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

Plaintiff-Appellant,

Supreme Court No 143374
Court of Appeals No 297156
Isabella Cir Ct No 09-005960-CK-B

-v-

NEAL A. SWEEBE, INC.,

Defendant-Appellee
_____/

APPELLANT'S

REPLY BRIEF

* * * ORAL ARGUMENT REQUESTED * * *

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STATEMENT OF QUESTION PRESENTED

Issue I: Where a series of sales of goods occurs on an open account over many years, the last purchase occurring May 9, 2005, and the purchaser, having made a partial payment on the account on May 13, 2005, ultimately fails to pay the remaining balance due, is a suit on open account/account stated subject to a 6-year period of limitations under MCL 600.5807(8) or .5813, and not to the 4-year period of limitations under Uniform Commercial Code §2-275, MCL 440.2275?

Plaintiff-Appellant Fisher Sand & Gravel Company answers "yes".

REPLY TO APPELLEE'S INTRODUCTION

Appellee contends the Uniform Commercial Code (UCC) is to be "liberally construed and applied to promote its underlying purposes and policies." MCL 440.1102(1). True. But the UCC, by its terms, applies only to discrete areas[1] of commercial transactions. It does not deal, for example, with transactions involving services or real estate. *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 25 n. 7; 678 NW2d 619 (2004); *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 612 (1992).

The UCC also has no article dealing with commercial credit generally, or regulating or limiting the remedies available to a commercial enterprise which has extended unsecured credit to a commercial customer for collecting the amount due. Thus, the UCC itself has not a single word addressing the subject of suits on open account or on an account stated; indeed, the terms "open account" and "account stated" nowhere appear in the UCC or in the Official Comments. The omission is by no means accidental; the terminology and associated body of law were well known long before the UCC was promulgated. 29 Williston on Contracts, §73:61 (4th ed) ("An account stated was said, near the end of the 18th century, 'to have been formerly conclusive'* * *."). Williston also notes, in §73:58 (boldfaced emphasis added, footnotes omitted):

> It is not essential that the account be stated in any particular form. Any evidence indicating an admission by the debtor to the creditor of a stated indebtedness claimed by the latter will furnish a good basis for implying a

[1] Sales of goods (Article 2), Leases (excluding real property)(Article 2A), Negotiable Instruments (Article 3), Bank Deposits and Collections (Article 4), Funds Transfers (Article 4A), Letters of Credit (Article 5), Bulk Transfers (Article 6), Warehouse Receipts, Bills of Ladings, and Other Documents of Title (excluding real property), Article 7, Investment Securities (Article 8), and Secured Transactions (excluding real property) (Article 9).

> promise. * * *
> * * * On the account being stated, "[t]he balance is a debt as a matter of contract implied by law. It is to be considered as one debt, **and a recovery may be had upon it without regard to the items which compose it.**"

This reflects general recognition that a suit on account stated or open account stands independently of the underlying transactions. 1A CJS, Account Stated, §42 summarizes: "An account stated is a new contract or promise, and while based on an original debt, may alter it." *Accord*: 1A CJS, Account Stated, §55: "The cause of action on an account stated is an independent one on the new contract."

Hence, applying the UCC—which leaves the venerable jurisprudence of accounts stated and open accounts unaffected—to the present situation engrafts onto the statute a reach not supported by its text, contrary to this Court's repeated abjurations that the Legislature's actual language is the best guide to the scope, meaning and intent of any statute. *In re Certified Question from US Court of Appeals for the 6th Circuit*, 468 Mich 109, 116-117; 659 NW2d 597 (2003); *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999); *Roberts v Mecosta Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Where, as here, the Legislature in the UCC has omitted any mention of open accounts or accounts stated, two subjects with a long history as legal constructs distinct and independent of any underlying transaction, Sweebe's request to construe the Code as somehow abrogating these doctrines finds no support in statutory language and runs afoul of cardinal rules of statutory construction.

REPLY TO APPELLEE'S COUNTERSTATEMENT OF FACTS

Discreditably, contrary to MCR 7.311(A), Sweebe continues to rely on matters not of record, and having nothing to do with Fisher Sand & Gravel. While conceding it did not pay FS&G for product, Sweebe asserts that this was due "to Sweebe still being owed by Fisher back in the 1980s when a failed nuclear plant was being constructed in Midland". That makes no sense (irrespective of Sweebe being a quarter century past any limitations period for asserting such a claim)—the Midland nuclear plant was Consumers Power Company's project, not FS&G's. Sweebe did some concrete work for Consumers' project, and it was Sweebe that owed FS&G for mixed concrete (a service, not a good, as explained in FS&G's original brief, n. 4, pp. 4-5[2]). All this reflects Sweebe's effort to distract this Court from focusing on Sweebe's status as a debtor, which accepted credit and materials from FS&G, but now seeks to welch on its obligations.

Sweebe also attempts to transmogrify Neal Sweebe's conclusory affidavit (Appx 72a-73a), shown to be legally nugatory under MCR 2.119(B) and case law (FS&G's original brief, p. 11), into something creating genuine issues of material fact as to

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[2] Appellee's footnote 2 misunderstands FS&G's discussion of sales of ready-mixed concrete as involving predominantly services, not goods. *Neibarger, supra.* FS&G is not contending that this case involved any sales of ready mixed concrete, but is merely explaining the distinction so this Court can better appreciate how difficult it can be for a merchant to attempt to decipher which limitations period applies to each of thousands of sales. As developed below, the jurisprudence of open accounts as between merchants arose in part to recognize such difficulties and relieve merchants from them.

Meanwhile, appellee wrongly relies on the pre-*Neibarger* case of *Ace Concrete Prods Co v C Rogers Constr Co*, 69 Mich App 610, 612-613; 245 NW2d 353 (1976), for the proposition that a sale of ready mixed concrete is a sale of goods. The dichotomy between goods and services was not recognized there, the *Neibarger* test was not yet available, and the Court merely *assumed* that Article 2 of the UCC applied. The central holding of *Ace* has been subsequently rejected by four Court of Appeals' panels and the federal district court—see *Johnson Controls, Inc v TRW Vehicle Safety Systems, Inc*, 491 F Supp 2d 707, 714-715 (2007) and cases there cited.

whether Sweebe's partial payment on account—which was not accompanied by any written or oral statement limiting its application—was for a specific transaction, and whether Sweebe owed money on account (despite Sweebe's present admission that it did). It is too late for Sweebe to recast Neal Sweebe's incompetent affidavit. *Quinto v Cross and Peters Co*, 451 Mich 358, 367; 347 NW2d 314 (1996).

REPLY TO ARGUMENT

Issue I: Where a series of sales of goods occurs on an open account over many years, the last purchase occurring May 9, 2005, and the purchaser, having made a partial payment on the account on May 13, 2005, ultimately fails to pay the remaining balance due, a suit on open account/account stated is subject to a 6-year period of limitations under MCL 600.5807(8) or .5813, and not to the 4-year period of limitations under Uniform Commercial Code §2-275, MCL 440.2275.

There is no question that in construing a uniform act which has been adopted in Michigan, the decisions of courts in other states may be persuasive, particularly where they are unanimous. *Shurlow v Bonthuis*, 456 Mich 730, 737-738; 576 NW2d 159 (1998). But here, sister state courts are far from unanimous. Yes, Sweebe can cite a few supporting its position[3]—but again, Sweebe relies mainly on *Moorman Mfg Co v Hall*,

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[3] Sweebe's litany of sister state cases is readily distinguishable *seriatim*:
Milwaukee Co v Northrop Data Sys, Inc, 602 F2d 767 (CA 7, 1979): The question was whether the parties had agreed to a 1 year limitations period, where the Wisconsin UCC, Wis Stat §402.275, provides for a 6 year period.
Sesow v Swearingen, 552 P2d 705 (Okla, 1976): Oklahoma categorizes suits on open account or account stated, not supported by a written contract, as contract actions subject to a 3-year limitations period, while the Oklahoma UCC allows 5 years. The Court held the UCC lengthened the period of limitations. Reading *Sesow* as giving a claimant the benefit of the longer limitations period, it supports Fisher's position.
Ideal Bldrs Hardware Co v Cross Const Co, Inc, 491 SW2d 228 (Tex Civ App, 1972): Same as *Sesow*.
Deluxe Sales & Serv, Inc v Hyundai Eng & Const Co, 254 NJ Super 370, 376; 603 A2d 552, 555 (App Div, 1992): The Court recognized exactly the principle for which Fisher contends, and also the special rule for accounts between merchant and merchant (traced in the opinion to a 1799 statute—see the discussion of *Spring v Gray's Executors, infra*). That rule did not apply because the debtor merchant, unlike Sweebe, directed the

113 Or App 30; 830 P2d 606, 607-608 (1992)[4], which, as demonstrated in FS&G's original brief, proceeds in purely conclusory fashion[5]. Indeed, under the UCC, a claim on account stated provides a valid basis for summary judgment, even where the opposing party contends the goods were non-conforming. *RC Mahon Co v Molin*, 252 Mich 606,

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[***footnote 3 continued***] application of its partial payments to corresponding specific invoices. Discussion of which limitation period applies was acknowledged as *dicta*.
Hughes v Collegedale Distribs, 355 So2d 79, 81 (Miss, 1978): Identical to *Sesow*, except "the age-old three-year statute pertaining to, among other things, open accounts and accounts stated not acknowledged in writing, was specifically amended at the time of the adoption of the Code, making it operable 'Except as otherwise provided in the Uniform Commercial Code . . . .' " In contrast, the Michigan Legislature did nothing of the kind.
Troy Boiler Works v Sterile Technologies, 777 NYS2d 574; 3 Misc3d 1006 (2003): This trial court case involved the sale of a single machine, not a series of transactions. No invoice was ever sent after delivery of the equipment, so it was doubtful that a valid claim for an account stated had been asserted. The trial judge cited *Moorman* and held the UCC applied.
H Russell Taylor's Fire Prevention Serv, Inc v Coca Cola Bottling Corp, 99 Cal App 3d 711; 160 Cal Rptr 411 (1979): A bailor waived the tort of conversion and sued on a theory of implied contract for failure to return gas cylinders, and the UCC applied to this sale of goods. Claims for open account and account stated were dismissed, so no issue concerning the limitations period applicable thereto was considered or addressed.
May Co v Trusnik, 54 Ohio App 2d 71; 375 NE2d 72 (1977): Sweebe's own summary (Appellee's Brief, p. 10) shows the case has nothing to do with the issue here presented.
O'Neil v Steppat, 270 NW2d 375 (1978): Sweebe attempts to distinguish this case, originally cited by Fisher, on grounds it involved a promissory note as well as sale of goods, and the suit on the note had a longer limitations period under UCC Article 3 (which has no SOL, and thus relies on general statutes). Again, Sweebe misses the key point—a claim on account stated or open account, like one on a note, is distinct from the underlying transaction and governed by its own distinct statute of limitations.

[4] Sweebe also quibbles with FS&G's citations from other states. But it simply either misreads the cases or fails to understand them. Thus, in *Greer Limestone Co v Nestor*, 175 W Va 289; 332 SE2d 589, 594 (1985), the limitations period was held to run only when the plaintiff merchant refused to extend further credit to the defendant merchant (headnote 14). Here, FS&G never cut off Sweebe's credit, as shown by the fact the last sale was on credit—even Sweebe only claims to have tendered payment 4 days later.

[5] Many states continue to recognize, as does Michigan (FS&G's original brief, pp. 13-14 and 28-30), that partial payment on an open or stated account revives the period of limitations, *e.g., Central Bank & Trust v Stettnisch*, 821 P2d 1066, 1067 (Okla App, 1987); *Greer Limestone,* n. 3 *supra*, at 595. This principle flows from common law, because the UCC has nothing to say on the subject. Again, the jurisprudence of open accounts/accounts stated is seen to continue, unabated by anything in the UCC.

607-608; 233 NW 431 (1930); *GW White & Son v Gosier*, 219 App Div 2d 866, 867; 632 NYS2d 910 (1995) (New York adopted the UCC in 1962, 1962 NY Laws c 553).

Here, it will do well to examine the origins of the jurisprudence of open accounts between merchants. A number of early cases involved limitation statutes copied from or based on the English Statute of James I, ch. 16[6], which provided that "all actions of account and upon the case, other than such actions as concern the trade of merchandise between merchant and merchant, their factors or servants, etc., shall be commenced" within six years. In *Toland v Sprague*, 37 US (12 Pet) 300, 333; 9 L Ed 1093 (1838), the US Supreme Court discussed the reasons for the mercantile exception, tracing them to a statute enacted in the reign of James I (boldfaced emphasis added):

> * * * No principle is better settled, than, that to bring a case within the exception [in favour of accounts between merchant and merchant, their factors or servants], it must be an account; and that, an account open, or current. See 2d Wms. Saund. 127, d. e., note 7. * * * But the case of *Spring and others v. The Ex'rs. of Gray*, in this Court: [31 US] 6 Peters 151 [1832]; takes so full and accurate a review of the doctrine and cases, as to render it unnecessary to refer to other authorities. It distinctly asserts the principle, that the account, to come within the exception, must be open or current. This construction, so well settled on authority, grows out of the very purpose for which the exception was enacted. **That purpose was, to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the act of limitations were to run, where their accounts were open and unsettled; where, therefore, the balance was unascertained, and where, too, the state of the accounts might be constantly fluctuating, by continuing dealings between the parties.**

In the referenced case of *Spring v Gray's Executors*, 31 US (6 Peters) 151, 163-164; 8 L Ed 352 (1832), Chief Justice Marshall discussed the applicable principles in a

[6] This English statute was part of the pre-1835 common law which applies in Michigan unless altered by this Court or superseded by a statute. Const 1963, art 3, §7. Any such statute, necessarily being in derogation of common law, would be subject to strict construction under familiar principles. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233–234; 713 NW2d 750 (2006).

case originating in Maine:

> The statute of Maine is copied from the 20th of James I., and its words are, 'all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, &c. shall be commenced,' &c.
>
> It would seem to be the necessary construction of these words, that the actions on the case to which the exception applies, must be founded on an account. The language of the act conveys the same meaning as if it had been 'all actions of account, and all actions on the case, other than such as are founded on such account as concerns the trade of merchandise,' &c. The foundation of the action must be an account, not a contract.
>
> From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account. The account must be one 'which concerns the trade of merchandise.' **The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise: and this trade must be, not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant. This 'trade of merchandise,' which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account—the business of merchandise which produces it—must be between them.**

Thus, claims on account stated and open account have at least a four *century* pedigree—James I reigned in England/Great Britain from 1603-1625[7], and the terminology seems to have already been well understood—of being recognized as distinct from suits on underlying single contracts (assumpsit—see footnote 9 *infra*), and subject to their own period of limitations, <u>especially as between merchants</u>. In that light, the

[7] So an English statute of 20th James I would correlate to the year 1623.

UCC's express pronouncement in MCL 440.1103 that "[u]nless displaced by the *particular* provisions of this act, the principles of law and equity, including the *law merchant* * * * shall supplement its provisions" gives force to FS&G's position. Per MCL 440.1103, absent some "particular provision" in the UCC[8] abolishing these distinctions, the reach of MCL 440.2725, limited by its terms to sales of goods, cannot be properly construed as abrogating or embracing claims for account stated or open account, even if all the underlying transactions happen to be sales of goods.

Sweebe glibly attempts, unsuccessfully, to deride FS&G's citation to a panoply of this Court's decisions[9] (without ever citing even one of them) recognizing that a claim on an account stated or open account is a cause of action distinct from and independent of any underlying transactions, and erroneously contends that *Seyburn, et al, PC v Bakshi*, 483 Mich 345; 771 NW2d 411 (2009) somehow overruled all those cases. *Seyburn* did nothing of the kind; *Seyburn* distinguished a "mutual and open account" under MCL 600.5831 from other types of claims, and held that the unique relationship of lawyer and client is governed by contract. FS&G has never claimed in this case a "mutual and open account", which is quite distinct from an open account or an account stated, both of which are governed by a completely different statute, MCL 600.2145. Thus, *Seyburn* in no way overrules the authorities cited in footnote 9 herein.

In attempting to expose non-existent flaws in Judge O'Connell's dissent in the

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[8] None is claimed to exist, even by Sweebe.

[9] *Stevens v Tuller*, 4 Mich 387 (1857); *White v Campbell*, 25 Mich 463, 467-468 (1872); *Payne v Walker*, 26 Mich 60, 62 (1872); *Hollywood v Reed*, 55 Mich 308, 310-311; 21 NW 313 (1884); *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885); *Curry v Raich* 245 Mich 146; 222 NW 160 (1928) (1928); *Dei's Estate*, 293 Mich 651, 655-658; 292 NW 513 (1940); *Collateral Liquidation, Inc v Palm* 296 Mich 702, 704; 296 NW 846 (1941); *Hawley v Prof Credit Bureau*, 345 Mich 500, 506-507; 76 NW2d 835 (1956).

Court of Appeals, Sweebe contends that reliance on MCL 440.1103 is misplaced, because Article 2 "applies to transactions in goods." While Article 2 indeed applies to transactions in goods, Sweebe's logic remains faulty. A claim on open account or account stated, being independent of the underlying transactions, is *sui generis*—for 400 years, especially as between merchants, it has been independent of any underlying contract(s) (thus, not sounding purely in assumpsit[10]), and equally distinct from whatever happens to be the nature of the underlying transactions, be they goods, services, choses in action, interests in land, or anything else. Therefore, the fact that Article 2 governs transactions in goods is of no relevance, because a claim for account stated or open account, even arising from sales of goods, is simply not identified or characterized by the underlying transactions. Therefore, a statute of limitations applying strictly to transactions in goods has no proper application. The Restatement of Contracts (©1932-2012 by ALI), §422(1) and (2), expressly confirms this (emphasis added):

> § 422 **Effect of Account Stated**
> (1) Matured debts are discharged by a manifestation of assent in good faith by debtor and creditor to a stated sum as an accurate computation of the amount of the matured debt or debts due the creditor, or if there are cross demands as the amount of the difference between the total indebtedness due one party and the total indebtedness due the other party. **A new duty arises to pay a sum so fixed.**
> (2) Retention without objection by one party for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent within the rule stated within Subsection (1)[11].

Per *Comment d*, the divorce between underlying transactions and the claim on

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[10] Notwithstanding the abolition of most *procedural* distinctions between law and equity, "the substantive elements of a cause of action and the kind of remedy available must still be determined by reference to the substantive law of actions in law and equity as they existed before the merger." *Fenestra, Inc v Gulf Am Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966).

[11] Sweebe was in possession of Fisher's June 30, 2009 statement for more than 6 weeks before this suit was filed, and had not objected to any prior statements going back to at least 1991 (Appx 1a, 26a-29a).

account is total: "A debt unenforceable because of the Statute of Frauds, as well as a debt barred by the Statute of Limitations, furnishes sufficient basis for an account stated; * * *." *Accord*: *Payne v Walker*, 26 Mich 60 (1872) (whether considered an open account, an account stated, or an open and mutual account); *In re Dei's Estate*, 293 Mich 651, 655-656; 292 NW 5132 (1940); *Hew v Aruda*, 51 Haw 451, 458; 462 P2d 476, 480-481 (1969)[12]; 6 Corbin on Contracts §1309 (1962); *Canadian Ace Brewing Co v Swiftsure Beer Service Co*, 17 Ill App 2d 54, 67; 149 NE2d 442, 450 (1958). MCL 440.1103's explicit preservation *inter alia* of the "law merchant" makes clear that, as claims for account stated or open account stand independently of any underlying transactions, they are subject to the general 6-year limitations period of MCL 600.5813 (or 5807(8). Nothing in MCL 440.2725 changes that fact or addresses the subject. This may be explained in many ways, one of which is that a claim on an account stated or open account is essentially the same as if a promissory note had been given for the balance, and "the recovery is upon the assent to the balance and the subsequent agreement to pay that balance, as if upon a promissory note." *Webb v JR Lowe & Co*, 215 Ala 552; 112 So 138 (1927). That sentiment nearly duplicates the one found in *White v Campbell*, 25 Mich 463, 468 (1872) ("The effect of the operation [converting an open account to an account stated for limitations purposes] is said to be much the same as though the debtor had given his note for the balance").

RELIEF REQUESTED

The circuit court's order granting summary disposition must be reversed in all respects; the Court of Appeals decision affirming that result must likewise be reversed.

[12] Hawaii adopted the UCC in 1965, 1965 Hawaii Laws No 208.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to MCR 7.204(G), Allan Falk certifies that on July 27, 2012, he served Appellant's Reply Brief on opposing counsel by placing two copies of same in an envelope addressed to:

W. Jay Brown
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and depositing same with the United States Postal Service, first class postage thereon fully prepaid.

I declare that the statements above are true to the best of my information, knowledge, and belief.

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