

STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals, Owens P.J., Meter and O'Connell, JJ.

FISHER SAND AND GRAVEL COMPANY

Supreme Court Docket # 143374

Plaintiff/Appellant

Court of Appeal Docket # 297156

V

NEAL A. SWEEBE INCORPORATED

Midland County Circuit Court Case # 09-

5960-CK-B

Defendant/Appellee

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF THE QUESTION PRESENTED

DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY DETERMINE THAT FISHER'S CLAIMS, INCLUDING CLAIMS FOR OPEN ACCOUNT, WERE SUBJECT TO THE FOUR YEAR STATUTE OF LIMITATIONS CONTAINED WITHIN THE UCC, § 2-725 RATHER THAN THE SIX YEAR STATUTE OF LIMITATIONS APPLICABLE TO CONTRACT ACTIONS PURSUANT TO MCLA 600.5807(8) AND WERE THEREFORE BARRED?

Defendant/Appellee answers "Yes"

Plaintiff/Appellant answers "No"

INTRODUCTION

The Uniform Commercial Code (“UCC”) is to be “liberally construed and applied to promote its underlying purposes and policies.” Mich. Comp. Laws Ann. § 440.1102(1) (West).

The “underlying policies and purposes of the UCC are to:

1. Simplify, clarify and modernize the law governing commercial transactions;
2. Permit the continued expansion of commercial practice through custom, usage, and agreement of the parties; and
3. Make uniform the law among the various jurisdictions.

Mich. Comp. Laws Ann. § 440.1102(2).

The majority decision in this case by the Michigan Court of Appeals fulfilled the purposes of the act and joined the prevailing rule of law across the United States and made the application of the UCC statute of limitations uniform among the various jurisdictions. It is appropriate to seek guidance from other jurisdictions in construing the UCC consistent with its underlying purposes. *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999) (citing *Shurlow v Bonthuis*, 456 Mich 730,737-738; 576 NW2d 159 (1998). “When uniform laws such as the UCC have been adopted by several states, the courts of one state may refer to decisions from another state and may construe the statutes in accordance with the construction given by that state.” *Yamaha Motor Corp USA v Tri-City Motors*, 171 Mich App 260, 270; 429 NW2d 871 (1988). “The UCC should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved. M.C.L. § 440.1102; M.S.A. § 19.1102, comment 1.” *Shurlow v. Bonthuis*, 456 Mich. 730, 737, 576 N.W.2d 159, 163 (1998)

Plaintiff Fisher Sand and Gravel Company (“Fisher”) argues that the application of the UCC statute of limitations adds an “anti-business friction” to Michigan’s economy and thus should be avoided. Defendant Neal A. Sweebe Incorporated (“Sweebe”) agrees that there is a business rationale for this Court to consider. However, business considerations dictate in favor of the application of the UCC limitations. Uniformity is a primary consideration and while the UCC limitations period is shorter in Michigan than for an account stated, it is longer than the statute of limitations for an account stated in other jurisdictions, including Oklahoma, Texas, and Mississippi.¹ Businesses are benefitted by being in secure in the knowledge that throughout the nation, they must only consider the jurisdiction’s enactment of the UCC to determine the timeframe in which they must act to collect debts.

The Court of Appeals majority decision serves to promote “consistency among the various states and to further coherence in the business law of this nation. *Citizens Bank v. Ansley*, 467 F.Supp. 51, 55 (M.D. Ga., 1979), *aff’d* 604 F.2d 669 (CA5, 1979).” *NBD Bank, N.A. v. Timberjack, Inc.*, 208 Mich. App. 153, 156-57, 527 N.W.2d 50, 52 (1994). For the reasons that follow, Sweebe requests that this Court affirm the decision of the Court of Appeals

COUNTER-STATEMENT OF FACTS

Sweebe takes exception to the characterization of the nature of the parties’ relationship. Yes, Sweebe did not pay for product over a long period of time – but it was due to Sweebe still being owed by Fisher back in the 1980s when a failed nuclear plant was being constructed in

¹ In *Sesow v. Swearingen*, 552 P.2d 705, 706 (1976), the court held that the longer UCC limitations of 5 years applied rather than the shorter 3 year limitation for an action on an open account. In *Ideal Builders Hardware Co. v. Cross Const. Co., Inc.*, 491 S.W.2d 228, 230 (Tex. Civ. App. 1972), the court applied the longer UCC statute of limitations (4 years) over the shorter statute of limitations for open accounts (2 years). In *Hughes v. Collegedale Distributors*, 355 So. 2d 79, 81 (Miss. 1978), the Mississippi court applied the longer UCC limitations for the sale of goods (6 years) over the shorter limitations period for open accounts (3 years).

Midland. (*Affidavit of Neal Sweebe, attached to Sweebe's Reply Brief in Support of Summary Disposition- Appx 72a-73a*). If this case were allowed to proceed, Sweebe would be entitled to offset the entire amount owed.

Sweebe takes issue with the characterization of the isolated purchase and payment in May of 2005. Rather than an unspecified payment on account, the payment was a specific payment for a specific invoice in the amount of the invoice *Id.*

Sweebe also takes issue with Fisher's assertion that Sweebe does not challenge the "fact" that it owes payment. Rather, Neal Sweebe was very clear that due to a debt owed to Sweebe by Fisher from long ago, Sweebe believes that his "company would have the right to offset the entire amount of the debt if such old events were allowed to be litigated." *Id.*

To be clear, there is no dispute that the last transaction of any kind between the parties took place in May of 2005 and that the suit was not filed until August of 2009 – more than 4 years after the latest possible accrual date. Based upon this fact alone, the decision of the Court of Appeals and the trial court must be upheld.

ARGUMENT

Both the trial court and the Court of Appeals correctly determined that Fisher's claims, including claims for open account, were subject to the four year statute of limitations contained within the UCC, § 2-725 rather than the six year statute of limitations applicable to contract actions pursuant to MCLA 600.5807(8) and were therefore barred.

Standard of Review

Sweebe accepts the standard of review as stated in Fisher's brief with the exception that Sweebe takes issue with the assertion that Sweebe submitted no evidence at the summary disposition stage. Sweebe provided the affidavit that is referenced above. Sweebe also asserts that the standards of statutory construction cited by Fisher are incomplete. This is addressed below.

Legal Argument

As urged by Sweebe, both the trial court and the Court of Appeals found that the UCC and its applicable four-year statute of limitations applied to the dispute. This ruling was correct and should be upheld.

It is undisputed that the transactions at issue were in goods as defined by the UCC:

“Goods” means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid.

MCLA 440.2105.

Fisher’s complaint alleged that it “supplied concrete to Sweebe from approximately October 30, 1991 through June 30, 2005.” (*Fisher Complaint at ¶ 9, Appendix 20a*) Case law makes clear that the sales of concrete are sales of goods subject to the UCC. *See Ace Concrete Products Co v Charles Rogers Constr Co*, 69 Mich App 610; 245 NW2d 353 (1976). It was undisputed that the transaction was for concrete and Fisher did not challenge the finding of the trial court that the underlying transaction was a transaction in goods and this finding must be upheld.²

The limitations period from the UCC is 4 years. *MCLA 440.2725*. This 4 year statute of limitations must be applied regardless of whether the cause of action is pled as breach of contract, unjust enrichment, open account, or account stated. Both Michigan law and law from other jurisdictions support the Court of Appeal’s affirmation of the trial court’s grant of summary disposition.

² Sweebe objects to the attempt of Fisher in its footnote #2 to argue that the contract was predominately for services. This was not an argument raised before the trial court or before the Court of Appeals. By not raising this issue below, Fisher has waived review. *Walters v Nadell*, 481 Mich 377, 378; 751 NW2d 431 (2008). In any event, the argument would not be persuasive as the sale of concrete is certainly not one that is predominately a contract for services. *Neibarger v Universal Cooperatives*, 439 Mich 512; 486 NW2d 612 (1992).

A. The Court of Appeals Correctly Adopted the Prevailing Rule from Other Jurisdictions in holding that the UCC 4-year statute of limitations applies

The precise question presented has been passed on by Courts in other jurisdictions and the overwhelming conclusion has been that the UCC's statute of limitations applies where the underlying transaction is a sale of goods regardless of how the claim is framed. It is appropriate to seek guidance from other jurisdictions in construing the UCC consistent with its underlying purpose of making the law uniform among the various jurisdictions. *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999) (citing *Shurlow v Bonthuis*, 456 Mich 730,737-738; 576 NW2d 159 (1998)). "When uniform laws such as the UCC have been adopted by several states, the courts of one state may refer to decisions from another state and may construe the statutes in accordance with the construction given by that state." *Yamaha Motor Corp USA v Tri-City Motors*, 171 Mich App 260, 270; 429 NW2d 871 (1988). The Uniform Commercial Code (UCC) "is to be liberally construed and applied to promote its underlying purposes and policies." *Shurlow v. Bonthuis*, 456 Mich. 730, 737, n. 12, 576 N.W.2d 159 (1998). Thus, courts find it "appropriate to seek guidance from the decisions of other jurisdictions." *Power Press Sales Co. v. MSI Battle Creek Stamping*, 238 Mich. App. 173, 180-81, 604 N.W.2d 772, 776 (1999).

Sweebe's research has revealed that the following jurisdictions have weighed in on the question presented in this appeal:

1. Oregon. The court in *Moorman Manufacturing Co of Cal v Hall*, 113 Or App 30, 830 P2d 606 (1992) considered the question presented by this appeal and presented wise reasoning. There, the plaintiff had sued on a breach of contract, open account and account stated. The trial

court had dismissed the case on statute of limitations grounds and held that the UCC statute of limitations was applicable. In upholding the trial Court, the Oregon Court of Appeals stated:

Although an account stated is based on a separate agreement between the parties, it relates to and cannot be divorced from the underlying sales transaction. The UCC drafters intended that one limitation apply to all transactions involving the sale of goods, regardless of the theory of liability. To hold that the UCC limitation period does not apply to actions on account despite the underlying sale of goods, would run counter to the drafters' purpose of providing consistency and predictability in commercial transactions.

Id at page 607-608 (citations omitted)

This holding is directly on point and the Court of Appeals decision adopting it was correct.

In an attempt to get around the *Moorman* case, Fisher now argues that Michigan and Oregon law is “diametrically opposed” on the law surrounding open account (*See Fisher's brief at page 2*). This is nothing more than a red herring. The *Moorman* dissent recited that under Oregon law an account stated is an independent contract. *Moorman, Supra at 34 (Rossman Dissenting)*. This is the same as Michigan law. There is no substantive difference between Michigan account stated law and Oregon account stated law.

Courts in Oregon and Michigan define account stated and open accounts in a substantially similar way. Oregon courts hold that “an “account stated” is an agreement to pay a “fixed amount that is due as a result of previous transactions in which a debtor-creditor relationship was created.” *EIMCO-BSP Ser. v. Valley Inland Pac. Constructors*, 626 F.2d 669, 671 (9th Cir.1980). Likewise, Michigan Courts hold that “an “account stated” is an agreement, between parties who have had previous transactions of a monetary character, that all items of accounts representing such transactions are true, and that the balance struck is correct, together with a promise, express or implied, for payment of such balance. *Leonard Refineries v. Gregory*, 295 Mich. 432, 295 N.W. 215 (1940)

Notably, Oregon case law holds that an account stated is an independent contract which creates an original cause of action, reasoning that, “in Oregon an account stated is an agreement between persons who have had previous monetary transactions fixing the amount due in respect to such transactions, and expressly or impliedly promising payment, and such account becomes an “original demand” and an action upon an account stated is upon the new promise and not upon the original debt or items of account.” *W. Hills Mem'l Park v. Doneca*, 131 F.2d 374 (9th Cir. 1942) Likewise, Michigan law holds that account stated and open accounts are independent contracts which form an original cause of action, explain that in regard to an open account or account stated, “the agreed statement serves, in place of original account, as the foundation of an action. It becomes an original demand, and amounts to an express promise to pay the actual sum stated.” *White v. Campbell*, 25 Mich. 463, 468 (1872) There is no substantive distinctions between the states.

Fisher also makes a severe misstatement on the top of page 3 of its brief in alleging that there is an Oregon case contrary to the Moorman case. The case that is cited for that proposition, *Central Bank & Trust v Stettmisch*, 821 P2d 1066 (OK 1987) is (1) a case from Oklahoma and not Oregon and (2) did not hold what Fisher asserts it does (See note 3 below).

2. West Virginia. In case that is completely mischaracterized by Fisher in its brief, the West Virginia Court of Appeals in *Greer Limestone Co v Nestor*, 175 W Va. 289; 332 NE2d 589 (1985), examined which statute of limitation applied to a claim brought under an open account theory and explicitly held as follows: “We, therefore, conclude that the four-year UCC statute of limitations is applicable.” Id at 594. Also at page 594, the Greer Limestone Court cites to numerous other jurisdictions that likewise have found the UCC statute of limitations governs the

sale of goods over more general statutes, including cases from Wisconsin, Georgia, California, Mississippi, Missouri, New York, Ohio, Oklahoma, and Texas. *Id.*

3. Wisconsin. In a federal case applying Wisconsin law, it was held that the UCC sales limitations period “is controlling and should be given effect over prior case law with respect to contract actions under the U.C.C.” *Milwaukee County v. Northrop Data Sys., Inc.*, 602 F.2d 767, 770 (7th Cir. 1979).

4. Oklahoma. In *Sesow v. Swearingen*, 1976 OK 97, 552 P.2d 705, 706 (1976), the Oklahoma Supreme Court considered the applicable statute of limitations for an action brought on an open account. It found that the longer UCC sales limitation applied as the later adopted UCC had to be applied over contrary earlier-enacted statutes.³

5. Texas. In *Ideal Builders Hardware Co. v. Cross Const. Co., Inc.*, 491 S.W.2d 228, 230 Tex. Civ. App. 1972), the Court applied the longer UCC statute of limitations (4 years) over a shorter open account statute of limitation (2 years) and concluded “that in adopting the Texas Business and Commerce Code our Legislature intended to ‘simplify, clarify and modernize the law governing commercial transactions.’” *Id.*

6. New Jersey. In *Deluxe Sales & Serv., Inc. v. Hyundai Eng'g & Const. Co., Ltd.*, 254 N.J. Super. 370, 377, 603 A.2d 552, 555-56 (App. Div. 1992), the New Jersey Supreme Court noted in passing that “[t]he majority view is that the [Uniform Commercial Code] supersedes the limitations period otherwise applicable to “running accounts” based on the sale of goods.”⁴

³ Fisher makes a further mischaracterization of the holding from a case out of Oklahoma, *Central Nat'l Bank & Trust Co v Stettinisch*, 821 P2d 1066 (1987). Fisher alleges that the case held that a general 5-year statute of limitations controlled over the 4 -year UCC statute of limitation. This ignores that the UCC limitations period in Oklahoma is 5 years! *Sesow v Swearingen*, 552 P2d 705 (1976). Further, the *Stettinisch* case did not involve the sale of goods and was timely filed under any statute of limitations. Moreover, the applicable Oklahoma pronouncement on the subject came from the *Sesow* court which specifically held that the UCC limitations period would apply to sales of goods on open account. *Sesow* at 707.

7. Mississippi. In *Hughes v. Collegedale Distributors*, 355 So. 2d 79, 81 (Miss. 1978), the court based its decision to apply the longer UCC statute of limitations for sales of goods to certain open accounts not specifically exempted in part on the express purposes of the UCC.

8. New York. In the New York case of *Troy Boiler Works v Sterile Technologies*, 777 N.Y.S. 2d 574 (2003), the issue was whether certain modifications to goods governed by the UCC created an “account stated . . . governed by a six year statute of limitations . . . and removed the contract from the purview of Article 2 of the UCC. . .” *Id* at 576. The Court reviewed the applicable law from New York and other jurisdictions that have considered the issue and specifically found that the 4-year statute limitations applicable and governing. *Id* at 577. The Court specifically held:

In light of the foregoing, the Court finds that whether or not Fisher has a claim for an account stated or any other claim on an account, the four year statute of limitations set forth in UCC § 2-725(1) applies to this action since the underlying transaction was for the sale of goods and any such claims relate to and cannot be divorced from the underlying sales transaction. In fact, no matter how Fisher seeks to characterize its claim, only one statute of limitations properly applies in keeping with the goals of UCC § 2-725.

Id at 579

9. California. In *H. Russell Taylor's Fire Prevention Serv., Inc. v. Coca Cola Bottling Corp.*, 99 Cal. App. 3d 711, 724, 160 Cal. Rptr. 411, 420 (Ct. App. 1979) the plaintiff alleged both an open account and account stated. The court applied the UCC sales limitation period to those claims after determining that Fisher's overall claim was contractual in nature.

10. Arizona. In a federal bankruptcy case applying Arizona law, the Court in *In re S&S Sales, Ltd.*, 2:08-BK-01095-SSC, 2009 WL 1074125 (Bankr. D. Ariz. Mar. 31, 2009)(*Attached as Appendix 8b-19b*), found that there was a “wealth of case law” from other jurisdictions

⁴ The court did not specifically make a ruling on the issue as it found that the running account exception to New Jersey law was not applicable so they did not need to affirmatively determine this question.

“which has addressed the open accounts involved in the sale of goods and has held that the statute of limitations under the Uniform Commercial Code supersedes the ‘open account’ statute.” *Id.* The court accordingly applied the Arizona UCC sales statute of limitations to the open account action.

11. Ohio. In *May Co. v. Trusnik*, 54 Ohio App. 2d 71, 74, 375 N.E.2d 72, 74-75 (Ohio Ct. App. 1977), the Court found that a post-sale modification between the original parties, which implemented an installment payment agreement, did not remove the transaction from the UCC four year statute of limitations. The court found that it did “not believe that a merchant, by renegotiating the payment terms of a customer's account, should be able to extend the statute of limitations eleven years.” *Id.* at 75.

12. South Dakota. While Fisher cites a case from South Dakota, *O’Neil v Steppat*, 270 NW2d 375 (1978) as supportive of its position, it is completely distinguishable and in fact supports Sweebe’s position. In *O’Neil*, there was a separate promissory note which financed the purchase of goods. There was no promissory note in this case. Where there is a contract and a separate promissory note, the UCC contemplates that the seller can either enforce the contract or the note. If the seller chooses to enforce the note, then it is governed by Article 3 of the UCC rather than Article 2. At the time *O’Neil* was decided, there was not separate limitations period in Article 3. Therefore, the fallback general statute of limitation applied.

Subsequent to the *O’Neil* decision, Article 3 of the UCC received a major overhaul. It now includes a separate statute of limitations applicable to promissory notes. *MCLA 440.3118*. Accordingly, the only proposition that *O’Neil* stands for is that in the enforcement of a

commercial transaction, one must determine whether Article 2 or Article 3 applies and then choose the appropriate statute of limitations.⁵

The *O'Neil* decision was subsequently criticized and disregarded by the court in *Fallimento C.Op.M.A. v. Fischer Crane Co.*, 995 F.2d 789, 792 (7th Cir. 1993). That panel held that a seller could not divorce a promissory note from the underlying transaction.

13. Kentucky. Fisher cites a decision applying Kentucky law, *Son v Coal Equity Inc*, 122 Fed Appx 797; 55 UCC Rep Serv 2d 342 (CA 6 2004) in support of its position. This case found two aspects of the particular statutory scheme particularly persuasive for its conclusion that the UCC limitations period did not apply. First, the non-UCC statute of limitations applied specifically to a “merchant’s account for goods sold and delivered.” Thus, it was the more specific statute. Second, it found that the statute was more recently enacted via recent amendments. Neither of the facets are present in the Michigan statutory scheme. The statutory differences negate and persuasive effect of this case

Via the majority decision, the Michigan Court of Appeals has correctly joined the many other jurisdictions that have ruled on this question in favor of the application of the UCC’s statute of limitations. In doing so, the purpose of the UCC to create uniformity among the many jurisdictions has been correctly supported. *MCLA 440.1201*.

B. Existing Michigan jurisprudence dictates that the four year UCC statute of limitations apply to all claims.

As identified by the Court of Appeals, there is no existing Michigan Case law that is directly on point. However, existing Michigan case law supports a broad application of the UCC statute

⁵ An open account or account stated are not governed by Article 3. Article 3 applies to negotiable instruments. *MCLA 440.3102*.

of limitations. This law, when applied to this case, supports the Court of Appeal's conclusion that Fisher's cause of action is barred.

The Court of Appeals found that the most relevant case was *First of America Bank v Thompson*, 217 Mich App 581; 552 NW2d 516 (1996). There, the Court of Appeals surveyed other jurisdictions and joined the prevailing rule that a deficiency judgment action where the underlying transaction is one in goods is governed by the UCC 4 year statute of limitations.

In *Neibarger v Universal Cooperatives*, 439 Mich 512; 486 NW2d 612 (Mich 1992), the Michigan Supreme Court examined the effect of the UCC limitations period on a claim involving the sale of goods. The Court stated its inquiry as whether one may plead around the UCC statute of limitations by pleading tort claims. In holding that the UCC and its accompanying limitations period applied (and barred the plaintiff's tort claims), the Court examined the purpose of the UCC as follows:

Michigan adopted the Uniform Commercial Code with the passage of 1962 P.A. 174, effective January 1, 1964. The stated purposes of the code are "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions."

Id at 519 (quoting MCLA 440.1102).

The Court presented numerous justifications for its holding, including the idea that a holding in line with the majority of other jurisdictions who have issued decisions on the subject "will promote the uniformity called for in § 1-102(2)(a)." *Id* at 529.

In 2006, this court examined the UCC in the context of a common law claim in conjunction with Article III. *Hoerstman General Contracting v Hahn*, 474 Mich 66; 711 NW2d

340 (2006). The Court found that the UCC completely preempted the common law as it relates to accord and satisfaction.

In 1998, this Court considered the question of” whether the a security interest in personal property given as collateral to secure payment under a lease agreement for which the Sweebe executed a personal guaranty was subject to UCC filing requirements.” *Shurlow v Bonthuis*, 456 Mich 730,731-732; 576 NW2d 159 (1998). In finding that is subject to the UCC filing requirements, this Court took note that the UCC “is to be liberally construed and applied to promote its underlying purposes and policies.” *M.C.L. § 440.1102*. The court looked to other jurisdictions for support and joined the prevailing nationwide view. *Id* at 738.

In 1991, this Court found that the court:

is to apply the language under a particular section of the code to further both that section's specific purpose and policies and the general underlying purposes of the code. U.C.C. § 1-102(1), Official Comment (1). Two of the code's general purposes are to simplify, clarify, and modernize commercial law and to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. M.C.L. § 440.1102(2)(a), (b); M.S.A. § 19.1102(2)(a), (b). One authority has acknowledged that an additional underlying purpose of the code is to make “the law of commercial transactions be, so far as reasonable, liberal and nontechnical.” 1 White & Summers, Uniform Commercial Code (3d ed.), § 64, p. 15.

NBD-Sandusky Bank v. Ritter, 437 Mich. 354, 360, 471 N.W.2d 340, 343 (1991)

More recently, the preemptive effect of the UCC statute of limitations on common law claims for breaches of contract, promissory estoppel, and unjust enrichment was examined. In *Crawford v JP Morgan Chase Bank*, 2009 WL 1913415 (ED MI 2009)(*Appendix 1b-7b*), the Court noted that were the UCC provides a comprehensive remedy to the parties and where a remedy would be “rendered meaningless by allowance of common law claims,” such a remedy will not be allowed. *Id* at page 5. The Court further noted that the UCC was a comprehensive

remedial scheme and that reliance on the common law would undermine the purposes of the code.⁶

All of Michigan precedence direct that the Court apply broad preemptive effect to the provisions of the UCC. Accordingly, Michigan law wholly supports the application of the UCC statute of limitations to Fisher's claim. It also further the purpose of providing for "consistency among the various states and to further coherence in the business law of this nation. *Citizens Bank v. Ansley*, 467 F.Supp. 51, 55 (M.D. Ga., 1979), aff'd 604 F.2d 669 (CA5, 1979)." *NBD Bank, N.A. v. Timberjack, Inc.*, 208 Mich. App. 153, 156-57, 527 N.W.2d 50, 52 (1994)

C. Principles of Statutory Construction support the trial court's conclusion

The statute of limitations period in the UCC is both a more specific and later enacted statute. This fact dictates that the Court apply the UCC limitations period over the more general statute of limitations. The Fisher argues that the applicable statute of limitations is the general catch-all limitations period contained in MCLA 600.5813 or the general contractual limitations period from MCLA 600.5807(8). Both of these statutes were added by P.A. 236 of 1961 and became effective on January 1, 1963. The statute of limitations period in the UCC was added after by P.A. 174 of 1962 and became effective January 1, 1964.

It is a commonly cited rule of law that specific statutes govern over more general statutes. *Dingman Advertising, Inc v Saginaw Township*, 92 Mich App 735, 285 NW2d 440. (1979). This rule is particularly persuasive when one statute is both the more specific and more recent statute. *Travelers Ins. v. U-Haul of Michigan, Inc.*, 235 Mich.App. 273, 280, 597 N.W.2d 235 (1999).

⁶ While this case discussed claims under Article III, the reasoning is equally applicable to Article II which likewise provides a comprehensive scheme for the regulation of the sale of goods.

Here, the UCC limitations period is both the more specific statute and was later enacted. Accordingly, the UCC limitations period must be applied to be consistent with the rules of statutory construction.

Moreover, the construction urged by Sweebe is consistent with the purpose of the UCC limitations period as stated by the official comment to § 2-725, which is to:

Introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contract have heretofore been governed by several different periods of limitation depending on the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

See Troy Boiler Works, supra at page 577.

This Court has found that “[a]lthough lacking the force of law, the official comments appended to each section of the UCC are useful aids to interpretation and construction. *Szabo v. Vinton Motors, Inc.*, 630 F.2d 1, 4 (C.A.1, 1980); *White & Summers, supra*, § 4, p. 12.” *Shurlow v. Bonthuis*, 456 Mich. 730, 735, note 7; 576 N.W.2d 159, 162 (1998).

D. Fisher’s cited case law is inapplicable

Fisher cites certain case law in support of its position. However, Fisher’s cited law is simply not on point and serves only as an attempt to deflect away from the true issue within the case.

Fisher takes great pains to describe case law indicating that when payment is made on account, it becomes a new promise and thus, under Fisher’s thinking, a new and independent contract. However, Fisher presents no law to establish his conclusion.

Fisher’s exact argument was addressed and rejected by the Court in the *Moorman Manufacturing* case, *supra* at page 607. The Court found that the account stated “cannot be divorced from the underlying sales transaction.” *Id.* The plaintiff in the *Troy Boiler Works* case,

supra, also argued that there was a new subsequent contract and an account stated. This was rejected.

Fisher presents no law in support of its ultimate conclusion that a partial payment would create an entirely new contract separate and apart from the underlying transaction in goods. This Court should reject Fisher's contention on this point.

Fisher's logic is twisted – Fisher first makes a point that where there is a renewed promise to pay, this renewed promise restarts the statute of limitations clock. Fisher then extrapolates this point to the illogical conclusion that this renewed promise is suddenly now subject to an entirely new and different statute of limitations. Of course, Fisher cites no case that holds such.

Accepting Fisher's logic would mean a complete erosion of the UCC's statute of limitations. It would mean that any time a buyer makes a second payment on a piece of machinery; the second payment automatically destroys the UCC statute of limitations because it is now a new promise to pay that would not be subject to the UCC. This cannot be and is not the rule.

Not one of the Fisher's cited cases discuss the interplay between the statute of limitations from the UCC and the common law causes of action. Indeed, most of the Fisher's cited case law predates the adoption of the UCC in 1964.

In an apparent attempt to end run the limitations period, Fisher amended its complaint to add an account for "Open Account." It is presumed that the reason this additional cause of action is posed is to try and take advantage of the accrual language from MCLA 600.5831 which states that in a "mutual and open account, the claim accrues at the time of the last item proved in the account." Thus, under Fisher's theory, the provision of concrete less than 6 years ago would mean that Fisher could collect on the entire balance.

However, the Fisher's argument was directly shot down by this Court in July of 2009 in

the case of *Seyburn, et al v Bakshi*, 483 Mich 345; 771 NW2d 411 (2009). There, the Court explored the application of this accrual statute and the particular cause of action that is necessary to invoke the statute “mutual and open account.”

In order for an account to be considered mutual and open, it must be “mutual as well as open.” *Id* at 356. “This ‘means a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that one will reduce the balance due on the other.’” *Id* (quoting *In re Hiscock’s Estate*, 79 Mich 536,538; 44 NW 947 (1890)). There are no allegations within the Fisher complaint to support a mutual and open account. The proper analysis to determine the applicable statute of limitations is to look at the nature of the damages sought rather than the form of action which is pled. *Reiterman v. Westinghouse*, 106 Mich.App. 698, 308 N.W.2d 612 (1981). Regardless of how it is phrased, Fisher is seeking damages for the failure to pay for goods delivered.⁷

Much of Fisher’s argument fails to appreciate the distinction between accrual of a cause of action versus a statute of limitations. An accrual statute, such as MCLA 600.5831, can coexist with different statutes of limitation. Indeed, the Court of Appeals in this case assumed that the accrual date of the cause of action was the date of the last transaction. However, the accrual of a claim does not set the time for suit.

Fisher argues that there is no language in the UCC abolishing the concepts of an open account or an account stated and that therefore there can be no appeal by implication. This argument is red herring. The question at issue is simply what statute of limitations applies to such actions – not whether such actions can be brought. Both account stated and open account

⁷ The citation to *Naph-Sol Refing Co v Murphy Oil Corp*, 550 FSupp 297 (WD Mich 1982) is equally unavailing as the Court in that case found the UCC limitations period inapplicable where the more analogous statute of limitations to an action based on a federal statute was the residual limitations period.

causes of action remain unaffected by the Court of Appeals decision. Rather, the law simply dictates that when bringing such a cause of action related to the sale of goods, it must be brought subject to the UCC statute of limitations. Actions for open account remain viable in Oregon many years after the *Moorman* case. (See, for example *Nw. Country Place, Inc. v. NCS Healthcare of Oregon, Inc.*, 201 Or. App. 448, 460, 119 P.3d 272, 279 (2005)).

Therefore, Fisher's argument on pages 24-27 of its brief must be disregarded. This case does not repeal either of the causes of action – it simply sets the timeframe in which such cases may be brought.

Fisher cites *Childs v Taylor Cotton Oil Company*, 612 SW2d 245 (Tex App 1981), a case in which the determinative issue was when the cause of action accrued. The court determined it proper to use the last transaction of the accrual date. The Court did not address nor overrule the earlier Texas precedence on point holding that the UCC limitations period applied rather than the account stated limitations period, *Ideal Builders Hardware Co. v. Cross Const. Co., Inc.*, 491 S.W.2d 228, 230 (Tex. Civ. App. 1972) (*discussed supra*)

An additional ground for dismissing Fisher's alternative unjust enrichment claim was set forth in *Romeo Investment Ltd v Michigan Consol Gas Co*, 2007 WL 1264008 (Mich App 2007)(*Appendix B, pages 20b-28b*) There, the Court held that an equitable counterpart to a legal claim would have the same statute of limitations:

A claim for unjust enrichment is the equitable counterpart of a legal claim for breach of contract. Our Supreme Court "has long recognized that statutes of limitation may apply by analogy to equitable claims." Taxpayers Allied for Constitutional Taxation v. Wayne Co, 450 Mich. 119, 127 n 9; 537 NW2d 596 (1995). "If legal limitations periods did not apply to analogous equitable suits, 'a Fisher [could] dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity.' " Id., quoting Lothian v. Detroit, 414 Mich. 160, 169; 324 NW2d 9 (1982). Thus, when an equitable claim would provide relief that is analogous to the relief available under a similar legal claim,

courts typically apply the legal claim's statute of limitations to the equitable claim as well. Id.

Fisher's challenge to the finding that the May 2005 payment was disconnected to the account is (1) irrelevant as May 2005 is still more than 4 years prior to suit and (2) unpersuasive in the event it may become relevant. Fisher's amended complaint alleged provision of concrete until October of 2004 (see ¶ 10) and the attached account indicates transactions through October of 2004. The Court's finding on this point should be upheld.

E. Answering the Court of Appeals Dissent

The Court of Appeals dissent opined that because the Supreme Court has not ever overruled existing law, that the Court of Appeals was inclined to follow the law as stated in cases holding that payment on an account triggers a separate obligation. Both the *Palm*⁸ and *Bonga*⁹ cases cited by the dissent simply state that the last payment on the account is the starting date for statute of limitations purposes. Neither case considers which statute of limitations applies. The cases talk about the accrual of the cause of action and do not consider the impact of a specific UCC statute of limitations.

The dissent's reliance on § 1103 of the UCC is likewise misplaced. Article II deals specifically with sales of goods and is expansive in its coverage dictating that "[u]nless the context otherwise requires, this article applies to transactions in goods." *MCLA 440.2102*. Thus, once the matter is deemed a transaction in goods, Article II of the UCC governs. One only looks to the outside of the UCC if the question is not answered by Article II. Article II specifically provides the time to sue on transactions in goods is 4 years and is therefore binding.

⁸ *Collateral Liquidation, Inc v. Palm*, 296 Mich. 702, 704; 296 NW 846 (1941)

⁹ *Bonga v. Bloomer*, 14 Mich.App 315, 319; 165 NW2d 487 (1968).

Finally, the dissent's discussion of repeal by implication is not on point as the discussion concerns the relationship between two statutes. In this case, the question is whether the legislature has replaced common law by passing the UCC. The legislature may of course preempt common law claims by passing comprehensive legislation affecting the matter in question. See *Kraft v Detroit Entertainment LLC*, 261 Mich App 534, 543-544; 683 NW2d 200 (2004) and the numerous cases cited therein.

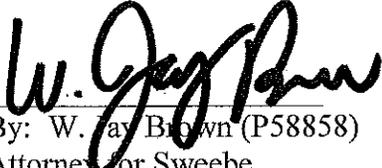
Moreover, the repeal by implication is not a relevant consideration where the case only addresses which statute of limitations is to be used and not whether common law actions can be brought.

CONCLUSION AND REQUEST FOR RELIEF

Given Michigan's continued support of a unified UCC, it is incumbent on this Court to uphold the well-reasoned decision of the Michigan Court of Appeals and support the holding that the UCC statute of limitations control suits where the underlying transaction is a sale in goods regardless of the manner in which the action is pled. To do otherwise is to create a nullity of the UCC limitations period. Accordingly, Sweebe requests that this Court affirm the Court of Appeals' decision and affirm the trial court's grant of summary disposition and dismissal of the Fisher's claims and affirm the subsequent judgment in Sweebe's favor.

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