

water-based adhesive, R-107, was used in IP's production of the bulk corrugated boxes. On September 24, 2010, the parties executed a formal procurement contract, Contract No. ZADHIFS1213.¹

In mid-December of 2010, IP alleges it began experiencing problems at the Lafayette, Louisiana plant with the R-107 glue. Specifically, the compression time began running longer resulting in a longer than usual manufacturing time. IFS attributed the increased compression time to the particularly cold weather. However, IP contends the winter months of 2010 through early 2011 were no colder than any of the prior years.² At the suggestion of IFS, IP agreed to discontinue using the R-107 glue and substituted instead another IFS adhesive. IP started using the R-1051 on December 16, 2010. At the time, the R-1051 replacement glue was successfully being used at IP's Richmond manufacturing plant.

Shortly thereafter, IP began experiencing trouble with a sandy grit buildup in the R-1051 formula. On January 12, 2011, IFS suggested and implemented a third change in the glue product, replacing the R-1051 adhesive with a "tweaked" version, designated R-1041.

¹ DE [1-3]

² At that time, the Lafayette, Louisiana production facility was an unheated facility.

On February 5, 2011, IP began receiving customer complaints regarding the separation of the glue joints in bulk boxes. On February 24, 2011, IP ceased using the R-1041 adhesive and recalled all of its unused boxes containing R-1041. IP resumed using the glue from its former provider.

IP asserts that each of the glue products was delivered with a Certificate of Analysis, (COA), that included the glue's viscosity, percent solids, and PH. However, IFS failed to include a formula sheet and complete analysis of the products. Although IP did not conduct an independent analysis of the glue products purchased from IFS, IP contends the modified chemical composition of the R-1041 adhesive caused the corrugated box failures and the need to recall all boxes that had been assembled with the R-1041 adhesive. IP asserts the failure of the corrugated boxes was due to the poor quality glue provided by IFS and not by improper processing, storage, handling, transportation or cold plant temperatures. As such, IP filed this action against IFS for breach of contract, negligent and fraudulent misrepresentation, and for violations of the Tennessee Consumer Protection Act.

JURISDICTION

Plaintiff International Paper is a corporation organized under the laws of the state of New York with its principal place of business in Memphis, Tennessee. IFS Industries, Inc. is a

corporation organized under the laws of the state of Pennsylvania with its principal place of business in Reading, Pennsylvania.³ Pursuant to 28 U.S.C. §1332, jurisdiction of this case is predicated on diversity of citizenship. A federal court has original jurisdiction over diversity cases where the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs. Plaintiff has alleged damages in the amount of \$5,000,000.⁴ Accordingly, the requirements of diversity jurisdiction under 28 U.S.C. §1332(a) have been satisfied.

LEGAL STANDARD

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate if the moving party can establish there is "no genuine dispute as to any material fact." Fed. Rule Civ. P. 56(a). The threshold inquiry in determining if the party is entitled to summary judgment is whether a finder of fact could reasonably find in favor of either party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259, 106 S.Ct. 2505, 2516, 91 L.Ed 2d. 202 (1986). A party, asserting that a fact cannot be or that a fact is genuinely disputed, must support his assertion by citing to specific parts in the record, and the court must examine all factual evidence in the light most favorable to the

3 DE [1], ¶¶ 5 and 6

4 DE [1], ¶59

non-moving party. See Fed. Rule Civ. P. 56(c); See *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000) citing *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 613 (6th Cir. 1998)). If the non-moving party fails to support the facts asserted, the court has discretion to:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed show that the movant is entitled to it; or
- (4) issue any other appropriate judgment.

Fed. Rule Civ. P. 56(e). Conversely, the non-moving party can survive a motion for summary judgment by establishing "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Although the non-moving party has the burden of producing rebuttal evidence, the non-moving party can simply overcome summary judgment by producing evidence from the pleadings, depositions, and any other documents in the record that establish a genuine issue. See *Celotex*, 477 U.S. at 324. Nevertheless, the non-moving party must prove more than a "mere existence of some alleged factual dispute between the parties" and must provide facts that are material to the outcome of the suit in order to survive the summary judgment motion. *Anderson*, 477 U.S. at 247-248. In ruling on a motion for summary judgment,

the Court may not make credibility determinations or weigh the evidence. *Upperline Equipment Company v. J & M Inc.*, 724 F. Supp. 2d 883, 887 (E.D. Tenn. 2009) and *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994)

ANALYSIS

Pursuant to Fed. R. Civ. P. 56 (a), IFS asserts it is entitled to summary judgment because IP has failed to raise a genuine issue of material fact that 1) IFS breached the contract; 2) IFS has engaged in fraudulent or negligent misrepresentation of any kind; and that 3) IFS violated the Tennessee Consumer Protection Act. Finally, IFS argues that IP has not established a claim that would support an award of punitive damages. The Court disagrees.

I. Breach of Contract Claim

The parties appropriately agreed that the law of Tennessee would govern the terms of their contract.⁵ In Tennessee, a party must establish the following elements in order to establish a claim for breach of contract: 1) the existence of an enforceable contract; 2) the non-performance of the contract amounting to a breach, and 3) damages caused by the breach. See Tenn. Code Ann. §47-50-109; *Upperline*, 724 F. Supp.2d at 888; *C & W Asset*

⁵ DE [1-3], ¶17 provides: This Contract shall be governed by the law of the State of Tennessee.

Acquisition, LLC v. Oggs, 230 S.W.3d 671, 676-77 (Tenn. Ct. App. 2007).

The pleadings, including both parties' statements of undisputed facts and the respective exhibits establish that IP and IFS entered into a contract where IP would purchase glue products from IFS for use in the manufacture of corrugated boxes.⁶ The contractual provisions regarding the glue specifications were:

1. **PRODUCT AND QUALITY:** Seller's adhesive and bulk adhesives products listed in **Attachment A** (collectively the "Products"), which will comply with such specifications, attached hereto as **Attachment B**, and delivered in Recyclable Totes as described in **Attachment C**. Notwithstanding Seller's compliance with such specifications, Buyer's continued purchase of these Products is subject to satisfactory performance of Product, in Buyer's sole judgment. Seller will supply Buyer with evidence of statistical methods used in manufacture and control of Product.⁷

. . . .

3. **ESTIMATED QUANTITY:**

. . . .

b) Qualification trials for the Products will be required at facilities not currently being served by Seller or on any Products that are new to a facility. At all times, including during such qualification process or transition process, Buyer is permitted to purchase product that is similar to Products purchased hereunder from other suppliers for use at any of the Buyer's facilities, including the facilities designated in **Attachment A**.

IP alleges that IFS breached the contract by failing to:

- 1) supply standard glue products;

6 DE [1], DE [1-3], DE [58-10] and DE [69-1]

7 The Procurement Contract indicated that the product specifications were to be found in Attachment B. However, Attachment B is not included in the executed version of the contract in the record.

- 2) maintain evidence of statistical methods used in the manufacture and control of the glue;
- 3) supply glue products that were fit for the ordinary purpose for which the glue was used;
- 4) secure plaintiff's consent before switching glue products; and/or
- 5) correct problems with non-conforming glue products; and
- 6) indemnify IP for damages resulting from the breach.⁸

IFS maintains that it is not liable because IP failed to test the adhesives or subject them to qualification trial periods as required by the contract. IFS further disputes that problems with the glue joints and the R-1041 formula caused IP's boxes to fail.⁹ IFS asserts that because IP's expert witness is unreliable, IP has failed to produce any evidence showing that the R-1041 glue formula was unfit and caused IP's damages.

The record indicates that IP's expert witness, David Horwat, received nine samples of the formulated adhesives as well as samples of the failed bonded lap joints. Mr. Horwat sent samples of the adhesive for infrared spectroscopy (FTIR) analysis to determine its composition. Also, he tested the adhesive samples by differential scanning calorimetric (DSC) analysis, and performed the thin-film-on-glass test, corrugated wet test and bonding speed test. Ultimately, Mr. Horwat reported in his analysis paper that the adhesive product was

⁸ DE [1], ¶¶ 40.a. - 40.f.

⁹ DE [1], ¶¶ 39-61

ineffective.¹⁰ Specifically, Mr. Horwat concluded, "The sources of failure were rooted by choice of polymer and formula changes during manufacture and were not the result of improper process conditions, storage, handling, transportation or cold weather at the International Paper plant."¹¹ The Court has previously ruled that Mr. Horwat's testimony survives the *Daubert* challenge.¹² Assuming a proper foundation is laid at trial, his testimony will be admitted.

IFS argues that the unusually cold weather conditions caused the glue and the box joints to fail. Further, IFS maintains it did not breach the contract because it provided IP with standard quality glue and honored its obligation to provide a Certificate of Analysis (COA) that conformed to IP's product specifications.

The issues concerning the quality of the glue and the cause for the box failures are disputed questions of material fact that should be resolved by a jury at trial. *Anderson*, 477 U.S. at 266.

10 DE [63-1], Exhibit 1 - An Analysis of Bond Line Failures and their Causes at International Paper, Lafayette, La.

11 DE [63-1], p.4

12 DE [136]. The Court ruled Mr. Horwat's scientific theory and methods were recognized and followed by other scientists in the field of adhesive formulation. Further, the Court found Mr. Horwat's experience and testing satisfied *Daubert* and Rule 702. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318-19 (9th Cir. 1995).

II. Fraudulent or Negligent Misrepresentation

In the alternative, IP alleges that IFS fraudulently and negligently misrepresented that its glue would be of standard quality and would satisfy IP's specifications for glue required in the assembly of corrugated boxes. IP further asserts that IFS failed to remedy the problem despite its assurance that adding more plasticizer would strengthen the glue. IFS maintains that IP has failed to produce any evidence supporting a claim of fraudulent or negligent misrepresentation.

In Tennessee, parties to a contract owe each other a duty of good faith and fair dealing as it pertains to the performance of the contract. *Barnes & Robinson Co. v. OneSource Facility, Services, Inc.* 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006). The duty of good faith and fair dealings insures that the parties' reasonable expectations are honored while protecting their rights to receive the actual benefits of the agreement executed. *Id.* at 642.

In order to sustain a claim in Tennessee for negligent misrepresentation, the following five elements must be established:

- 1) The defendant was acting in the course of his business;
- 2) The defendant negligently supplied false information;
- 3) The defendant intended the information to guide the plaintiff in plaintiff's business transaction;
- 4) The plaintiff justifiably relied upon the false information; and
- 5) As a result, plaintiff suffered a financial loss.

See *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997) and *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991). Puffing, sales talk, conjecture or representations concerning future events are not actionable even if they are later proven to be false. *McElroy v. Boise Cascade, Corp.*, 632 S.W.2d 127, 130 (Tenn. App. 1982); *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498-499 (Tenn. 1987).

In the case at hand, the paramount issue is whether or not the R-1041 glue was defective. If the glue was defective, did IFS negligently or fraudulently represent to IP that the glue would properly bond IP's corrugated boxes. Because the R-1041 glue had functioned properly in boxes produced at the Richmond facility, the question remains whether conditions known or unknown at the Lafayette, Louisiana plant attributed to the box failures or whether the change in the formula was the sole cause for the failures. Other factual issues involve whether IFS negligently or fraudulently misrepresented that the newly-formulated glue would meet the standard specifications required by IP. And, finally did IFS demonstrate a lack of good faith and fair dealing by changing the glue formula. The record indicates that all of these issues present genuine issues of fact that could be resolved in favor of either party. Thus, summary judgment is inappropriate.

Finally, an action for fraud or deceit requires a showing of scienter or intent. IP must present some evidence that IFS made a false representation of an existing or past material fact and the false representation must be made knowingly without belief in its truth or with a reckless disregard for the truth. See *Maddux v. Cargill, Inc.*, 777 S.W.2d 687, 691-692 (Tenn. Ct. App. 1989). Again, IP's claims that the R-1041 glue was defective and that IFS knew the product was defective are disputed by IFS. The quality and effectiveness of the glue is the primary issue governing whether or not IP's case has merit. The Court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Upperline*, 724 F.Supp.2d at 887; *Adams*, 31 F.3d at 379. As such, whether IFS intentionally or negligently misrepresented that the glue met IP's standard specifications can only be resolved by a trier of fact.

III. Tennessee Consumer Protection Act

IP seeks damages under the Tennessee Consumer Protection Act pursuant to Tenn. Code Ann. §47-18-101, et al. The Tennessee Consumer Protection Act (TCPA) provides a cause of action to a party for an unfair or deceptive act in the course of trade or commerce. See Tenn. Code Ann. § 47-18-109(a)(1); *Menuskin v. Williams*, 145 F.3d 755, 767 (6th Cir. 1998) and *Olin Corp. v. Lamda Electronics, Inc.* 39 F. Supp. 2d 912 (E.D. Tenn.

1998). To establish a *prima facie* case under the TCPA, the plaintiff must prove the defendant engaged in an act(s) that is unfair or deceptive under the TCPA causing plaintiff to suffer a loss of money, property or a thing of value. Tenn. Code Ann.

§ 47-18-109. The right is extended to corporate parties in a consumer transaction. *Id.* Claims brought under the TCPA are subject to the specific pleading requirements of Fed. Rule Civ. P. 9(b). *Metro. Property & Cas. Ins. Co. v. Bell*, No 04-5965, 2005 WL 1993446 at *5 (6th Cir. Aug. 17, 2005)

IP asserts that IFS violated the TCPA in reference to R-1041 by 1) representing that R-1041 had uses and benefits that it did not have; 2) representing that R-1041 was of a particular standard when it was of another; and 3) engaging in a practice that is deceptive to the consumer.¹³ IP's complaint sufficiently avers IFS' violations of the TCPA. The complaint alleges that IFS misrepresented the characteristics, use, quality and grade of its glue products. IP asserts these misrepresentations caused IP to purchase, use and continue to use to its detriment the R-1041 glue at issue.¹⁴ IP further alleges that IFS misrepresented that it had the experience to provide IP the glue appropriate for its industry.¹⁵

13 DE [1], ¶¶ 57-60; Tenn. Code Ann. §§ 47-18-104(b)(5) and 47-18-104(b)(27)

14 DE [1], ¶¶ 58-60

15 DE [69], p. 11

IFS argues that IP failed to produce evidence sufficient to create a genuine issue of material fact that IFS engaged in an unfair or deceptive trade practice. IFS asserts it never guaranteed the performance of R-1041, that IP never performed the qualifications trial prior to putting it to use in the Lafayette plant, and the box failures have not been linked to the R-1041 glue.¹⁶

The terms unfair and deceptive are not defined in the TCPA. However, Tenn. Code Ann. § 47-18-104(b) lists, among others, the following acts as unfair and deceptive practices:

- (1) Falsely passing off goods or services as those of another;
- (2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services. .
. .
- (3) Causing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another.
. . .
- (4) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such a person does not have;
- (6) Representing that goods are original or new if they are deteriorated, altered to the point of decreasing the value, recondition, reclaimed, used or secondhand;

¹⁶ DE [58-1], pp. 14- 18

- (7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are another;¹⁷

The provisions of the TCPA are to be liberally construed to protect consumers and legitimate business enterprises from unfair or deceptive practices in the course of any commercial transaction. Accordingly, whether a specific representation in a particular case is unfair or deceptive is a question of fact. *Tucker v. Sierra Builders*, 180 S.W. 3d 109, 116 (Tenn. Ct. App. 2005).

CONCLUSION

The Court finds genuine issues of material fact exist as to whether IFS is liable for breach of contract, negligent and fraudulent misrepresentation and violations of the Tennessee Consumer Protection Act. Therefore, IFS' motion for summary judgment is DENIED.

IT IS SO ORDERED on this 14th day of June, 2013.

s/John T. Fowlkes, Jr.

JOHN T. FOWLKES, JR.

UNITED STATES DISTRICT JUDGE

¹⁷ Tenn. Code Ann. §47-18-104; Title 47. Commercial Instruments and Transactions: Unfair or deceptive acts or practices; effective July 1, 2012.