

STATE OF MICHIGAN
WASHTENAW COUNTY TRIAL COURT
CIVIL DIVISION - BUSINESS COURT

EDEN, INC., a Michigan Corporation,

Plaintiff/Counter-Defendant,

vs.

Civil Action No. 12-1219-CK

AMERICAN SOY PRODUCTS, INC., a
Michigan Corporation,

Hon. Archie C. Brown

Defendant/Counter-Plaintiff.

James M. Cameron (P29240)
Stephen C. Borgsdorf (P67669)
Attorneys for Plaintiff

Mark G. Cooper (P52657)
Alexander E. Blum (P74070)
Attorneys for Defendant

OPINION AND ORDER OF THE COURT

**GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND
DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

At a session of the Court
Held in Ann Arbor, MI
On August 14, 2013

Eden, Inc. ("Eden"), filed its motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) requesting that this Court grant its Motion and find that American Soy Products, Inc. breached the parties' contracts and its implied warranties; find that these breaches caused damages to Eden in an amount to be determined at trial; dismiss ASP's counterclaims for breach of contract; and award such further relief as the Court deems appropriate.

American Soy Products, Inc. ("ASP"), filed its motion for summary disposition pursuant to MCR 2.116(C)(10) requesting that this Court grant its motion for summary disposition against Eden as to all counts of Eden's amended complaint; find that there is no genuine issue of material fact that the parties' Sole Sales Agency and Requirements Agreement expired in September 2008 because Eden failed to purchase the amount of product necessary to trigger the renewal provisions contained in the Requirements Agreement; find that the parties' Amended and Restated Joint Venture Agreement does not require ASP to provide product to Eden once the

Requirements Agreement expired; dismiss Count II of Eden's amended complaint for breach of restated joint venture agreement; dismiss Count III of Eden's amended complaint for breach of the Requirements Agreement; dismiss Count IV of Eden's amended complaint for Anticipatory Repudiation of Contracts; dismiss Count IV [sic] of Eden's amended complaint for Breach of Implied Warranty or Fitness for a Particular Purpose; dismiss Count V of Eden's amended complaint for declaratory Judgment that the Requirements Agreement and the Joint Venture Agreement obligate ASP to supply product to Eden; dissolve the injunction issued by this Court on December 5, 2012; and declare that neither the Joint Venture Agreement nor the Requirements Agreement obligate ASP to supply soy milk to Eden.

The dispute between Eden and ASP, the sole supplier of its Edensoy brand soy milk since 1985, is a breach of contract action involving two issues: first, whether Eden is entitled to judgment as a matter of law on its breach of contract and breach of warranty claims; and second, whether ASP is entitled to judgment as a matter of law as to its breach of contract counterclaims.

FACTS:

On October 11, 1985, Eden entered into a Joint Venture Agreement ("JVA") with four Japanese companies to form American Soy Products, Inc. ("ASP"), a company created expressly for the purpose of selling Eden a unique brand of soymilk named "Edensoy." Under the JVA, ASP would produce Edensoy, as required by Eden, and Eden would buy all of its soymilk requirements from ASP. Presently, Eden owns 27.78% of ASP and possesses two of seven seats on ASP's Board of Directors.

On February 5, 1997, the parties reaffirmed their joint venture in the operation of ASP for the "[m]anufacture and sale of Soy Beans Milk and related products" by creating a Revised Joint Venture Agreement ("RJV"). Through the RJV, ASP "specifically agree[d] to be bound by the terms and conditions set forth in the [agreement]." These terms and conditions included ASP's promise to "use its best efforts to maintain the high quality standards of [its] products" and to "appoint Eden to be the sole sales agent of [ASP's soybean milk and related products] in the U.S.A. and Canada." Under the RJV, Eden agreed to purchase all of its requirements of soymilk from ASP "in accordance with the provisions hereof during the term hereof." The parties agree that the RJV is still in full force and effect.

On April 9, 1997, the parties entered into a Sole Sales Agency and Requirements Agreement ("SSAR"), that Eden claims was to confirm, clarify, and define the business relationship between the parties for the term hereof. The SSAR has an initial ten-year term commencing in September 1998, with automatic five-year renewal terms thereafter, and provided for termination only upon certain events.

Under the SSAR, Eden is guaranteed exclusivity for the majority of ASP's production capacity, and is the exclusive distributor of ASP's soymilk. In turn, ASP must contractually (a) provide Eden with its requirements of Edensoy soymilk; (b) provide Edensoy to Eden at the best price

offered to any soymilk purchaser; and (c) use its best efforts to develop additional Edensoy products.

In the event that Eden's requirements of Edensoy amount to less than SSAR projections, Eden is subject to a reduction in the portion of ASP's production capacity that Eden has the exclusive right to purchase. Also, the renewal provisions of the SSAR are affected if Eden meets 90%, 60%, or less of the projected volume of Edensoy sales.

The parties have performed in accordance with the SSAR since 1998.

On October 3, 2012, Eden received a photograph, taken by an Edensoy customer, of a partial pallet of Edensoy 1-quart cartons dated August 13, 2012, where leaking product in the center of the pallet had spoiled 14 cases of a 50-case order. On October 5, 2012, ASP's quality-control manager contacted Eden's quality control manager and asked to visit Eden to inspect certain date codes of Edensoy quarts, specifically August 13, August 14, September 10, September 12, September 24, and September 28. Eden contends that ASP was on notice that it had manufactured defective Edensoy that had made it out to the public as of the date of inspection by ASP, October 5, 2012, and Eden contends that ASP took no further action for several days.

ASP again visited Eden on October 9, 2012, with a handwritten list of products that its quality control manager wanted returned to ASP. The product on the list totaled more than 3,000 cases of product, some of which had been sold to the public and Eden began the process of recalling these items from its customers.

On October 12, 2012, Eden contacted ASP via email notifying ASP that it elected to withhold \$72,357.46 from ASP "due to this week's business disruption, extraordinary labor, customer billings, bad product, and other expenses we are incurring"

On October 15, 2012, ASP personnel visited Eden and found several damaged packages and verbally advised Eden to put several product date codes "on hold."

On October 16, 2012, Eden asked for written confirmation regarding what to do with the leaking 250 ml cartons of Edensoy, and requested a market withdrawal document regarding the affected 250 ml products. ASP requested that Eden do a market withdrawal of a single pallet of 250 ml Edensoy and provide ASP with a list of who would be sending product back. In response, Eden requested a recall notice for all 250 ml cartons that were potentially harmed by the equipment malfunction.

Soon thereafter, ASP returned a shipment of "reworked" 250 ml cartons to Eden that it had allegedly "inspected" and found were not damaged. Eden personnel inspected the cartons, and they found several leaking 250 ml cartons that had been sliced open by ASP's machinery. ASP did not issue a market withdrawal addressing either product. On October 17, 2012, ASP advised Eden, "[it] was very important to receive payment to be able to continue to produce and ship product," noting that it had already credited Eden \$785.25. Eden responded that it was standard

practice in the food industry for the buyer to deduct from invoices due the expenses associated with supplier-caused problems.

On October 19, 2012, Eden withheld payment of a \$51,168.66 invoice from ASP (invoice #1612). On October 22, 2012, ASP, through its lawyer advised Eden that, "ASP will not continue to produce and ship product to your client Eden, Inc., until all sums due and owing in accordance with sale terms, less issued credits, are paid and assurance is given that payment for future shipments will be paid for in accordance with sale terms."

On October 24, 2012, ASP provided Eden with a market withdrawal letter for the leaking 250 ml products.

On October 29, 2012, key personnel and counsel for Eden and ASP met to try to resolve the dispute. At that point Eden had or intended to withhold payments for ASP invoices 1611, 1612, and 1613 totaling \$177,882.05 pending resolution of the dispute. No resolution was obtained.

On October 31, 2012, Eden requested an emergency meeting of the ASP board of directors to resolve the dispute, but the ASP board declined the request.

On November 6, 2012, Eden inquired whether the Edensoy quarts produced the week of October 15 were ready for pickup and ASP responded that it "was not shipping any product to Eden until further notice."

Eden then filed suit for breach of contract and obtained a Temporary Restraining Order ("TRO") from this Court on November 14, 2012 requiring ASP to provide Eden with its requirements of Edensoy and Eden to pay for the Edensoy upon the parties' usual thirty day term.

Upon a Show Cause hearing, the Court found that "the agreement remains in full force and effect pursuant to the automatic renewal that was occurring between the parties." The Court issued a Preliminary Injunction to govern during the pendency of the lawsuit that required (a) ASP to supply Eden with its requirements of Edensoy; (b) Eden to pay any outstanding invoices, less the \$177,000 in dispute that was deposited into escrow; and (c) Eden to pay invoices going forward within thirty days of issuance.

On December 17, 2012, ASP answered the Complaint and raised five counterclaims for breach of contract. On December 19, 2012, ASP filed a motion for reconsideration of the order granting the injunction. ASP's motion for reconsideration was denied on January 22, 2013.

On May 2, 2013, on ASP's application for leave to appeal, the Michigan Court of Appeals vacated this Court's Preliminary Injunction. Eden filed its application for leave to appeal the Court of Appeals decision vacating the Preliminary Injunction with the Michigan Supreme Court. That appeal is pending.

STANDARD OF REVIEW:

MCR 2.116(C)(10) permits summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183 (2003). When reviewing a motion under sub rule (C)(10), courts consider the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party. *Walsh v Taylor*, 263 Mich App 618, 621 (2004). “[S]ummary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute.” *Porter v City of Royal Oak*, 214 Mich App 478, 484; *South Macomb Disposal Auth v America Ins Co*, 225 Mich App 635, 675 (1998) (“A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact.”). Moreover, summary disposition may be appropriate even before the close of discovery where “there is no fair likelihood that further discovery would yield support from the nonmoving party’s position.” *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 540-41 (2004).

MCR 2.116(C)(8) allows for summary disposition when a party “fail[s] to state a claim on which relief can be granted.” The rule “tests the legal sufficiency of the complaint and allows consideration of only the pleadings.” *Wade v Dep’t of Corrections*, 439 Mich 158 (1992). A motion for summary disposition under MCR 2.116(C)(8) should be granted when the court determines that “the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* at 163. In a contract dispute, the court may examine the contract at issue in making this determination. *Woody v Tamer*, 158 Mich App 764 (1987), (“In an action based upon a contract, the court may examine the contract in conjunction with a motion for summary judgment for failure to state a claim.”).

ARGUMENT:

Requirements and Supply Contract created by RJV.

The Court finds that the RJV creates a supply and requirements relationship between Eden and ASP.

The RJV provides that: first, Eden is obligated to purchase all its requirements of [soymilk] for sale in the U.S.A. and Canada from ASP throughout the term of the joint venture and, second, the RJV appoints Eden to be the sole sales agent of [ASP’s soymilk] in the U.S.A. and Canada. These provisions create an exclusive dealing contract that obligates ASP to use its best efforts to supply soymilk to Eden. MCL 440.2306(2); *General Motors Corp v Paramount Metal Products Co*, 90 F Supp 2d 861, 873-74 (ED Mich 2000). The unambiguous language of the RJV creates an exclusive arrangement where Eden must obtain its requirements of Edensoy from ASP, and thus imposes an enforceable obligation that ASP use its best efforts to provide Eden with its requirements of soymilk. MCL 440.2306(2). ASP is also obligated to use its best efforts to maintain the high quality standards of the products to be manufactured by ASP consistent with the high standards which have heretofore been established over the course of the joint venture.

The "high quality standards" contemplated by the agreements do not embrace the leaking products at issue in this case, which were not fit for sale to the public.

The Court finds that instead of meeting its contractual obligations, ASP sent leaking boxes for which it continues to demand payment, and then refused to supply soymilk. These are breaches of contract, violations of ASP's specific obligations imposed by the RJV, which have caused damages to Eden.

ASP has a duty to resolve disputes in "good faith" pursuant to the RJV. "Good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing." MCL 440.9102(1)(qq). Moreover, Michigan law instructs that a buyer may set off damages by "deduct[ing] all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." MCL 440.2717. By demanding payment for a defective product and refusing to accept the set-off contemplated by the parties' own past conduct and Michigan law, ASP breached its agreement with Eden.

ASP argues that any supply obligations in the JVA expired at the time of the expiration of the SSAR. The SSAR does not purport to supersede the stated purpose of the RJV, but only to confirm, clarify, and define the business relationship between the parties for the term hereof. The supply and requirements relationship is established in the RJV, and the particulars of the relationship are implemented as set forth in the SSAR during the term of the SSAR.

ASP breached its obligations under the SSAR and RJV by ceasing production of Eden's requirements and resuming production only after the intervention of this Court. ASP's unilateral termination of the contract was not pursuant to any provisions allowed under the SSAR's Article 10.3. ASP thus breached its obligations under the SSAR and RJV by unilaterally halting delivery of Edensoy soymilk products.

ASP's assumption that termination of the SSAR terminates its obligation to supply soymilk is not supported by any provisions within the SSAR. In the event that Eden's requirements of Edensoy amount to less than SSAR projections Eden is subject to a reduction in the portion of ASP's production capacity that Eden has the exclusive right to purchase.

ASP argues neither the SSAR nor the RJV requires ASP to supply soy milk to Eden. The SSAR expired in September 2008. The RJV's supply obligations, which are contained in Article 20, were entirely carried out through the SSAR, and thus, when the SSAR expired, so too did any obligation ASP had to supply soy milk to Eden pursuant to the RJV.

ASP also argues that the SSAR did not contain "automatic five-year renewal terms." If Eden's purchases of soy milk fell below a certain level, which they did, the SSAR was only renewable upon the mutual agreement of both ASP and Eden. ASP contends that on numerous occasions ASP informed Eden that it was not exercising its option to renew and was instead allowing the SSAR to expire.

ASP offers a portion of Michael Potter's deposition testimony (a witness for Eden), which, it argues is an admission that the RJV does not require ASP to supply Eden with its requirements of soymilk. However, the Court finds that Potter testified that Eden's position is that ASP must use its best efforts to supply Eden with its requirements of soymilk pursuant to the JVA.

ASP's alternative argument that the parties have been operating on nothing more than a purchase-order-to-purchase-order relationship, also mandates that supply of defective goods is a breach of contract. MCL 440.2601.

The Court grants Eden judgment pursuant to MCR 2.116(I)(2) finding that the RJV and SSAR do create a requirements contract for the supply of Edensoy.

Not a Perpetual Contract.

ASP argues that the RJV is a perpetual agreement. Perpetual contracts are disfavored. The Court finds that the RJV is a contract of indefinite duration which is terminable by either party upon the occurrence of certain designated events. Where, as here, the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time unless otherwise agreed by either party." MCL 440.2309(2). ASP argues that the RJV provides that, upon a two-thirds vote of shareholders, the business purpose can be changed, or ASP can be merged, sold, dissolved, or liquidated, such that, the parties agreed to a mechanism, a two-thirds vote of shareholders, to terminate the RJV. The Court disagrees, finding that Article 10 is not to be read so broadly as granting ASP the authority to terminate the RJV as that is not a "change of business purpose" within the clear and unambiguous language included within the RJV. The only legitimate meaning to the terms included within the RJV is that this contract is neither perpetual nor terminable at will, but instead the RJV is terminable according to its terms and those included in the SSAR.

The cases cited in ASP's brief, *Payroll Express Corp v Aetna Cas and Sur Co*, 659 F2d 285 (2nd Cir. 1981); *Nicholas Laboratories v Almay Inc*, 723 F Supp 1015, 1018 (SDNY 1989) are distinguishable in that they acknowledge that the policy of avoiding perpetual contracts is inapplicable to contracts which provide for termination or cancellation upon the happening of a specified event, as in the instant case.

In *Lichnovsky v Ziebart International Corp*, 414 Mich 228, 236 (1982) the only Michigan case that ASP offers, the Michigan Supreme Court found that rule against perpetual contracts does not apply where the agreement, although of uncertain duration, contains a provision specifying the manner of termination. Since the RJV has clear termination provisions, ASP's argument is inapposite.

The Court finds that the RJV is a contract of indefinite duration which is terminable by either party upon the occurrence of certain designated events.

SSAR Remains in Effect.

ASP argues that the SSAR expired in 2008 and did not renew.

ASP also argues that each renewal section in 10.2 is dependent upon Eden meeting certain sales levels of soy milk (Products A). The baseline for Eden's sales levels is set forth in § 2.2 of the SSAR wherein ASP promises to set aside 85% of its total production capacity, defined as the "Eden Allocation," for the production of Products A for Eden. In order to renew the SSAR Eden's sales must meet certain levels of the Eden Allocation.

ASP also argues that Subsection 10.2 (a), (b) and (c) each require Eden's sales to be at least 60% of the Eden Allocation for the SSAR to renew automatically, or at the sole option of Eden. ASP argues that Eden's sales during the relevant time were no more than 30% of the Eden Allocation. Therefore, the only way the SSAR could have renewed is pursuant to subsection (d) which provides that the SSAR may be renewed upon the mutual agreement of both Eden and ASP. ASP contends that it notified Eden on numerous occasions that it was not exercising its option to renew the contract and was allowing the contract to expire, and as such the parties have not expressly renewed the SSAR by mutual agreement.

ASP also points to statements by its then CEO at a board meeting in January 2008, a letter it sent in April 2008, and another statement at a board meeting in September 2008 in support of its claim that it notified Eden. Eden argues how does such an announcement by one party terminate a contract that contains automatic renewal provisions? Why does a statement from a CEO equate with corporate action by the board of directors? The minutes offered by ASP identifies no vote by the board of directors of ASP to support its argument that the SSAR was not renewed.

There is no dispute that the SSAR had an initial term of ten years. Beyond this initial term, the SSAR provides for automatic renewals, using the percentage of the Eden Allocation met over the course of the contract to determine which renewal provision applies. "All sales tests set forth below are based on product having been available to Eden substantially in accordance with agreed-upon production schedules...and shall be adjusted if product unavailability is experienced." The parties can also extend the SSAR by mutual agreement.

The Eden Allocation is the amount of ASP's production capacity for all products that would be devoted to producing soymilk for Eden; specifically, ASP promised to allocate 85% of its total annual production capacity to meet Eden's requirements for Edensoy. Eden did not promise to purchase the Eden Allocation. The SSAR separately defines "Minimum Quantities" as an annually agreed number not less than fifty-four percent (54%) of ASP's full production capacity. The Court finds that the purpose behind this Section is to protect Eden (provision requiring ASP to devote its manufacturing facilities to the production of Edensoy.)

In the event that Eden's annual requirements for soymilk are less than the Eden Allocation, ASP shall have the right to reallocate the portion of the Eden Allocation that is not required by Eden to produce any products (including soymilk) that ASP chooses. ASP's remedy is to reallocate its production capacity to other products. No reasonable interpretation of the SSAR supports a

finding that the supply relationship would end if the Eden Allocation was not met. The provision expressly gives the right to reallocate only the portion of the Eden Allocation that is not needed by Eden. The portion that is needed by Eden cannot be reallocated.

If the “Minimum Quantity” was not met, the Court finds that the SSAR contemplates only that Eden would lose its exclusive distributorship in the United States and Canada. The SSAR does not purport to imperil the supply relationship, a relationship that is built into the RJV. Instead, under the SSAR, ASP can reduce Eden’s exclusivity as distributor and re-allocate its production capacity.

ASP argues that from September 2003 through September 2008, Eden’s purchases of Edensoy amounted to 29% of the Eden Allocation, and thus, the SSAR was only renewable by mutual consent and that ASP did not so consent.

The Court finds that ASP’s argument incorrectly assumes that the supply relationship would end if the Eden Allocation were not met. The Court agrees with Eden that ASP’s calculations do not square with the SSAR. ASP, in its argument, sets forth three different numbers regarding its annual production capacity, which is the denominator necessary to calculate the “Eden Allocation” in the first place. There is no agreement on what the annual production capacity was. The renewal provisions say “sales of Products A” (soymilk), and is not limited to sales of soymilk made to Eden. The shortfall calculated by ASP is incorrect.

Eden argues that ASP’s inability to maintain a consistent supply of product and refusal to provide best pricing to Eden, among other shortcomings, demonstrate that it has not performed its portion of the obligation, and therefore, ASP cannot impose any sanction upon Eden in the event that the Eden Allocation was not met. *Verran v Blacklock*, 60 Mich App 763, 768, (1975) (“[O]ne who has caused the breach of an agreement cannot recover damages for the breach of the other party, nor can he set up the agreement as a defense to an action on the contract”); *Dohanyos v Prudential Ins Co*, 952 F2d 947, 950 (6th Cir. 1992) (“Under Michigan contract law, it is clear ‘that a party cannot take advantage of [its] own wrong nor profit by [its] own delinquencies...”).

ASP’s assertion that the SSAR was terminated as of September 2008 is not supported by ASP’s own actions. Section 7 of the Agreement entitled “Exclusive Distributorship for Products A (U.S.A. and Canada)” states in part, in reference to sales of soy milk products by ASP to customers other than Eden: “In cases where Company [ASP] is primarily responsible for servicing the customer, Eden shall be compensated on the basis of a mutually agreed commission of not less than two percent (2%) of Company’s net sales of Products A to that customer.” This 2% commission is not addressed in the RJV. ASP continued those payments up until the present lawsuit. In the incidents that resulted in the June 1, 2009 and March 1, 2012 settlements, reached long after the purported “termination” of the SSAR, the Court finds that ASP did not argue that it was not bound to supply Edensoy, nor that it was somehow not liable for damages wrought by its own manufacturing problems. ASP’s actions since September 2008 are incongruent with its claims in this lawsuit.

The only logical conclusion this Court can draw is that the parties renewed the SSAR by mutual agreement by continuing to do "business as usual". Either the parties determined, through their course of dealing, to ignore the Eden Allocation provisions, or the parties manifested their mutual assent to continue under the SSAR. Either way, as this Court explained at the Injunction hearing, "the agreement remains in full force and effect pursuant to the automatic renewal that was occurring between the parties."

The Court finds ASP in breach of the SSAR, and therefore, ASP may not terminate the SSAR pursuant to section 10.3 of the SSAR. ASP may only terminate the SSAR and RJV if Eden fails to comply with its responsibilities as set forth in Article 22 of the RJV. The Court further finds, for the reasons set forth in this Opinion and Order, that Eden is not in breach of the RJV or SSAR.

Purchase Orders Support Eden's Claim:

Assuming ASP was correct that the RJV and SSAR do not require it to provide soymilk to Eden, which this Court has determined above is without merit, it is incorrect to conclude that this would eviscerate Eden's claims. Eden's first amended complaint, says "the leaky 1 quart and 250 ml cartons of Edensoy were spread out among various production dates across a six week span, 23 different purchase orders, and six different invoices." ASP ignores the allegations of its own counterclaim, "[i]n September and October 2012, ASP provided shipments of product to Eden pursuant to a purchase order." These pleadings bring any applicable purchase orders into this lawsuit. To the extent that Eden's breach of contract claims need a "purchase order" to survive, its claims are sufficiently stated to withstand ASP's (C)(10) motion.

Eden's Claims for Anticipatory Repudiation, Specific Performance, and Breach of Implied Warranty are Valid against ASP.

ASP asserts that since neither the RJV nor SSAR currently requires ASP to provide soymilk to Eden, it cannot be liable on a claim of anticipatory repudiation. Similarly, it argues that Eden's count for specific performance and injunctive relief is entirely dependent on the validity and enforceability of the SSAR and RJV.

ASP also asserts that since Eden's claims are based entirely on the SSAR and RJV, and not on any purchase orders, Eden's claims for breach of implied warranty for a particular purpose must be dismissed as a matter of law.

The Court finds that ASP breached its implied warranty to supply Eden with a product fit for its particular purpose. This is a transaction in goods governed by Article 2 of the UCC. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 526 (1995). Under Article 2, a supplier of goods may be held liable for breach of implied warranty if the goods are defective. MCL §§ 440.2314, 440.2315. To establish a valid warranty of fitness for a particular purpose, buyer must demonstrate (1) that the seller knew the particular purpose for which the goods were

required; and (2) that the buyer relied on the seller to select or furnish suitable goods. MCL § 440.2315. *Leavitt v Monaco Coach Corp.*, 241 Mich App 288 (2000). There is no dispute as to these elements. Further, a buyer who seeks to recover damages for a breach of implied warranty must provide notice to the seller “within a reasonable time after he discovers or should have discovered any breach.” MCL § 440.2714. Eden notified ASP of the problem with the 1-quart containers on October 5, two days after a customer first sent a photograph documenting a potential issue. Eden notified ASP of the problem with the 250 ml containers on October 13, the same day that 250 ml packages were discovered leaking in Eden’s warehouse. The notice was timely. Accordingly, the Court finds that summary disposition is appropriate on Eden’s breach of implied warranty claim and this matter should proceed to trial solely on the issue of damages.

ASP argues that the Court should dismiss all of Eden’s claims. Even if ASP was correct that there is not an obligation for it to supply Edensoy under the RJV or SSAR, these ancillary claims still stand.

Eden’s claims of anticipatory repudiation, specific performance, and injunctive relief encompass ASP’s obligation to supply Edensoy as set forth in the RJV and SSAR, as well as the specific orders that were being ignored by ASP. On November 6, 2012, Eden asked ASP if the Edensoy quarts produced the week of October 15 were ready for pickup. ASP responded that it was not shipping any product to Eden until further notice. The implied warranty arises under any sale of goods wherein the seller has reason to know of the particular purpose for which the goods are required. MCL 440.2315. These claims survive even under ASP’s interpretation of the RJV and SSAR.

ASP’s Counterclaims are Denied.

This court may grant summary disposition to Eden if it finds that ASP’s alleged breaches of contract fail under the plain language of the parties’ agreements. All of ASP’s counterclaims sound in breach of contract and, based upon the Court’s findings above, none have merit. Furthermore, ASP’s counterclaims fail as a matter of law. The claims either fail to state a breach or, in some instances, fail to prove the existence of a contract altogether.

ASP’s first counterclaim alleges that Eden “breached the purchase orders by failing to pay ASP for the soymilk that ASP provided.” Eden lawfully set off the damages caused by ASP’s defective products and placed the disputed money in an escrow account pending the disposition of this Court or resolution by the parties. Eden was permitted, pursuant to the UCC, to set off damages caused by ASP’s distribution of leaking and defective products. MCL § 440.2717. There is no question that the shipment of the leaking, defective products constituted a breach. MCL 440.2601. Eden did not breach. Offsetting of damages was a lawful response to ASP’s defective products. ASP’s first counterclaim for nonpayment fails and summary disposition is appropriate in favor of Eden.

ASP’s second counterclaim alleges that Eden breached a settlement agreement dated March 1, 2012, by “failing to implement any plan for promotion of the 250/ml Product.” The Court finds

that there is no contract to promote the 250 ml product and ASP has failed to state a claim. There is no breach. Eden spent significant sums to market, promote, and rehabilitate the Eden brand following the March 1, 2012 settlement. There is simply no evidence to the contrary. ASP's second counterclaim for failure to promote fails and summary disposition is appropriate in favor of Eden.

ASP's third counterclaim alleges that Eden breached a 2009 Settlement Agreement between the parties "by making unauthorized deductions from the amount it claims that it owes ASP for product supplied by ASP." The 2009 Settlement Agreement does not prohibit deductions related to ASP's provision of unmerchantable products in general; rather, it limits further deductions related to the unmerchantable products that were the subject of the dispute resulting in the 2009 Settlement Agreement. ASP has failed to show any breach. ASP argues that Eden's actions following the September and October 2012 delivery of defective goods amount to "unauthorized deductions." The Michigan UCC and the parties' course of dealing provide ample "authorization" for any deductions. ASP's third counterclaim based on the 2009 Settlement Agreement fails and summary disposition is appropriate in favor of Eden.

ASP's fourth counterclaim asserts breach of a valid contract. ASP contends that Eden and ASP agreed to each pay a portion of the legal fees associated with the 2012 closing agreement. The parties entered into a 2012 Settlement Agreement (referred to by Plaintiff as "closing agreement"). ASP President Roller admitted that Plaintiff's fourth counterclaim was not based on the 2012 "closing agreement." Roller testified that the purported agreement occurred during a "board meeting," where Eden agreed to "pay their own legal fees from that point going forward." There is no mention of any such agreement in the minutes or resolutions. The purported exchange only amounts to mere discussion, lacking the consideration required for a valid contract. Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. *Kamalath, 194 Mich App 543, 548-549 (1992)*. This is the type of contract that would have to be in writing to be valid. Under the statute of frauds, "[a] special promise to answer for the debt, default, or misdoings of another person" is void unless the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement. MCL 566.132(1)(b). Having already entered into a Settlement Agreement that did not mention payment of ASP's attorney fees, any claim by ASP that a separate agreement was made via discussions at a board meeting would not be supported by any further consideration to Eden. ASP's fourth counterclaim for breach of contract regarding payment of attorney fees fails and summary disposition is appropriate in favor of Eden.

ASP's fifth counterclaim asserts that "ASP and Eden entered into a valid contract, supported by mutual consideration, whereby Eden agreed to pay for raw materials which ASP purchased for use in the production of all Edensoy 32 oz. and 250 ml product, which Eden discontinued." Roller admits that the fifth counterclaim is not based on a written contract. There was no meeting of the minds between the parties. ASP's fifth counterclaim for damages for "raw materials" fails and summary disposition is appropriate in favor of Eden.

RULING:

The Court finds that except as to the amount of damages, there is no genuine issue as to any material fact, and the Plaintiff is entitled to judgment as a matter of law. MCR 2.116(C)(10).

The Court grants Eden's motion for summary disposition in its entirety, denies ASP's motion for summary disposition, dismisses ASP's counterclaims, grants such other relief as the Court deems appropriate, and finds that there is no genuine issue regarding the following material facts:

- The Revised Joint Venture Agreement (RJV) imposes an obligation upon ASP to supply Edensoy to Eden;
- The Sole Sales Agency and Requirements Agreement (SSAR) is presently in effect;
- The RJV has a clear termination provision and is not a perpetual contract;
- The Eden Allocation is the amount of ASP's production capacity for all products that would be devoted to producing soymilk for Eden; and the supply relationship does not end if the Eden Allocation was not met;
- The escrowing of the money damages at issue (\$177,000.00) was in compliance with the RJV;
- ASP provided defective leaking cartons of Edensoy to Eden in September and October 2012 not in compliance with the RJV and SSAR;
- The Edensoy affected by the defective, leaking cartons is known to the parties and reflected in purchase orders, invoices, and credits;
- ASP stopped filling Eden's orders for Edensoy in October 2012;
- ASP actions in providing leaking Edensoy and ceasing production of Edensoy are breaches of its contracts with Eden;
- Eden has suffered damages as a result of ASP's breaches of contract in an amount to be determined at trial.

IT IS SO ORDERED.

August 14, 2013



Archie C. Brown, Washtenaw Business Court Judge