~~UNDER SEAL~~ CS

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

S&V INDUSTRIES, INC.,

Plaintiff,

VS. NF **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.

FILED
2016 DEC 20 PM 2:59
CLERK & MASTER
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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]

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[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