that the statute provides that one way acceptance can occur is upon failure to make an effective rejection. Under Tennessee law, "[a]cceptance occurs when the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that he or she will retain them in spite of their nonconformity, or fails to make an effective rejection, or does any act inconsistent with the seller's ownership. Tenn. Code Ann. § 47–2–606." *Audio Visual Artistry v. Tanzer*, 403 S.W.3d 789, 806 (Tenn. Ct. App. 2012).

Whether effective rejection and nonacceptance of nonconforming goods has occurred is usually a question of fact for the jury. *Structural Metals, Inc. v. S & C Elec. Co.*, No. SA-09-CV-984-XR, 2012 WL 5208543, at *7 (W.D. Tex. Oct. 22, 2012).

Tennessee Code Annotated sections 47-2-602 and 47-2-606 require timeliness and reasonableness of the Defendants' actions to signify nonconforming goods are being rejected and not accepted.

> The U.C.C. imposes a duty on the buyer to discover and to take timely action concerning non-conforming goods within a reasonable time. *EPN-Delaval, S.A. v. Inter-Equip., Inc.*, 542 F.Supp. 238, 247 (S.D.Tex.1982). Tenn. Code Ann. § 47-2-606(1)(b) provides that a buyer will be deemed to have accepted the goods if it fails to inspect them and to notify the seller of discrepancies within a reasonable time.
>
> The question of whether the buyer's rejection occurred within a reasonable time can best be answered by considering four factors: (1) the difficulty of discovering the defect, (2) the terms of the agreement, (3) the relative perishability of the goods, and (4) the course of the buyer's performance after the sale and before the formal rejection. 1 J. White & R. Summers, *Uniform Commercial Code* § 8-3, at 408 (3d ed. 1988).
>
> The timeliness of a rejection is not merely based upon the amount of time between the delivery and the rejection. According to Tenn. Code Ann. § 47-1-204(2), timeliness depends upon the 'nature, purpose and circumstances' of the action. Just as a long delay may, by itself, be sufficient to render a rejection ineffective, a rejection occurring only a short period of time after delivery may be ineffective if the buyer's intervening acts render the rejection too late.

Henley Supply Co. v. Universal Constructors, Inc., No. 88-238-II, 1989 WL 31620, at *7 (Tenn. Ct. App. Apr. 7, 1989).

> Although Article 2 does not define 'rejection,' the authors of a leading treatise on the UCC state that, '[s]omewhat simplified, rejection is a combination of the buyer's refusal to keep delivered goods and his notification to the seller that he will not keep them.' 1 James J. White and

> Robert S. Summers, Uniform Commercial Code 388 (3rd ed., 1988). To be effective, a rejection 'must be within a reasonable time after...delivery or tender.' T.C.A. 47-2-602(1). In general terms, an effective rejection terminates a buyer's obligations under the contract, except for the duty to hold the rejected goods with reasonable care at the seller's disposition. 'Acceptance,' on the other hand, arises when the buyer, after a reasonable opportunity to inspect the goods, 'signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity.' T.C.A. 47-2-606(1)(a).

Schroder v. Plus Mark, Inc., No. 03A01-9411-CH-00400, 1995 WL 140727, at *4 (Tenn. Ct. App. Mar. 31, 1995).

Application of Law to Record

Applying the foregoing law to the summary judgment record, the Court concludes the essential elements of nonconforming goods rejected and not accepted by the Defendants are not established in the summary judgment record. There are genuine issues of material fact concerning each of these essential elements: whether the goods were nonconforming, if and when the alleged rejection occurred and whether that occurred within a reasonable amount of time, and whether the Defendants signified acceptance of nonconforming goods.

That there are genuine issues of material fact on these essential elements derives from the fundamental controverted fact between the parties: the terms of the Sale.

As noted, to prevail on summary judgment that they effectively rejected and did not accept nonconforming goods, the Defendants must establish, without disputed facts, the constituents of nonconforming goods under the terms of the Sale in this case and the

conduct it took under the terms of the Sale for Defendants to reject within a reasonable time and not signify acceptance.

It is the Defendants' position that the POs are the parties' contracts and that the terms of the POs govern. Based upon the written terms of the POs, the Defendants assert there is no genuine issue of material fact and they are able to establish the essential elements on summary judgment of nonconforming goods. This is achieved, they argue, because their Original Specification is incorporated into the POs to establish the parameters for conformity of a product. The undisputed facts are that each one of the COAs accompanying every roll of the PO 673417 goods in issue showed data points in excess of the shrinkage range of Defendants' Original Specification. The Defendants assert that the timing and actions necessary to effectively reject and not accept nonconforming goods was triggered by issuance of the PO when the Plaintiff released the manufactured goods to the Defendants, not when the baby roll was approved.

According to the Plaintiff, when approved in September 2013, the Thailand baby roll, under the parties' course of dealing and performance, added to and explained the application of the Original Specification to the goods being produced in Thailand post September 2013. Thus, under the parties' course of dealing and performance, the Thailand baby roll established the specification for conformity of subsequent goods released to the Defendants under the POs, not the Original Specification in isolation. Further based upon the parties' course of dealing and performance, the time for and actions of rejection of nonconforming goods and nonacceptance were set by the Plaintiff

producing the Thailand baby roll for the Defendants for them to evaluate and approve. Accordingly, the Plaintiff asserts that under course of dealing and performance, the time for Defendants' rejection within a reasonable time of nonconforming goods and nonacceptance was in September 2013 when the Defendants concluded their evaluation of the Thailand baby roll.

For the Defendant to prevail that rejection and nonacceptance of nonconforming goods are established without dispute on summary judgment, they must demonstrate as a matter of law that the terms of the Sale are based upon the PO terms, and that the Other Evidence of the parties' course of dealing and performance is inadmissible. To accomplish this the Defendants cite to the Integration and Modification provision of paragraph 30 of the CTP Global terms, quoted above, and incorporated into the PO terms. The Defendants also cite to Tennessee Code Annotated section 47-2-202, the UCC Statute of Frauds. The Defendants' argument is that the Other Evidence of the parties' course of dealing and performance is inadmissible as prior or contemporaneous, oral evidence which contradicts the written PO terms.

Under Tennessee Code Annotated sections 47-2-202, however, parol evidence of the terms of the sale is excluded only if it is clear that written terms constitute the final expression of the parties.

> § 47-2-202. Final written express; parol or extrinsic evidence
>
> 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 [emphasis added]:

> (a) By course of performance, course of dealing or usage of trade, pursuant to § 47-1-303; 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.

Moreover, under section 47-2-209, if the parties attempt to modify a contract's terms but fail to meet the requirements of the statute of frauds, section 47-2-209(4) provides that the parties attempt at modification or rescission can still operate as a valid waiver of contract terms:

> § 47-2-209. Modification, rescission and waiver
>
> (1) An agreement modifying a contract within this chapter needs no consideration to be binding.
>
> (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
>
> (3) The requirements of the statute of frauds section of this chapter (§ 47-2-201) must be satisfied if the contract as modified is within its provisions.
>
> **(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver** [emphasis added].
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived,

> unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Further, consistent with the foregoing, section 47-1-303(f) provides that "[s]ubject to § 47-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance." TENN. CODE ANN. § 47-1-303(f) (West 2016). As explained in section 47-1-303:

> (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
>
> > (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
> >
> > (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
>
> (b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
>
> (d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance

under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

(1) Express terms prevail over course of performance, course of dealing, and usage of trade;

(2) Course of performance prevails over course of dealing and usage of trade; and

(3) Course of dealing prevails over usage of trade.

(f) Subject to § 47-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

TENN. CODE ANN. § 47-1-303 (West 2016).

Case law on this section explains that "[u]nder subsection (f), 'a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.' *Id.* § 47–1–303(f)." *Miller v. Driver*, No. 3:10-CV-0819, 2012 WL 2131230, at *8, n. 20 (M.D. Tenn. June 12, 2012). Additionally, "[w]hile buyers and sellers are normally free to make the buyer's obligation to pay depend upon the acceptance of the goods by a third party, *Can-Key Indus., Inc. v. Industrial Leasing Corp.,* 286 Or. 173, 593 P.2d 1125, 1128 n. 2 (1979), the time within which the goods must be accepted or rejected must remain reasonable in light of the parties' course of

dealing, the usage of the trade, and the circumstances of the particular case. Tenn. Code Ann. §§ 47-1-204(2) (1979) & 47-1-205 (1979); *CMI Corp. v. Leemar Steel Co.,* 733 F.2d 1410, 1414 (10th Cir.1984); *Warren v. Guttanit, Inc.,* 69 N.C.App. 103, 317 S.E.2d 5, 11 (1984); *cf. Moore v. Howard Pontiac-American,* 492 S.W.2d 227, 229-30 (Tenn. Ct. App.1972) (revocation of acceptance)." *Henley Supply Co. v. Universal Constructors, Inc.*, No. 88-238-II, 1989 WL 31620, at *6 (Tenn. Ct. App. Apr. 7, 1989).

Commentators further explain that course of dealing, usage of trade and course of performance are relevant to interpret contract terms and may also constitute contract terms or override express terms:

> The agreement of the parties includes that part of their bargain that may be found in course of dealing, usage of trade, or course of performance. These sources are relevant not only to the interpretation of express contract terms but may also themselves constitute contract terms. And these sources may not only supplement or qualify express terms but, in rare circumstances, may also even override express terms.
>
> ****
>
> Course of performance differs from usage of trade. For example, a party can be chargeable with a usage of trade of which it is ignorant, but the same ignorance is normally a defense to a claim arising from course of performance. Conversely, § 1-303 makes clear that one party's awareness of another's conduct can be used as affirmative evidence of acquiescence to a course of performance that indicates that party's implicit consent to a particular interpretation of a contractual provision or acceptance of a modification to an express term. Usage of trade may shape a contract only if the usage is sufficiently pervasive to justify an expectation of incorporation. By definition, course of performance differs from course of dealing. For example, a course of dealing is a sequence of conduct between the parties prior to entering into a particular agreement whereas course of performance arises subsequent to entry into the agreement. While the difference appears clear, both courts and lawyers occasionally err.

What is the legal effect of course of dealing and one or more of its cohorts once proved? First, one or more may add to the express terms of the agreement. This may occur even where the contract is unambiguous and complete on its face.

****

Second, course of dealing, usage of trade, or course of performance may give particular meaning to the language of the agreement. Thus, each may contradict, supersede, or confirm the ordinary language of words used in an agreement. If the parties contract with reference to a trade usage that imports a meaning different from the ordinary lay meaning of words used, so much the worse for the lay meaning. The trade usage will control. For example, a deal for a 'thousand rabbits' may actually call for delivery of 1,200 rabbits.

Third, course of dealing and one or more of its cohorts may cut down or even subtract what would otherwise be whole terms of the express agreement of the parties. Section 1-303(d) of Article 1 says that course of dealing and usage of trade may 'qualify' the express terms of the agreement. Thus, 'delivery June-August' may be qualified by trade usage to require deliveries spread through these three months rather than all at once. And 1-303(a) and (d) on course of performance are drafted broadly enough to allow for the same kind of effect. A major function of course of performance, together with the law of modification and waiver, is to help cut down or subtract express terms altogether. Section 1-303(f) says that a course of performance 'is relevant to show a waiver or modification of any term inconsistent with the course of performance.'

Fourth, when course of dealing and its cohorts in some way become part of the agreement, they, like express terms, supersede or vary the effect of the contractually variable Code provisions that would otherwise govern. For example, an express contract disclaimer is not always required to disclaim the warranty of merchantability that section 2-314 'implies' in contracts for sale of goods. Section 2-316(3)(c) makes plain that a usage of trade or course of performance or dealing can disclaim, too. On the other hand, a course of conduct may not override the writing requirement of 2-326.

Fifth, course of dealing and its cohorts may give meaning to terms of the agreement when the contract is formed through course of performance. The terms may be found in the writings exchanged between the parties, or they

> may be imposed simply by the parties' conduct, or some combination of these.
>
> Sixth, course of dealing et al play additional, supplementary roles in defining contract terms.
>
> ****
>
> Under Article 2, the provision that express terms control inconsistent course of dealing and its cohorts really cannot be taken at face value, at least in some courts. But course of dealing does override usage of trade, and course of performance overrides both course of dealing and usage of trade as is now made explicit in 1-303(e). Course of dealing between the parties is 'closer' to their expectations than general trade usage and should prevail over it.
>
> ****
>
> As we have already seen, the parol evidence rule should not be a hurdle so long as the conduct merely explains rather than contradicts the writing. Although the parol evidence bars the introduction of extrinsic evidence in order to construe the terms of a fully integrated agreement, evidence of course of performance, usage of trade, and course of dealing is admissible regardless of whether the contract contains an effective merger clause. The admissibility of evidence of course of performance differs from that of the latter two, however, in that the parol evidence rule bars contradictory evidence solely from any prior or contemporaneous oral agreement.

1 *White, Summers, & Hillman*, Uniform Commercial Code § 4:3 (6th ed.) (West 2016) (footnotes omitted).

> Tennessee law expressly recognizes that conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale, even if the writing of the parties do not otherwise establish a contract. T.C.A. § 47-2-207(3). In such a case, the statute provides that the terms of the particular contract consist of those terms on which the writings of the parties agree. T.C.A. § 47-2-207(3)....The express terms of an agreement, and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. T.C.A. § 47-1-303(e). Furthermore, a course of performance is relevant to

> show a waiver or modification of any term inconsistent with that course of performance. T.C.A. § 47-1-303(f). The evidence in the record demonstrates that the parties had a contract that is evidenced by their conduct and the writings they exchanged, and that the parties established a course of performance sufficient to impose the same contractual terms upon S&V and Carlisle for the purchase of the Thailand Nylon 6 tire cord fabric.
>
> ****
>
> The writings between the parties and the parties' conduct and course of performance establish that a contract existed well before any POs were ever issued. Therefore, even if Carlisle's purported terms and conditions did apply, they would be merely a part of the agreement, and, any terms that contradict the parties' course of performance would be modified or waived.

Plaintiff S&V Industries, Inc.'s Response In Opposition To Defendant The Carlstar Group's Motion For Summary Judgment, pp. 91; 93 (Sept. 15, 2016).

In their summary judgment papers the Defendants do not provide an analysis of Tennessee Code Annotated sections 47-1-205, 47-1-303, 47-2-202(4), 47-2-207 and 47-2-209 and do not demonstrate why these sections in this case do not admit into evidence the Other Evidence of facts of course of dealing and performance and Sale terms other than the PO terms. Without this analysis, the Court concludes that the Defendants have not demonstrated that the PO terms were intended to be the final expression of the terms of the Sale, nor have the Defendants demonstrated that they did not waive the PO terms. This is critical because it is only by restricting the Sale terms to

the PO terms that the Defendants establish the Original Specification as the standard for conforming goods and that time for rejection occurred in 2014 upon issuance of the POs.

The effect of not excluding the Other Evidence of course of dealing and performance is that this Other Evidence must be considered on summary judgment. When the Other Evidence is considered it presents genuine issues of material fact for trial on whether the Product Evaluation and Defendants' subsequent actions supplemented the Original Specification so that goods that conformed to the Thailand baby roll were considered by the parties as conforming goods, and whether approval of the Thailand baby roll by the Defendants with the Galen Brooks Product Evaluations in September 2013, ordering by the Defendants of Forecasted Goods, and Galen Brooks' approval of the first release of goods constitute ineffective rejection and signify acceptance of nonconforming goods. For these reasons, summary judgment must be denied on Defendants' claim that it effectively rejected nonconforming goods under PO 673417.

Revocation of Acceptance—Tenn. Code Ann. § 47-2-608

Further with respect to PO 673417, the Defendants assert in their Statements of Undisputed Material Fact numerous explanations that their Product Evaluation qualifying the Thailand baby roll was uninformed and not binding on them. These facts include, as set out above, that the Plaintiff's certification of the Thailand baby roll sent to the Defendants for requalification by Galen Brooks had an ambiguity regarding correlation between the Thailand and Dubai labs. Additionally, the Defendants assert excuses for Mr. Galen not addressing head-on that the shrinkage value stated on the Thailand baby roll

and first release of crate shipments exceeded specifications. These excuses for Mr. Galen include the receipt of partial information from Plaintiff, overlooking the Plaintiff's footnote, that Mr. Galen relied upon and trusted the Plaintiff, and delayed testing of the baby roll masked that causation of blistering was not due to moisture absorbed during the storage delay. These excuses appear in the following excerpts quoted from the DUMFs.

> 55. On February 18. 2013, SRF produced a small roll—called a "baby roll"—of the 840/2 denier Nylon 6 material.
>
> 56. SRF tested the material characteristics of this baby roll in its state-of-the-art laboratory in Thailand.
>
> 57. Although this material was found to meet most of Carlstar's material specifications, the material did not meet the material specification for shrinkage.
>
> * * *
>
> 59. [T]he shrinkage for the 840/2 denier material was tested in SRF's state-of-the-art Thailand laboratory to be 8.5%, exceeding the 5.0%–8.0% range specified by Carlstar.
>
> 60. SRF sent a piece of the Thailand baby roll to be retested in its Dubai laboratory.
>
> 61. SRF's Dubai laboratory tested that material as having a shrinkage value of 7.57%, which falls with Carlstar's specific range of 5.0%–8.0%.
>
> 62. Significantly, it was impossible to determine whether one, both, or none of these two disparate test results was accurate.
>
> 63. SRF and S&V could have emailed or called the appropriate personnel at Carlstar to ensure that Carlstar was aware of the fact that the Thailand baby roll had materially different test results when tested in the Thailand and the Dubai laboratories.
>
> 64. This would have allowed Carlstar to have input as to how the parties would proceed in qualifying the Thailand material.

65. Instead, SRF and S&V chose to assume that the Dubai laboratory test was the correct result and sent the baby roll to Carlstar for approval.

66. As they had done with all other rolls, SRF and S&V sent Carlstar a certification report along with the shipment of the Thailand 840/2 denier baby roll.

67. The certification report set forth the results of all of the tests conducted in its Thailand laboratories on various physical properties of the material, including the 8.5% shrinkage result that fell outside of Carlstar's material specification.

68. The certification report also included a footnote that read:

> Shrinkage—We have tested the sample at [Dubai] Lab & the results are in line with current supplies from [Dubai]. Based on the correlation established with Carlisle vs [Dubai] lab, we expect the results to be recording within specification at customer lab.

69. SRF intended for Carlstar to rely on the footnote in the test certificate report that the baby roll material met Carlstar's specification for shrinkage, and that the report was SRF's "trustee" for that result.

70. When asked repeatedly in his deposition, S&V President refused to give a "yes" or "no" answer to the question of whether Carlstar was entitled to accept as true the representations in the footnote in the Thailand 840/2 denier baby roll test certificate that the baby roll met Carlstar's shrinkage specification.

71. When Carlstar received the test certificate accompanying the 840/2 Thailand baby roll, Carlstar's former Plant Chemist, Galen Brooks, followed Carlstar procedures and reviewed the test certificate to verify that the material met Carlstar's specifications.

72. Mr. Brooks testified that because SRF and S&V were trusted suppliers, he expected the data reported on the test certificate to conform to Carlstar's specifications, as had the hundreds of previous test certificates that SRF and S&V had sent to Carlstar over the years.

73. Mr. Brooks testified that as a result of this expectation, he simply overlooked the fact that the 8.5% shrinkage data point fell outside of Carlstar's 5.0%–8.0% shrinkage specification.

74. Mr. Brooks also testified that he did not notice the footnote addressing the shrinkage test result.

75. Mr. Brooks testified, however, that even if he had seen the 8.5% data point and the footnote, he would have trusted SRF's representations in the footnote that the baby roll met Carlstar's specifications.

76. Around the time that Carlstar received the Thailand baby roll, Carlisle began attempting to use reclaimed rubber in its tires.

77. This process was time consuming and delayed Carlstar's ability to produce and test tires using the Thailand baby roll for a few months.

78. When Mr. Brooks eventually manufactured some sample tires using the Thailand baby roll material, the tires came out with an unacceptably high level of blisters.

79. Mr. Brooks reported this high blister rate to SRF and S&V.

80. Neither Mr. Brooks nor any other Carlstar employee was aware of the fact that the Thailand baby roll had been tested in SRF's Thailand lab to have shrinkage characteristics that exceeded Carlstar's specifications.

81. Even when Carlstar reported this blistering problem to S&V, SRF and S&V still stayed silent on the issue of shrinkage.

82. Therefore, Mr. Brooks, still in the dark about the true shrinkage characteristics of the Thailand baby roll, erroneously assumed that the delay in using the baby roll material to produce tires had caused the material to gain excess moisture while it sat around for months in the plant, which is a known cause of blister formation.

83. Mr. Brooks performed additional standard tests on the non-blistered tires manufactured with the Thailand baby roll and determined that the tires had acceptable strength and performance characteristics, none of which related to shrinkage or blister formation.

84. Still unaware that the SRF material did not conform to Carlstar's written specifications, Carlstar then approved the SRF Thailand 840/2 denier material for use it the Clinton plant.

85. SRF began manufacturing production quantities of Nylon 6 material in its Thailand plant in October 2013.

There are other facts contained in the DSUMFs concerning the absence of a statistically invalid correlation of the Dubai and Thailand plants, unknown to the Defendants, which the Defendants assert to support their position that their qualification of the Thailand baby roll was uninformed.

86. On December 31, 2013, Carlstar offered S&V a purchase order contract (PO 673238) for thirty-six (36) rolls of 840/2 denier Nylon 6 material.

87. S&V accepted the contract by making delivery of these rolls.

88. Carlstar paid S&V for all thirty-six (36) rolls of this material in four (4) separate shipments on January 9, 2014, January 15, 2014, January 22, 2014, and January 28, 2014.

89. Ten (10) of the thirty-six (36) rolls covered by PO 673238 were the last of the material manufactured in SRF's plant in Dubai.

90. SRF had successfully produced 840/2 Nylon 6 material in its Dubai plant for Carlstar for years.

91. These ten (10) rolls, along with all of the hundreds of other rolls of 840/2 Nylon 6 material that SRF produced in Dubai, met Carlstar's written material specifications and produced tires with a blister scrap rate of less than 0.5%.

92. The remaining twenty-six (26) rolls covered by PO 673238 were the first rolls shipped to Carlstar from SRF's Thailand plant.

93. Of these twenty-six (26) rolls, twenty-three (23) failed to conform to Carlstar's written specification for shrinkage.

94. Before Carlstar discovered that these twenty-three (23) rolls were nonconforming, Carlstar offered S&V an additional purchase order contract (PO 673417) for an additional sixty-four (64) rolls of 840/2 denier material.

95. S&V accepted PO 673417 by making delivery of eight (8) rolls of the material covered by PO 673417 on February 6, 2014.

96. These eight (8) rolls were from SRF's Thailand plant and six (6) of them failed to conform to Carlstar's shrinkage specification.

* * *

109. During this time, SRF and S&V represented to Carlstar, as they had done in the test certification report that accompanied the shipment of the Thailand 840/2 baby roll, that the material met Carlstar's specifications.

110. SRF and S&V claimed that SRF had developed two different correlations that rendered the material conforming, even though the vast majority of the test certification reports shipped with each roll of the material had test results showing that the shrinkage exceeded the 5.0%–8.0% specified range.

111. The first correlation was one that SRF alleged it had established between SRF's Dubai and SRF's Thailand laboratory.

112. The second correlation was one that SRF alleged it had established between SRF's Dubai laboratory and Carlstar's Clinton laboratory.

113. SRF and S&V's claims that they had developed these two alleged correlations were false.

114. No such correlations were ever established.

115. Indeed, the correlation that was allegedly established between the SRF Thailand laboratory and the SRF Dubai laboratory, which SRF and S&V claimed to have been -0.93%, was actually nothing more than the arithmetic difference between a single shrinkage test result (8.5%) on the Thailand baby roll tested in the Thailand laboratory and the result of a single test on the same baby roll tested in the Dubai laboratory.

116. Similarly, the correlation that was allegedly established between the SRF Dubai laboratory and the Carlstar Clinton laboratory, which SRF and

S&V claimed to be -0.4%, was actually nothing more than the arithmetic difference between the average shrinkage percentage of nine (9) rolls tested by SRF's Dubai laboratory (7.8%) and the single unknown roll that was tested by Scott Wyatt in the Clinton laboratory in response to Ram Krishnan's repeated requests (7.4%).

117. These were not statistical correlations, including the kind of statistical correlation that is required by ASTM D-885 to create a comparison between laboratories with respect to ASTM D-885 testing.

118. Section 5.1.1 of ASTM D-885 describes the statistical procedure to be followed to establish a bias or correlation between two different laboratories:

> If there are differences of practical significance between reported test results for two laboratories (or more), comparative tests should be performed to determine if there is a statistical bias between them, using competent statistical assistance. As a minimum, test samples should be used that are as homogenous as possible, that are drawn from the material from which the disparate test results were obtained, and that are randomly assigned in equal numbers to each laboratory for testing. Other materials with established test values may be used for this purpose. The test results from the two laboratories should be compared using a statistical test for unpaired data. If a bias is found, either its cause must be found and corrected, or future test results must be adjusted in consideration of the known bias.

119. In total, the testing that SRF conducted in its Thailand laboratory showed that seventy-six (76) of the ninety (90) rolls of 840/2 denier material that SRF manufactured in Thailand and were covered by PO 673238 and PO 673417 failed to meet Carlstar's specified 5.0%–8.0% shrinkage range . . . .

120. Because SRF and S&V did not establish scientifically valid correlations among the SRF Thailand laboratory, the SRF Dubai laboratory, and the Carlstar Clinton laboratory, the Thailand testing data cannot be assumed to have been conforming if was tested in the SRF Dubai

> laboratory or in the Carlstar Clinton laboratory (which, again, does not even have the ability to test conditioned samples of Nylon 6 fabric).

The relevance of these DSUMFs 55-96 and 109-120, the Court concludes, is if the Defendants intend to assert the defense provided in Tennessee Code Annotated section 47-2-608 of revocation of acceptance due to failure to discover nonconformity because acceptance was reasonably induced either by difficulty of discovery before acceptance or by the seller's assurances. "Reasonably induced," however, is generally a question of fact for trial, and that is certainly true in this case where, among other things, the actions of Galen Brooks must be evaluated and weighed.

Additionally, to prevail on revocation under section 47-2-608, the Defendants must show that the shrinkage alleged nonconformity of the Thailand goods "substantially" impaired the value of the Goods to the Defendants. This is usually an issue of fact for trial.

> The threshold question for revocation of acceptance is whether the nonconformity substantially impaired the value of the goods. *See id.* at 705–06. In general, it is a question of fact whether an acceptance has been revoked and whether such nonconformity exists so as to substantially impair the value of the goods to the buyer; however, 'where reasonable minds could only conclude that the value is not substantially impaired, this is a question of law.' 67A Am.Jur.2d. *Sales* §§ 1201, 1206. Although § 2–608 of the New Jersey UCC relates the impairment of value to the buyer, according to New Jersey case law ''a substantial impairment is based upon an objective factual evaluation rather than upon a subjective test of whether the buyer believed the value was substantially impaired.'' *General Motors Acceptance Corp.,* 523 A.2d at 706 (quoting *Herbstman v. Eastman Kodak Co.,* 68 N.J. 1, 342 A.2d 181, 185 (N.J.1975)). Nevertheless, it has been suggested that the objective evaluation should be personalized,

> in the sense that the facts must be examined from the viewpoint of the buyer and his circumstances, objective in the sense that the criterion is what a reasonable person in the buyer's position would have believed. In other words, the statute creates a subjective test in the sense that the requirements of the particular buyer must be examined and deferred to; however, since the rationale of the "substantial impairment" requirement is to bar revocation for trivial defects or defects that can easily be corrected, the impairment of the buyer's requirements must be substantial in objective terms.

*8 *Id.* (quoting 67A Am.Jur.2d *Sales* § 1203 at 600 (footnotes omitted)).

Mobilificio San Giacomo S.P.A. v. Stoffi, No. C.A. 96-415-SLR, 1998 WL 125536, at *7–8 (D. Del. Jan. 29, 1998).

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> Under the U.C.C., Beech–Nut may have been within its rights to revoke its acceptance of all shipped Fruit Nibbles. However, this right only arises when a products' non-conformity substantially impairs the value of the whole shipment. U.C.C. § 2–608(1). Substantial impairment is a factual issue. *SCD RMA, LLC v. Farsighted Enterprises, Inc.*, 591 F.Supp.2d 1131, 1138 (D.Hi.2008) (*citing* 3 Williston on Sales § 25–15); *Hubbard v. UTZ Quality Foods, Inc.*, 903 F.Supp. 444, 451–52 (W.D.N.Y.1995) (noting that 'whether goods conform to contract terms is a question of fact' and holding a trial to decide if potatoes failed to meet buyer's contracted-for color specifications and whether such failure constituted a substantial impairment of the installments); *Glennville Elevators, Inc. v. Beard,* 384 S.C. 335, 338 (S.C.Ct.App.1985) (whether delivery of under-weight and under-moist corn bushels substantially impaired value of whole contract is a question of fact); *RIJ Pharmaceuticals v. IVAX Pharmaceuticals, Inc.*, 322 F.Supp.2d. 406, 416 (S.D.N.Y.2004) (declining to determine on summary judgment that shipments of medication were non-conforming as a question of fact).

Promotion in Motion, Inc. v. Beech-Nut Nutrition Corp., No. CIV. 09-1228 WJM, 2011 WL 6372323, at *3 (D.N.J. Dec. 20, 2011), *aff'd,* 548 F. App'x 47 (3d Cir. 2013).

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> Whether a product's non-conformity substantially impairs its value to the buyer is a question of fact. *Erling v. Homera, Inc.,* 298 N.W.2d 478, 481 (N.D.1980). 'A party alleging a breach of warranty has the burden of establishing the existence of a warranty, a breach of warranty, and that the breach of warranty proximately caused the damages alleged.' *Hagert v. Hatton Commodities, Inc.,* 384 N.W.2d 654, 657 (N.D.1986).

Eggl v. Letvin Equip. Co., 2001 ND 144, ¶ 8, 632 N.W.2d 435, 438–39 (West 2016).

****

> Tenn. Code Ann. § 47-2-608's central requirement is that the defects must substantially impair the value of the item to the purchaser. With regard to the 'substantial impairment' test, this Court has recognized that:
>
> > Cases in other jurisdictions have held that substantial impairment of value within the meaning of U.C.C. § 2-608(1) exists when the nonconformities in the goods are such that they shake the buyer's faith in the ability of the goods to perform the function for which they were purchased.
>
> *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 304 (Tenn.App. 1984).
>
> While it is true that Tenn. Code Ann. § 47-2-608 creates a subjective test in the sense that the requirements of a particular buyer must be examined and deferred to, the evidence with regard to the substantial impairment to a particular buyer must be measured in objective terms. Welch v. Fitzgerald-Hicks Dodge, Inc., 121 N.H. 358, 430 A.2d 144, 148 (1981) and Kenn v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668, 670 (1978). See also J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 8-3, at 261 (1972). Thus, the 'substantial impairment' requirement should be construed to exclude attempted revocations based upon trivial defects or defects that can be easily repaired. Dickson v. U-J Chevrolet Co., 454 So.2d 964, 967 (Ala. 1984); Colonial Dodge, Inc. v. Miller, 121 Mich.App. 466, 328 N.W.2d 678, 680 (1980); Freeman Oldsmobile Mazda Co. v. Pinson, 580 S.W.2d 112, 114 (Tex.Civ.App. 1979); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144, 148 (1976); and Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa.Super. 120, 224 A.2d 782, 784 (1966).

Harper v. Mitchell, No. 85-97-II, 1985 WL 4040, at *2 (Tenn. Ct. App. Dec. 4, 1985).

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> Of course, this argument overlooks Trinity's reason for its argument, but the fact remains that the cause of the collapse was relevant to McKinnon's revocation of acceptance defense. Although McKinnon steadfastly disclaims that its ability to revoke its acceptance depends on the cause of the collapse, we can see no other evidence of a revocation of acceptance prior to the collapse. *See* Tenn. Code Ann. § 47–2–608(2). Therefore, the only hope McKinnon had to sustain its revocation defense was a finding that the defects in the steel caused the bridge to collapse. Only by establishing the fact that the defects in the steel caused the substantial change in condition could McKinnon sustain its right to revoke its acceptance. The trial judge had announced that requirement months in advance of the trial, again in ruling in McKinnon's motion in limine, and at several places in the lengthy trial itself. We think Dr. Hill's evidence was proper and sustains the trial judge's finding on why the bridge collapsed.

Trinity Indus., Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 179 (Tenn. Ct. App. 2001) *abrogated by Bowen ex rel. Doe v. Arnold*, No. M201500762SCR11CV, 2016 WL 5491022 (Tenn. Sept. 29, 2016).

Applying the foregoing case law, the Court's analysis is that the Defendants have presented facts in their defense that the blister rate on PO 673417 was unacceptably high and tires had to be scrapped. These facts trigger the application of revocation and whether the Plaintiff's item of alleged nonconformity, in this case shrinkage, caused the unacceptably high blister rate.

Thus, in the trial of this case if the Defendants prevail on the issue that the goods are determined to be nonconforming, but, next, the Plaintiff prevails and Defendants are

determined to have ineffectively rejected and accepted the Thailand goods under sections 47-2-602 and 47-2-606, there are facts of record which present the revocation and substantially impair issues under Tennessee Code Annotated section 47-2-608. On this, there are competing expert opinions which create genuine issues of material fact, *see* DSUMFs 168-174, in which Defendants' expert says it is most likely spiking in blisters was due to the Thailand goods whereas in Plaintiff's Amended Statement of Additional Disputed Facts 26, 27, 29, 215-232, 242-244, 246-251, 266-271, 305, experts assert shrinkage does not result in blistering, and that if blistering was caused by the shrinkage noncompliance that would have surfaced in the Product Evaluation Mr. Brooks performed, PASADFs 131-133. There are also facts from which competing inferences can be drawn, PASADFs 16-39, of the manufacturing standards of Defendants' Clinton facility being low, blistering is normal at the Clinton facility and the sources of the blistering are usually unknown.

Conclusion of Genuine Issues of Material Fact on PO 673417

Thus, because the Defendants have not demonstrated on summary judgment that the PO terms were the parties' final written expression and/or whether the terms of the POs are explained, supplemented or waived, the Other Evidence of documents in addition to the PO terms and the parties' course of dealing and performance is relevant. When that is considered, it presents, under Tennessee Code Annotated sections 47-2-602, 47-2-606 and 47-2-608, genuine issues of material fact for trial on PO 673417 on whether the goods were nonconforming, and/or whether the Product Evaluation and subsequent

actions by the Defendants constitute effective rejection, acceptance and/or grounds for revocation of acceptance of nonconforming goods.

Summary judgment is, therefore, denied with respect to the PO 673417 goods in issue, Defendants' first ground for summary judgment.

(2) POs 673418 and 673819

The analysis and ruling for this ground 2 for summary judgment has already been stated above at 8-11.

(3) Forecasted Goods

With respect to ground 3 for summary judgment—Defendants' defense for nonpayment of goods the Plaintiff asserts it ordered to meet Defendant's forecasted needs—the defense has two parts. One part is that the goods were nonconforming. That has been decided above to present genuine issues of material fact for trial.

The second part is that the "terms and conditions of the parties' relevant purchase order contracts" clearly and unambiguously disclaim Defendants liability for forecasted goods:

> Any forecast provided by CTP is non-binding and not a commitment by CTP to purchase such quantities of the Product unless otherwise agreed upon between the Seller and Buyer.

See DSUMF 138.

In response to DSUMF 138, the Plaintiff disputes that the Defendant has established that the above quoted forecasting disclaimer is incorporated into the POs 673417, 673418 and 673819. In PASADFs 203-207, quoted as follows, the Plaintiff asserts facts from which it contends competing inferences can be drawn about whether the forecasting disclaimer is a term and condition referenced in POs 673417, 673418 and 673819 and incorporated therein:

> 203. Also at the bottom of PO 673418, under "Important Instructions" at Note 3 it states, "Subject to The Carlstar Group LLC Terms and Conditions. Copies available upon request to Buyer." (Douglas Dec. ¶ 56; Douglas Depo. Ex. 19).
>
> 204. In addition to the terms Carlisle references, there are at least two other different sets of terms and conditions that were produced in discovery, but not attached to any particular purchase order. (Douglas Dec. ¶ 58).
>
> 205. First, there is an undated terms and conditions sheet titled only "Terms and Conditions." (Douglas Dec. ¶ 58).
>
> 206. Second, there is a draft of a document titled "The Carlstar Group LLC Terms and Conditions" that appears to be one of multiple versions of those terms and conditions. (Douglas Dec. ¶ 59).
>
> 207. It is disputed which terms and conditions correspond to which purchase orders, if any, and there is also a dispute about which purchase order is the correct purchase order. The purchase orders made exhibits to Mr. Douglas's deposition contain different terms than those now relied upon by the Carlisle. (Douglas Dec. ¶ 60).

Plaintiff S&V Industries, Inc.'s Amended Statement Of Additional Disputed Facts And Response In Opposition To Defendant's Motion To Strike, pp. 33-34 (Sept. 20, 2016).

As determined at the outset, *supra* at 8-11, the Court finds from the Supplemental Affidavit of Kathy Taylor; Exhibits U, Y and Z to DSUMFs; and DSUMFs 165, 166, and 167 there is no genuine issue of fact that these POs referenced and incorporated the "CTP Transportation Products, LLC Global Terms and Conditions," quoted above, including that forecasting by the Plaintiff was nonbinding and not a commitment.

Nevertheless, based upon the above analysis that the Defendants have not demonstrated on summary judgment that the POs were intended to be their final written expression of the terms of the Sale and/or whether the terms of the POs are explained and supplemented, or waived by the parties' course of dealing and performance, this Other Evidence must be considered on summary judgment.

The Court concludes from PASADFs 1-15, 86-109 and the Declaration of Mahesh Douglas, Plaintiff's president, that the Plaintiff has established genuine issues of material fact whether the Forecasting Disclaimer provision of the POs constituted the terms of the Sale. A representative but inexhaustive example of the genuine issues of material facts with respect to Forecasted Goods which are presented by Plaintiff's Other Evidence is the Mahesh Douglas Declaration quoted as follows:

> — Carlisle and S&V agreed that the title and risk of loss for any materials that S&V consigned for Carlisle would pass to Carlisle once the rolls were loaded on Carlisle's preferred carrier and the driver signed off, and that title and risk of loss for any materials would be borne by S&V only while the material was in transit. (Douglas Dec. ¶ 114).

— Carlisle never failed to consume all of the inventory that S&V procured on its behalf, even if the inventory exceeded Carlisle's actual usage needs, and it was the parties' course of performance that Carlisle agreed that it was responsible for purchasing any unused/excess inventory after three (3) months from the date of arrival at the S&V warehouse. (Douglas Dec. ¶ 115).

— The parties understood and agreed that Carlisle was responsible for all inventories in the warehouse, inventories in transit, and WIP based on the forecasts and the firm POs Carlisle issued. (Douglas Dec. ¶ 116). This is particularly evidenced by the fact that Carlisle had so much control over the amount of inventory that S&V kept at its warehouse—including the requirements for additional "safety stock." (Douglas Dec. ¶ 117).

— The parties understood that the POs were simply instructions from Carlisle for the release of certain crate quantities at certain times, and the parties agreed if S&V deviated from the specified crate quantities, it would be subject to a "crate break fee" of $45 per occurrence. (Douglas Dec. 118). The vast majority of the parties agreement was performed by S&V well before any POs were issued for crate quantities of material—as S&V has already procured, paid for, and SRF had already manufactured the custom Nylon 6 tire cord.

— The contract for the amount of inventory and the price at which Carlisle would pay for it were set months before the issuance of any POs, as were the agreed upon material specifications for the Nylon 6 product that Carlisle was purchasing. Both Carlisle and S&V conducted themselves as if the forecasted amounts were binding—with Carlisle even penalizing S&V for times when its inventory dipped below Carlisle's forecasted amounts. (Douglas Dec. ¶ 119).

— Without the prior agreement about the amount of inventory, Carlisle would simply be issuing a PO for material that it could not confirm was in the warehouse which would jeopardize its ability to keep its production lines running. (Douglas Dec. ¶ 120).

— In addition, Carlisle had always previously paid for all of the inventory covered by its forecasts, even when that inventory exceeded its actual need. (Douglas Dec. ¶ 121).

For these reasons, summary judgment is denied with respect to Defendants' defense that under the terms of the Sale payment was disclaimed with respect to the Forecasted Goods.

Next Steps for the Case

The Defendants' Motion for Summary Judgment has accomplished the Rule 56 purposes of focusing the issues, and identifying genuine issues of material fact for trial and those without substantial controversy. These accomplishments position the case well for mediation, thoroughly prepare the Court to try the case, and also support the time limits of presentation of evidence at trial.

Ellen Hobbs Lyle

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Jay S. Bowen
Lauren Kilgore
Brigid Carpenter
Perry W. Miles
Derek H. Swanson
George B. Davis

MAILED
2-21-16

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ATHLON SPORTS COMMUNICATIONS, INC.,	)	
Plaintiff,	)	
VS.	)	**NO. 12-1787-III**
STEPHEN C. DUGGAN, MARK A. MILES, DANIEL R. GROGAN, and ROBERT KELLY GROGAN,	)	
Defendants.	)	

ORDER RESERVING ADDITIONAL DAYS FOR TRIAL AND ALLOCATING EACH SIDE 14 HOURS TO QUESTION WITNESSES

Counsel have reserved three days, August 31–September 2, 2015, for an evidentiary hearing on the fair value of the Plaintiff's shares in a dissenters' rights proceeding.

After reviewing for a second time the trial plans filed by counsel, which list the identity and number of witnesses and the nature of their testimony, the Court sees each side has an expert witness and a potential total of 7 more witnesses—potentially 9 witnesses in all. From this, the Court concludes that the trial is likely to exceed the time reserved.

It is therefore ORDERED that in addition to the 3 trial days already reserved from 9:00—5:00 each day, counsel, parties and witnesses shall also reserve September 3 from 9:00 to 2:30 and September 8 from 9:00 to 5:00.

EXHIBIT A

It is further ORDERED that, exclusive of opening and closing statements, each side is allocated a total of 14 hours for both direct and cross examination of witnesses. That is, the Plaintiff has a total of 14 hours to complete both: direct examination of its witnesses and cross examination of witnesses called by the Defendants; all the Defendants have a total of 14 hours to complete both: cross examination of witnesses called by the Plaintiff and direct examination of their witnesses. The Court will keep track of the time. The Court has used this method often in the past, and it is easy, effective and not onerous.

ELLEN HOBBS LYLE
CHANCELLOR

cc: Paul Davidson
Laura Merritt
Attorneys for the Plaintiff

John Jacobson
W. Russell Taber III
Attorneys for Stephen Duggan, Daniel Grogan and Robert Kelly Grogan