

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

THE SERVICE SOURCE, INC. a Michigan corporation, and THE SERVICE SOURCE FRANCHISE, LLC, a limited liability company,

Plaintiffs-Appellees,

v

DHL EXPRESS (USA), INC., a foreign corporation,

Defendant-Appellant.

Noreen L. Slank (P31964)
COLLINS EINHORN FARRELL PC
4000 Town Center, Suite 909
Southfield, Michigan 48075
248.355.4141
noreen.slank@ceflawyers.com

Christopher S. Ruhland
Andrew S. Wong
DECHERT LLP
US Bank Tower
633 West 5th Street, 37th Floor
Los Angeles, California 90071-2013
213.808.5700
christopher.ruhland@dechert.com
andrew.wong@dechert.com

Amy L. Rudd
DECHERT LLP
300 West 6th Street, Suite 2010
Austin, Texas 78701
512.394.3040
amy.rudd@dechert.com

Attorneys for Appellant

Supreme Court No. 147860

Court of Appeals No. 301013

Lenawee County Circuit
No. 09-003258-CK
Hon. Margaret M.S. Noe

APPELLEES' BRIEF

ORAL ARGUMENT REQUESTED

John J. Bursch (P57679)
*Counsel of Record
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
jbursch@wnj.com

Courtney E. Morgan, Jr. (P29137)
MORGAN & MEYERS, P.L.C.
3200 Greenfield Road, Suite 260
Dearborn, Michigan 48120
313.961.0130
cmorgan@morganmeyers.com

Keefe A. Brooks (P31680)
BROOKS WILKINS SHARKEY &
TURCO PLLC
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800
brooks@bwst-law.com

Attorneys for Appellees



TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF APPELLATE JURISDICTION	iv
STATEMENT OF QUESTIONS PRESENTED	v
INTRODUCTION	1
STATEMENT OF FACTS	3
I. Service Source's creation and business model	3
II. The parties' contract	4
III. DHL's breach	5
IV. Service Source's damages	6
V. Trial court proceedings	7
VI. Court of Appeals proceedings	8
STANDARD OF REVIEW	10
ARGUMENT	10
I. As a matter of Florida law, the parties' contracts are not requirements contracts	10
II. As a matter of Florida law, DHL breached its contractual obligation to provide domestic delivery service to Service Source customers	12
III. As a matter of Florida law, the trial court did not clearly err in its damage award	15
A. It was appropriate to award damages for January 2009	15
B. It was also appropriate to award damages after March 5, 2009	16
CONCLUSION AND REQUESTED RELIEF	19

TABLE OF AUTHORITIES

Page(s)

Federal Cases

<i>In re Anchor Glass Container Corp</i> , 297 BR 887 (MD Fla, 2003).....	10
<i>Unishippers Global Logistics, LLC v DHL Express (USA), Inc.</i> , 526 Fed App'x 899 (CA 10, 2013).....	14

State Cases

<i>Baxter v Geurink</i> , 493 Mich 924; 824 NW2d 564 (2013)	18
<i>Capitol Env'tl Servs, Inc v Earth Tech, Inc</i> , 25 So 3d 593 (Fla 1st Dist Ct App, 2009)	15
<i>Dade County Sch Bd v Radio State WQBA</i> , 731 So 2d 638 (Fla, 1999).....	12
<i>Flynn v Kornefel</i> , 451 Mich 186; 547 NW2d 249 (1996)	10
<i>Hosp Mortg Group v First Prudential Dev Corp</i> , 411 So 2d 181 (Fla, 1982)	2, 16
<i>IReider v P-48, Inc</i> , 362 So 2d 105 (Fla 1st Dist Ct App, 1978)	16
<i>Jenkins v Eckerd Corp</i> , 913 So 2d 43 (Fla 1st Dist Ct App, 2005)	12
<i>Jones v Warmack</i> , 967 So 2d 400 (Fla 1st Dist Ct App, 2007)	2, 12, 16
<i>Patel v Wyandotte Hosp & Med Ctr, Inc</i> , 2003 WL 1985257 (Mich Ct App, 2003)	17
<i>Poinsettia Dairy Prods, Inc v Wessel Co</i> , 166 So 306 (Fla, 1936)	16
<i>Roll-Ice Int'l, LLC v V-Formation, Inc.</i> , 2006 WL 3734126 (Mich Ct App, 2006)	17
<i>Schnepf v Thomas L McNamera, Inc</i> , 354 Mich 393; 93 NW2d 230 (1958)	19

Page(s)

Tavormina v Dade County,
508 So 2d 1293 (Fla 3d Dist Ct App, 1987)..... 10

Walters v Nadell,
481 Mich 377; 751 NW2d 431 (2008) 18

State Rules

MCR 2.613(C)..... 10

MCR 7.301(A)(2).....iv

Other Authorities

Const 1963, art 6, § 4.....iv

STATEMENT OF APPELLATE JURISDICTION

Service Source agrees that this Court has jurisdiction over the decision of the Michigan Court of Appeals. Const 1963, art 6, § 4; MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

Service Source was a shipping “reseller” that obtained DHL shipping services at wholesale and then resold those services at a higher price to consumers. Because Service Source’s business was entirely dependent on DHL shipping, the parties entered into a multi-year contract, controlled by Florida law, in which Service Source promised to deliver a minimum monthly volume and DHL promised to provide international and domestic shipping “Services,” and to “fulfill [Service Source] customers’ needs for Services.” DHL reserved the right to pick up only at locations where DHL “regularly provides collection service,” and to deliver only to destinations “regularly serviced by DHL.” So if DHL regularly picked up packages at 925 West Ottawa Street, Service Source could not require DHL to pick up at 525 West Ottawa Street.

Five years before the contract’s expiration, DHL breached the contract by eliminating all domestic delivery service. DHL thus could no longer “fulfill [Service Source] customers’ needs for Services.” Service Source could not find a replacement shipper and went out of business. When Service Source sued, DHL argued that it no longer “regularly” provided package pick-up or delivery to *any* domestic location, so it had no liability, even though this meant DHL provided no domestic “Services” at all. The trial court granted partial summary disposition to Service Source on liability, then awarded Service Source \$4,291,000 in lost-profit damages for the period January 1, 2009 (when Service Source’s business began to fail due to DHL’s November 10, 2008 announcement that it would cease all domestic shipping) to December 31, 2012 (well before the contract’s expiration date). The Court of Appeals affirmed in a unanimous, unpublished opinion. This Court’s May 23, 2014 order frames three questions for review:

1. Whether, as a matter of Florida law, a non-exclusive contract for services is a requirements contract.

The trial court did not answer this question.

The Court of Appeals did not answer this question.

DHL answers: No.

Service Source answers: No.

2. Whether, as a matter of Florida law, Service Source was entitled to summary disposition on the issue of liability.

The trial court answered: Yes.

The Court of Appeals unanimously answered: Yes.

DHL answers: No.

Service Source answers: Yes.

3. Whether, as a matter of Florida law, the trial court clearly erred in awarding Service Source damages beginning when Service Source first began losing its customers as a result of DHL’s breach, and extending to year four of the parties’ five-year agreement.

The trial court answered: No.

The Court of Appeals unanimously answered: No.

DHL answers: Yes.

Service Source answers: No.

INTRODUCTION

Service Source was a shipping “reseller” that obtained preferential wholesale shipping rates with DHL, then resold DHL’s shipping services to smaller customers at a rate higher than Service Source’s wholesale rate, but lower than the retail rate those customers would have ordinarily paid. The entire purpose of the Service Source-DHL contract was to ensure that Service Source’s customers had uninterrupted access to DHL’s shipping services: “DHL agrees . . . to fulfill [Service Source] customers’ needs for Services.” (App 82a.) When DHL breached the contract and terminated all domestic shipping services in the United States, Service Source lost its very profitable business. The trial court correctly held DHL liable for its breach and awarded lost-profit damages. The Court of Appeals unanimously affirmed in an unpublished opinion.

DHL’s primary argument in this appeal is that it had no contract obligation to provide domestic shipping services, because it only needed to pick up and deliver to locations DHL “regularly” services. Because DHL no longer serviced *any* domestic U.S. location, the argument goes, DHL had no obligation to continue domestic delivery. But in the parties’ contract, DHL specifically “agree[d] to provide Services” and “to fulfill [Service Source] customers’ needs for Services,” and “Services” included international *and* domestic package delivery. (App 82a.) Indeed, every judge to have examined the contract has rejected DHL’s argument.

DHL says this interpretation writes the “regularly services” language out of the parties’ contract. Not so. The “regularly services” condition protects DHL by prohibiting Service Source from demanding pick up at a particular location when there is already a DHL drop box nearby, and allowing DHL to move a standard delivery location to a nearby address. Service Source’s interpretation gives meaning to all words in the parties’ contract; DHL’s does not. As the Court of Appeals concluded, “[t]here is no indication that the parties intended to allow DHL to completely cease either domestic or international service.” (App 35a.)

DHL is also wrong in its contention that the trial court committed clear error in calculating Service Source's damages at trial. DHL argues that Service Source had no damages from January 1 to January 30, 2009, because DHL did not stop domestic delivery until January 30, 2009. But as the Court of Appeals explained, "there is evidence in the record that [DHL's] announcement had an immediate impact" on Service Source's business, and Service Source is entitled to all damages that flowed directly from DHL's anticipatory breach. (App 37a.)

DHL also argues that Service Source is not entitled to damages after March 5, 2009, the date DHL purported to terminate the parties' agreement for non-payment. The problem with this theory is that Service Source did not withhold payments until *after* DHL's breach destroyed Service Source's business. And under well-settled Florida law, when DHL announced that it would not fulfill its contractual obligation to ship packages, Service Source was "relieved of its duty to tender performance and ha[d] an immediate cause of action" against DHL. *Hosp Mortg Group v First Prudential Dev Corp*, 411 So 2d 181, 182 (Fla, 1982) (citation omitted). Under Florida law, if "one party to an agreement has breached the agreement," as DHL did here, "the other party's failure to continue with the agreement is not considered a default of the contract." *Jones v Warmack*, 967 So 2d 400, 402 (Fla 1st Dist Ct App, 2007). Because Service Source was not in breach, DHL's purported termination had no effect.

Finally, as a matter of Florida law, the parties' agreement is not a requirements contract because it is a non-exclusive agreement to provide services. And even if Florida law suggested this was a requirements contract, the outcome would be exactly the same. Service Source purchased shipping services from DHL until DHL breached the parties' agreement. Service Source's damages for that breach are identical to the damages the trial court calculated.

For all these reasons, the Court should summarily affirm the Court of Appeals or, in the alternative, dismiss the application for leave as improvidently granted.

STATEMENT OF FACTS

I. Service Source's creation and business model

Louis Meeks, Scott Wayne, and Mike Wayne formed The Service Source, Inc., in 1995, as Midwest Transit Corporation. Its business was as a “reseller” of Airborne Express Delivery Services (App 363a), purchasing shipping services from Airborne at a wholesale rate, then reselling those services to customers at a higher rate, though still significantly less than the retail rates customers could ordinarily obtain directly from Airborne or Airborne’s competitors (App 364a–366a). Because The Service Source, Inc.’s business was so dependent on Airborne’s provision of shipping services, the parties entered into a five-year agreement that could be extended annually so as to retain a five-year rolling term.

DHL acquired Airborne Express in 2005 and entered into a new reseller agreement with The Service Source, Inc., on January 6, 2006. (App 82a–170a.) This contract was also for five years, and the parties amended it in November 2006 and December 2007, each time extending the contract for an additional year. (App 171a, 172a.) So at the time DHL terminated all domestic shipping, it was required to provide domestic and international shipping service to The Service Source, Inc., and its customers through January 6, 2013. (App 172a.)

In 2007, Messrs. Meeks, Wayne, and Wayne formed a second company, The Service Source Franchise, LLC, to expand their reseller business into a franchise model, as other resellers had done. Under this model, The Service Source Franchise sold franchise territories to other entities that likewise provided shipping services at discounted rates through DHL. DHL and The Service Source Franchise entered into a five-year contract on July 22, 2007, that was identical in all material respects to the contract DHL executed with The Service Source, Inc. (App 174a–296a.) DHL and The Service Source Franchise amended their agreement one time, so that it ran through July 22, 2013. (App 297a.)

II. The parties' contract

The material terms of the DHL/The Service Source, Inc., and DHL/The Service Source Franchise, LLC, contracts are identical. So to simplify matters, Plaintiffs will be collectively referred to from this point forward simply as "Service Source."

In the DHL/Service Source contract, DHL expressly agreed to provide "Services" to Service Source's customers and "to fulfill [Service Source] customers' needs for Services." (Agreement ¶ 1, App 82a, 174a.) The contract defined "Services" as "expedited international air express services for documents and/or packages or freight being sent to various locations around the world *and* for domestic door-to-door air and ground express services for documents and/or packages or freight being sent to various locations throughout the United States." (*Id.* 1st Whereas clause (emphasis added).) In other words, DHL promised to provide international and domestic shipping services to Service Source customers. Indeed, it was DHL's "desire[] to handle substantially *all* the requirements of" Service Source's customers (*id.* 2nd Whereas clause (emphasis added)), though the contract did not contemplate that DHL would be Service Source's exclusive provider of shipping services (*id.* 2nd and 3rd Whereas clauses).

By virtue of its acquisition of Airborne Express and its own business expansion, DHL had a network of pick-up and drop-off locations, and the parties reasonably agreed that shipments by Service Source customers would begin and end at those locations, i.e., "domestic locations at which DHL regularly provides collection service with its own personnel," and "destination[s] regularly serviced by DHL or its designated agents." (Agreement ¶ 1, App 82a, 174a.) As a result, if DHL regularly picked up packages at 925 West Ottawa Street, Service Source could not require DHL to pick up a package at 525 West Ottawa Street. Or if DHL wanted to change a regular delivery destination from 300 South Capitol Avenue to 401 South Capitol Avenue, it could do so without a Service Source objection.

Notably, the contract allowed Service Source to *add* new “customer locations” after obtaining approval from DHL. (Agreement ¶ 2, App 83a, 175a.) And it also allowed DHL to add “additional services.” (*Id.* ¶ 1.) But nowhere did the contract authorize DHL to *eliminate* pick-up or delivery locations, other than the “regularly provides” and “regularly service[s]” language noted above. Quite the opposite, DHL explicitly “agree[d] to provide Services to [Service Source] customers *to fulfill [Service Source] customers’ needs for Services*” at the contract rates. (*Id.*) In return, Service Source agreed to provide a monthly minimum volume of \$328,000, i.e., \$4 million annually. (*Id.* ¶ 21, App 90a, 182a.)

As noted above, the parties’ agreement was for a five-year, rolling term that could be extended at the end of each year. (Agreement ¶ 17, App 88a, 180a.) The contract included a merger-and-integration clause (*id.* ¶ 24, App 90a, 182a), and it also contained a choice-of-law clause that stated the agreement would be “governed by and construed in accordance with the laws of Florida without regard to its conflict of law rules” (*id.* ¶ 28, App 91a, 183a).

III. DHL’s breach

On November 10, 2008, DHL issued a press release announcing that it was terminating all domestic shipping in the United States effective January 30, 2009. (App 299a.) The same day, DHL sent a letter to Service Source to the same effect, noting that DHL would be terminating domestic shipping services for irregular customers “on December 10, 2008,” but “may,” “as an “accommodation,” continue domestic shipping services for regular customers until “January 30, 2009, after which date DHL plans to discontinue any further US domestic services to those customers as well.” (App 40a.) The very last line of the press release—which appears on a page DHL neglected to include in its appendix—notes that DHL was also ending its service guarantee for domestic shipping effective November 17, 2008. (App 3b.) As a result, DHL would no longer guarantee overnight delivery—a package gets there when it gets there.

At the time of DHL's breach, there were only two other shippers in the United States market who could have assumed DHL's role: Federal Express and UPS. Federal Express advised Service Source that it would have no reseller partners at all, and UPS would enter into a relationship with Service Source only if Service Source was *not* a reseller. (Bench Trial Tr Vol I at 121–141, App 7b–27b.)

Unwilling to throw in the towel, Service Source contacted a dozen other potential shipping partners, ranging from much larger resellers, to franchisees of other resellers, to third-party logistics companies, to less-than-truckload shipping companies. None of these efforts were successful, and DHL did not even suggest at trial that Service Source somehow fell short in its attempt to mitigate damages. (Bench Trial Tr Vol III at 76–77, App 171b–172b.)

IV. Service Source's damages

At the trial on damages, Service Source introduced the expert testimony of Bruce Knapp, who has been a licensed CPA in Michigan for 25 years and has performed business valuation forensic services in a variety of matters since 1997. (Bench Trial Tr Vol II at 5–145, App 29b–169b.) DHL did not challenge Mr. Knapp's qualifications to testify at trial.

Mr. Knapp's investigation revealed that The Service Source, Inc. enjoyed revenues of more than \$48 million from 2004 through 2008 while paying DHL roughly \$34 million over the same period. (Pls' Ex 6, Schedule 3, App 4b.) Knapp's analysis "normalized" this data (as well as that of The Service Source Franchise) by removing one-time blips in financial performance and then calculated Service Source's lost profits. (Bench Trial Tr Vol II at 29–41, App 53b–65b.) DHL's expert, Gary Hallman, essentially used the same approach. Indeed, the two experts' calculations of The Service Source Franchise's loss were both roughly \$300,000, only \$1,500 apart. (*Id.* at 23–25, App 47b–49b.)

Mr. Knapp ultimately presented two lost-profits analyses for The Service Source, Inc., one based on an assumption of “business as usual.” This yielded a loss of \$3,490,000. (Pls’ Ex 6, Schedule 6, App 5b.) The other analysis was based on the assumption that, despite DHL’s announcement, it would continue honoring the parties’ contract through January 2013, and that Service Source would wind down its business. Due to decreased expenses in the wind down, this approach yielded a loss of \$4,420,000. (Pls’ Ex 7, Schedule 2, App 395a.)

V. Trial court proceedings

As Service Source frantically tried to save its business by looking for another shipper, it mitigated losses by continuing to use DHL domestic shipping services when possible through January 30, 2009. (App 377a–379a, 386a–387a.) But the damage was done. Service Source had no choice but to begin withholding payments due to DHL as an offset against Service Source’s multi-million-dollar losses, and it filed its complaint for breach of contract on February 10, 2009, only 10 days after DHL stopped all domestic shipping. (App 58a.) DHL then purported to terminate Service Source for non-payment by letter dated March 9, 2009.

Service Source filed a motion for partial summary disposition as to liability, which the trial court granted on October 12, 2009. (App 302a, 329a–330a; accord 10/12/09 Order, App 23a–24a.) The matter then proceeded to a bench trial on damages that spanned four days, February 9, 2010 through February 12, 2010. The proofs consisted largely of the parties’ damages experts. After the parties proposed findings of fact and conclusions of law, the trial court announced its findings and holdings from the bench on June 11, 2010. (App 398a.) Among other things, the trial court found “Mr. Knapp’s testimony, demeanor and knowledge of the facts and applicable accounting principals [sic] reliable and credible.” (App 407a.) Conversely, the trial court found that the testimony of DHL’s expert, Dr. Hallman, while “credible, lacked certain information and as such was not as reliable.” (*Id.*)

The trial court reiterated its holding that DHL “breached the contract with [Service Source] when it unilaterally determined to cease[] domestic package delivery service to [Service Source].” (App 409a.) The court awarded \$287,522 in damages to The Service Source Franchise and \$4,291,000 to The Service Source, Inc., less the balance of \$673,211 that Service Source had withheld from DHL after DHL announced it was terminating all domestic deliveries. (App 415a.) The total judgment amount in favor of Service Source was \$3,905,311. (*Id.*)

DHL moved for a new trial on four bases, which the trial court denied in large part. (App 438a–441a.) After two small adjustments, the final judgment awarded Service Source a total of \$3,834,311 after offset, plus pre-judgment interest. (App 29a.)

VI. Court of Appeals proceedings

DHL filed a timely notice of appeal and proceeded to advance a series of specious arguments. For example, DHL argued that there was “no evidence in the record that DHL failed to provide shipments on behalf of [Service Source] after January 30, 2009.” (DHL Appeal Br 8, 17, n 5.) But DHL’s counsel specifically represented to the trial court that as of January 30, 2009, DHL “ceased domestic service to everybody,” “[i]ncluding [Service Source] customers.” (Summ Disp Hr’g Tr at 13, App 314a.)

DHL also argued that Service Source’s February 10, 2009 complaint was “in response” to DHL’s “termination” letter. (DHL Appeal Br 6.) But DHL sent that termination letter on March 9, 2009, a full month after Service Source filed its complaint. Neither that letter nor the letters DHL sent to Service Source on February 23, 2009, warning about the non-payment, even acknowledged DHL’s own material breach of the parties’ contract as a result of DHL’s cancellation of all domestic shipping services in the United States and its refusal to service Service Source customers. (See *id.*; App 61a, 62a.)

Most important to this appeal, DHL argued that (1) the parties' contracts did not "require DHL to provide domestic shipping services" (DHL Appeal Br 15); (2) the trial court erroneously allowed Service Source to deduct officer salaries when computing lost profits (*id.* at 18–19); (3) the trial court erroneously awarded Service Source damages for the month of January 2009 (*id.* at 24); and (4) the trial court erroneously awarded Service Source damages after DHL sent its March 9, 2009 termination letter (*id.* at 25). In a unanimous, unpublished opinion, the Court of Appeals agreed with DHL on point (2), but otherwise affirmed.

With respect to breach-of-contract liability, the Court of Appeals agreed with Service Source that the parties' contracts, read as a whole, "clearly contemplate that [DHL] would provide domestic service. (App 35a.) The contracts are titled "Reseller Agreement for U.S. Origin Domestic and International Service." (*Id.*) The contracts require DHL to provide "Services" defined to include "domestic door-to-door air and ground express services." (*Id.*) And there "is no indication that the parties intended to allow DHL to completely cease either domestic or international service." (*Id.*) The "trial court correctly held that defendant breached its contracts with [Service Source] when [DHL] unilaterally chose to cease all domestic service." (*Id.*)

As for officer salaries, the Court of Appeals agreed with DHL that Florida law applied, and that under Florida law, a portion of officer salaries should have been deducted from Service Source's lost profits, necessitating a remand for the judge to recalculate damages. (App 37a.)

Regarding the damage award for the month of January 2009, the Court of Appeals found "no clear error." (App 37a.) There was "evidence in the record that [DHL's] announcement had an immediate impact on [Service Source's] business, particularly after DHL ceased guaranteeing delivery dates as of November 18, 2008." (*Id.*) There was also evidence that Service Source did not make a profit in January 2009 when it ordinarily would have. (*Id.*) "The trial court did not clearly err by granting damages for this period." (*Id.*)

The Court of Appeals also rejected DHL's remaining objections to the damage award, noting that DHL "misrepresent[ed] the record" and "misstate[d] the record" in important respects. (App 37a, App 38a.) The Court of Appeals concluded that the trial court's "award of damages was not clearly erroneous, except for the failure to deduct [officer] salaries from [Service Source]'s lost profits." (App 39a.) DHL then filed a motion for reconsideration that the Court of Appeals summarily denied on September 6, 2013.

STANDARD OF REVIEW

Service Source agrees that this Court reviews *de novo* the partial grant of summary disposition with respect to DHL's liability for breach of contract. (DHL Br 12.)

"Findings of fact by the trial court," including the determination of damages, "may not be set aside unless clearly erroneous." MCR 2.613(C). This Court gives substantial deference to the trial court, which has the opportunity to view the demeanor of witnesses and otherwise judge credibility. *Flynn v Kornefel*, 451 Mich 186, 191; 547 NW2d 249 (1996).

ARGUMENT

I. **As a matter of Florida law, the parties' contracts are not requirements contracts.**

Service Source agrees that the parties' contracts are not requirements contracts (DHL Br 13-16). The contracts do not contain an exclusivity provision. (Quite the opposite, the contracts express DHL's hope "to handle substantially all the requirements" of Service Source's customers (App 82a, 174a).) And under Florida law, a non-exclusive contract "is not a 'requirements contract.'" *Tavormina v Dade County*, 508 So 2d 1293, 1294 (Fla 3d Dist Ct App, 1987).¹

¹ There is also no argument that the contract is unenforceable due to an indefinite quantity, see *In re Anchor Glass Container Corp*, 297 BR 887, 891 (MD Fla, 2003), because Service Source committed to a \$4 million minimum annual volume. (App 90a, ¶ 21; App 182a, ¶ 21.)

Though reaching the correct conclusion, DHL's discussion of this issue in its merits brief commits three fundamental errors. First, DHL urges the Court to "take this opportunity to . . . hold that contracts for services . . . do not qualify as requirements contracts under Michigan law." (DHL Br 15.) Because the parties' contracts are controlled by Florida law, rather than the law of Michigan (Agreement ¶ 28, App 91a, 183a), this case does not present the Court with any opportunity to construe or clarify Michigan law regarding requirements contracts. The Court can only opine on Florida law. (And even that opinion will have no lasting precedential value.)

Second, DHL argues that if the parties' contracts were requirements contracts, a new trial would be required to determine if Service Source's use of other shippers after DHL's November 2008 announcement breached the (fictional) exclusivity requirement, and to determine the amount of Service Source's damages based on its requirements. Not so. Service Source's frantic attempts to form relationships with other shippers in December 2008 and January 2009 was necessary to mitigate the damages caused by DHL's breach and could not have constituted a Service Source breach of contract. And Service Source's damages would be exactly the same as the trial court calculated them here: lost profits based on DHL's refusal to meet the requirements of Service Source's customers to ship packages domestically.

Third, although the parties' contracts do not qualify as requirements contracts as a matter of Florida law, DHL glosses over the contractual language noting Service Source's needs and requirements and DHL's promise to fulfill them. In the very first recital in the contract, the parties acknowledge Service Source's "requirements" for domestic and international shipping services. (Agreement 1st Whereas clause, App 82a, 174a.) Then, in Paragraph 1, DHL expressly "agrees to provide Services [including domestic shipping] *to fulfill [Service Source] customers' needs for Services.*" (*Id.* ¶ 1 (emphasis added).) As discussed in more detail below, this was a clear DHL promise to provide domestic shipping for the contract's duration.

II. As a matter of Florida law, DHL breached its contractual obligation to provide domestic delivery service to Service Source customers.

Under Florida law, summary disposition is appropriate when contractual language is unambiguous. *Dade County Sch Bd v Radio State WQBA*, 731 So 2d 638, 643 (Fla, 1999).

When discerning parties' intent, Florida law instructs the courts to examine the entire contract "without fragmenting any segment or portion." *Jones v Warmack*, 967 So 2d 400, 402 (Fla 1st Dist Ct App, 2007). And where a contract is "clear and unambiguous," Florida law prohibits consideration of any parol evidence as to the language's meaning. *Jenkins v Eckerd Corp*, 913 So 2d 43, 52 (Fla 1st Dist Ct App, 2005).

Here, the parties' contract unambiguously expressed the parties' intent that DHL provide Service Source customers with international *and* domestic shipping for the contract's duration:

- The contract is titled an "Agreement for U.S. Origin Domestic and International Service" (App 82a, 174a);
- The contract recites Service Source's requirements for "Services," defined to include both international and domestic delivery services (*id.* 1st Whereas clause);
- The contract recites DHL's agreement "to provide" those Services at the rates specified therein (*id.* 4th Whereas clause);
- The contract confirms DHL's "agree[ment] to provide Services to [Service Source] customers *to fulfill [Service Source] customers' needs for Services*" (*id.* ¶ 1 (emphasis added));
- The contract obligates Service Source to provide \$328,000/month—roughly \$4 million annually—in minimum revenue (*id.* ¶ 21, App 90a, 182a), an obligation Service Source can satisfy *only* if DHL is providing domestic shipping;
- And while the contract contains provisions allowing DHL to "add additional services" and Service Source to add "customer locations" after obtaining approval from DHL (*id.* ¶ 1, 82a, 174a & ¶ 2, 83a, 175a), nowhere does the contract even suggest that DHL can terminate all domestic shipping services.

Against the weight and context of all these provisions, DHL focuses on the single word "regularly" in the following sentence as the reason that DHL had no obligation to provide any domestic shipping services whatsoever:

Shipments will originate at [Service Source] customers' domestic locations at which DHL *regularly* provides collection service with its own personnel and will be delivered to any destination *regularly* serviced by DHL or its designated agents. [Agreement ¶ 1, App 82a, 174a (emphasis added).]

DHL's argument is that if DHL eliminates *all* domestic collection and delivery locations, it has no "regularly" serviced locations and is therefore relieved of any and all obligations to provide domestic services to Service Source's customers. There are multiple problems with DHL's position.

First, DHL's interpretation violates *Warmack's* admonition not to fragment a sentence or phrase from the rest of the contract. When read in context, it is immediately apparent that DHL cannot claim the ability to terminate all domestic shipping services while simultaneously "agree[ing] to provide [such] Services to [Service Source] customers to fulfill [Service Source] customers' needs for [those] Services." (Agreement ¶ 1, App 82a, 174a.)

Second, there is a far more ordinary interpretation of DHL's highlighted sentence: to protect DHL from unreasonable Service Source requests for pick-up and delivery locations. For example, if DHL regularly picked up packages at 925 West Ottawa Street, Service Source could not require DHL to pick up a package at 525 West Ottawa Street. Or if DHL wanted to change a regular delivery destination from 300 South Capitol Avenue to 401 South Capitol Avenue, it could do so without a Service Source objection. This concept is what the Court of Appeals was referring to when it said that, under this language, DHL "could likely cease service to a handful of specific domestic locations without breaching the contract, but could not completely stop all domestic service." (App 35a.)

Third, the lower courts' interpretation does not render any words meaningless, nor do they "rewrite" the contract. (Contra DHL Br 20–22.) It is DHL's interpretation that renders nugatory its promise to provide domestic delivery services for the contract's duration.

Fourth, DHL's interpretation conflicts with its own counsel's representations to the trial court. At the summary disposition hearing, in response to a question, DHL's counsel conceded that DHL has *not* eliminated all pick-up and delivery points in the United States: "DHL still picks up packages in the United States. It still delivers packages in the United States." But it only does so for "international" deliveries. (10/12/09 Summ Disp Hr'g Tr at 24–25, App 325a–326a.) Under the language of DHL's favored sentence, those pick-up and drop-off sites are locations in the United States that DHL "regularly services." And that means Service Source customers should have been able to use those same locations for entirely domestic shipping. Yet DHL's counsel conceded that as of January 30, 2009, DHL "ceased domestic service to everybody," "[i]ncluding [Service Source] customers." (*Id.* at 13, App 314a.) That is because DHL wasn't trying to satisfy the terms of the parties' contract; it was trying to eliminate an entire business division where it was losing huge sums of money. DHL was free to make that business decision, but it must also pay the consequences for its broken promise.

In sum, the parties' contractual language is clear and unambiguous, and Service Source's interpretation of that language is the only construction that gives meaning to every word of the contract. Neither the trial court nor the Court of Appeals concluded that the contract could be read in multiple ways. (Contra DHL Br 23.) They both concluded that Service Source's interpretation was the *only* reasonable one. Accord *Unishippers Global Logistics, LLC v DHL Express (USA), Inc.*, 526 Fed App'x 899, 904–905 (CA 10, 2013) (United States Court of Appeals for the Tenth Circuit interpreted a similar DHL contract, holding "DHL's obligation to provide domestic shipping services appears unambiguous within the four corners of the contract").² As a matter of Florida law, the trial court and Court of Appeals must be affirmed.

² Note that in *Unishippers*, DHL retained a right to terminate on 180-days' notice without cause, so plaintiff's damages were limited to 180 days. The contract here has no such provision.

III. As a matter of Florida law, the trial court did not clearly err in its damage award.

DHL makes two arguments with respect to the trial court's damage award following trial. As the Court of Appeals explained, "the trial court did not clearly err in its calculation of plaintiffs' damages, and correctly applied the law" (App 37a), with only one exception (officer salaries) which is not at issue here.

A. It was appropriate to award damages for January 2009.

DHL argues that the trial court could not award damages before January 30, 2009, because DHL had not yet breached the parties' contract. For two independent reasons, that argument fails. First, it is wrong to say that DHL did not breach the parties' contract until January 30, 2009. DHL cut off all domestic delivery services on December 10, 2008, for those Service Source customers who used DHL only irregularly in the preceding year. (App 40a.) That was a breach that *pre*-dated January 2009.

Second, as the Court of Appeals explained, "there is evidence in the record that [DHL's] announcement had an immediate impact on [Service Source]'s business, particularly after DHL ceased guaranteeing delivery dates as of November 18, 2008." (App 37a.) There was evidence that [Service Source] did not make a profit during January of 2009, and there was evidence that under normal circumstances it would have been profitable." (*Id.*) Accordingly, the "trial court did not clearly err by granting damages for this period." (*Id.*)

DHL protests that contract damages "cannot arise until one party has breached the contract." (DHL Br 25.) But under Florida law, it is "well-settled that the injured party in a breach of contract action is entitled to recover monetary damages *that will put it in the same position it would have been had the other party not breached the contract.*" *Capitol Envtl Servs, Inc v Earth Tech, Inc*, 25 So 3d 593, 596 (Fla 1st Dist Ct App, 2009) (emphasis added). And the damages the trial court awarded for January 2009 did exactly that.

B. It was also appropriate to award damages after March 5, 2009.

DHL's final argument is that Service Source is not entitled to damages after March 5, 2009, the date that DHL purported to "terminate" the contract for non-payment. This argument is buried at the end of DHL's appeal brief (DHL Br 26–31), and with good reason.

Under Florida law, "one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." *Hosp Mortg Group v First Prudential Dev Corp*, 411 So 2d 181, 182 (Fla, 1982.) "Therefore, the nonbreaching party is relieved of its duty to tender performance and has an immediate cause of action against the breaching party." *Id.* (quoting *Poinsettia Dairy Prods, Inc v Wessel Co*, 166 So 306 (Fla, 1936)). Accord, e.g., *Jones v Warmack*, 967 So 2d 400, 402 (Fla 1st Dist Ct App, 2007) ("If one party to an agreement has breached the agreement, the other party's failure to continue with the agreement is not considered a default of the contract.") (citing *IReider v P-48, Inc*, 362 So 2d 105, 109 (Fla 1st Dist Ct App, 1978)).

Once DHL informed Service Source on November 10, 2008, that DHL would no longer provide domestic delivery services, Service Source had no ongoing duty to perform the contract, e.g., by paying for its customers' deliveries.³ And that non-payment did not allow DHL to terminate all of its own obligations in the contract DHL had just materially breached; it gave DHL the opportunity to collect monies owing as an offset against Service Source's damages, which is exactly what the trial court ordered when it set off the \$673,211 that even Service Source conceded it owed DHL.

³ The only exception would be if DHL could prove that Service Source would have been unable to perform the remaining years of the contract even if DHL had fully performed. *Hosp Mortg Group*, 411 So 2d at 183. And that is an argument DHL has never made or tried to prove. Indeed, given that Service Source was generating nearly \$10 million annually from its resale services, it would have been impossible for DHL to so demonstrate.

In support of its argument, DHL cites two unpublished Michigan cases. But those cases support Service Source, not DHL. In *Roll-Ice Int'l, LLC v V-Formation, Inc.*, 2006 WL 3734126 (Mich Ct App, 2006), it was the party claiming damages that terminated the contract, not the other way around. 2006 WL 3734126, at *1 (“[T]he parties had a valid contract, but the plaintiff chose to terminate it. Thus, at the time of the termination, plaintiffs’ damages ceased to accrue.”). And even then, the court would have entertained post-termination damages for plaintiff if, before plaintiff’s termination letter, defendant had “unequivocally declare[d] the intent not to perform.” *Id.* at *2. Here, DHL *did* unequivocally declare its intent not to perform, both in a letter to Service Source and in a press release to the rest of the world. Accordingly, Service Source was entitled to all of its lost-profit damages and could withhold payments to offset those damages, both as a matter of Florida law and under the reasoning in *Roll-Ice*.

In *Patel v Wyandotte Hospital & Medical Center, Inc.*, 2003 WL 1985257 (Mich Ct App, 2003), the plaintiff sued for employment discrimination, and the trial court awarded damages only for the 180-day period following the employer’s termination of the employee. What DHL fails to explain is that the parties in *Patel* had a 180-day provision that allowed either party to terminate at will. 2003 WL 1985257, at *14. In contrast here, the parties had no at-will termination provision. And the only ground for termination that DHL has asserted—Service Source’s non-payment for customer delivers—was not a Service Source breach because it was made in response to DHL’s November 10, 2008 announcement that it was no longer honoring any of its contracts to provide domestic shipping services.

DHL also criticizes the trial court for awarding lost profits based on a “quasi-tort perspective.” (DHL Br 28–29.) But as DHL concedes, the trial court comments that DHL quotes in its brief were in connection with whether to deduct officer salaries to determine Service Source’s profits (DHL Br 29 n 8), a subject which is not even an issue in this appeal.

The trial court's award of Service Source's lost-profit damages was also hardly "extra-contractual," as DHL asserts. (DHL Br 29.) The damages measured exactly what Service Source would have expected as profit had DHL not breached the parties' agreement.

The trial court also correctly rejected DHL's argument that "DHL did not commit the first material breach." (DHL Br 30.) DHL says in its appeal brief that the trial court's "only determination of DHL's liability for breach of contract" was that DHL breached the contract when it "discontinued domestic service to" Service Source. (*Id.* citing App 402a.) But seven pages later in the exact same transcript, the trial court noted its conclusion of law that "DHL breached the contract with [Service Source] when [DHL] unilaterally determined to cease[] domestic package delivery service to [Service Source]." (App 409a (emphasis added).) The trial court correctly recognized Service Source's withholding of payments owed to DHL not as a first breach, but rather a reasonable response to DHL's first material breach, which is why the trial court used the \$673,211 withholding as an offset. (App 415a.) Importantly, DHL did not appeal that aspect of the trial court's ruling in the Court of Appeals.

Finally, DHL argues that Service Source "made an election to continue the contract by requesting and receiving performance from DHL." (DHL Br 30–31.) To begin, DHL did not raise this argument in the Court of Appeals and has therefore lost the ability to do so now. *Baxter v Geurink*, 493 Mich 924, 924; 824 NW2d 564 (2013) (quoting *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008)). In any event, the argument is nonsense. Service Source was doing everything it could to save its business and mitigate damages. Service Source could not possibly have "elected" to keep receiving performance from DHL, because DHL had already told the world it would no longer perform, and DHL kept its promise by discontinuing all domestic delivery services in January 2009. As soon as it was apparent that Service Source's mitigation efforts would fail, it immediately filed this lawsuit. There was no election.

DHL's only cited case on the "election" issue is *Schnepf v Thomas L McNamera, Inc.*, 354 Mich 393; 93 NW2d 230 (1958). But this Court in *Schnepf* made clear that the election concept only applies when the breaching party has notified the non-breaching party that it intends to continue performance. *Id.* at 397 (an "injured party has a genuine election of either continuing performance or of ceasing to perform," where "there has been a material breach which does *not* indicate an intention to repudiate the remainder of the contract") (emphasis added). That was obviously not the case here; Service Source did not even have the option of continuing its performance of providing customers to DHL who required DHL's domestic delivery service.⁴ In sum, DHL's 11th-hour, unpreserved "election" argument has no merit.⁵

CONCLUSION AND REQUESTED RELIEF

The Court's May 23, 2014 order granting leave frames three issues, all of which turn exclusively on Florida law. The first issue—whether the parties' agreement constitutes a requirements contract—has never been raised by either party. And both parties now agree that the answer to that question is "no," because the parties' contract was non-exclusive, a necessary prerequisite to forming a requirements contract under Florida law. Even if Florida law were different, and the parties' agreement could somehow be characterized as a requirements contract, both the fact and amount of DHL's liability would remain exactly the same.

⁴ Service Source notes that DHL only cites to Michigan law when it serves DHL's purpose, even though all three of the legal issues presented are controlled exclusively by Florida law according to the terms of the parties' contract.

⁵ As an aside, Service Source also notes that DHL criticizes the Court of Appeals for not expressly addressing DHL's argument about post-March 5, 2009, damages. (E.g., DHL Br 26–27.) But DHL devoted only four paragraphs to this entire issue in its 45-page initial brief in the Court of Appeals (see DHL Ct App Br 25–26). DHL apparently did not consider this issue to be of jurisprudential significance until it lost all of the other kitchen-sink arguments it advanced below.

The second issue—whether the trial court appropriately granted summary disposition to Service Source on liability—is easily answered yes as a matter of Florida law. DHL contends that it had the right to simply stop all domestic delivery services at any time. But that contention is belied by the plain language of the parties’ contract, not to mention common sense. The contract’s entire purpose was to provide domestic delivery to Service Source customers, and that is precisely what DHL promised. (App 82a (“DHL agrees to provide Services to [Service Source] customers *to fulfill [Service Source] customers’ needs for Services.*”) (emphasis added).)

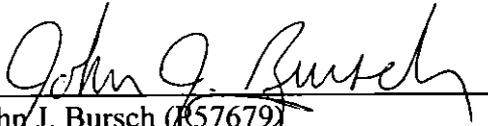
As to the third issue—the proper calculation of damages—it is also easily answered as a matter of Florida law, to the extent it was properly preserved at all. The trial court’s damage award correctly put Service Source in the position it would have been in but for DHL’s breach. And it was entirely appropriate for Service Source to begin withholding payments due DHL after DHL told not only Service Source but the entire world that it would no longer perform the domestic delivery services for which the parties had expressly contracted.

For all these reasons, the Court should summarily affirm the Court of Appeals. Alternatively, the Court should dismiss DHL’s application for leave as improvidently granted.

Respectfully submitted,

Dated: September 3, 2014

WARNER NORCROSS & JUDD LLP

By 
John J. Bursch (R57679)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
jbursch@wnj.com

Attorneys for Plaintiffs-Appellees