AD HOC ARBITRATION

EUROCHEM TRADING USA CORPORATION V. WS AG CENTER, INC.

PARTIAL FINAL AWARD

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02 January 2019

Tribunal:
Michael D. Young (Sole arbitrator)

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Partial Final Award

I. Introduction

[1]. Claimant EuroChem Trading USA Corporation ("ECTUS" or "Claimant") alleges that Respondent WS AG Center, Inc. ("WS AG" or "Respondent")[1] purchased urea, phosphate, and other products ("goods" or "products") from ECTUS over the course of roughly eight years, and that WS AG failed to pay $14,283,519.42 that is due to ECTUS under nine particular contracts (together with the amendments thereto, the "Contracts") for said purchases. Based on this nonpayment and other alleged conduct, ECTUS asserts thirteen claims in its "Demand of Arbitration," including breach of contract and account stated, and seeks payment of the money owed, as well as an award of pre-judgment interest (calculated at the Florida statutory rate of 6.09% for the period June 1, 2017 through October 16, 2018, and equaling $1,198,747.30) and liquidated damages (at 10% of the principal amount due, equaling $1,428,351.94), and the reimbursement of its attorneys' fees and costs. The total that ECTUS seeks is $16,910,618.66, exclusive of attorneys' fees and costs.

[2]. Respondent denies the allegations of the Demand of Arbitration and denies any liability to the Claimant. Respondent's main argument is that the course of dealing of the parties is not reflected in the terms of the executed Contracts. Respondent contends that the parties operated on a "revolving account" basis, whereby the terms of the parties' agreements were agreed to orally, prior to the transactions occurring, but that the amounts stated in any particular Contract failed to reflect promises made by Ivan Boasher, the former president of ECTUS, to make up for past damages to WS AG (arising from such factors as drops in market prices, or by Claimant's untimely delivery or the delivery of defective products). According to Respondent, these promised off-sets are greater than the amounts claimed by ECTUS and therefore Respondent owes zero to ECTUS.

[3]. After a two-day hearing, conducted on September 6 and 7, 2018, and upon due consideration both of the record and of post-hearing memoranda submitted by the Parties on October 16, 2018, I rule that ECTUS has established breach of the Contracts and account stated as well as damages of $14,283,519.42, exclusive of pre-judgment interest and attorneys' fees and costs, which amounts are to be determined after further submissions herein.

[4]. I recognize and appreciate the efforts by counsel for each party. The result set forth herein is not a reflection of any difference in the quality of those presentations, but of my review of the evidentiary record and of the relevant law.

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[1] ECTUS in its initial Demand for Arbitration also made claims against Kent Ganske, Agricultural Consultants, and Midwest AG Commodities. The initially named Respondents moved to dismiss each Respondent except for WS AG on grounds including that (a) unlike WS AG they are not parties to the arbitration agreements between ECTUS and WS AG and (b) the determination of whether the non-signatory Respondents are nonetheless bound by an arbitration agreement must be decided by a court, not the Arbitrator. On March 15, 2018 I advised the parties: "I will be ruling that I do not have jurisdiction to decide whether the non-signatories are bound by the arbitration agreement. Accordingly, I will grant the Motion to Dismiss the non-signatories without prejudice to the right of the Claimant to seek relief in court, including a declaration from a court that the non-signatories are proper parties in this arbitration." In response, counsel requested that I not issue a formal decision and stipulated to the dismissal of the non-signatory Respondents from the arbitration.

II. History of the Proceedings

[5]. This Arbitration was initiated by Claimant in June 2017 by the filing and/or transmission of a "Demand of Arbitration and Designation of Arbitrator" ("Demand"). The initially filed Demand sought the following relief, among other elements: award of monetary damages for account stated and breach of contract "in an amount to be calculated but of no less than $14,285,215.27, plus... 10% liquidated damages and pre-judgment interest" against WS AG and the above referenced non-signatories; and the entry of a temporary and permanent injunction enjoining WS AG (and the non-signatories) from "transferring, concealing, dissipating, and/or destroying assets until any award entered in this arbitration shall have been paid in full." The Demand was filed with the Arbitrator and transmitted again to Respondent (and the non-signatories) in January 2018.

[6]. Between June 2017 and January 18, 2018, the undersigned was selected to arbitrate the matter. An initial case management conference was conducted by telephone on January 2, 2018, resulting in Order # 1 of the Arbitrator, setting forth a schedule for the submission of a responsive pleading and motions.

[7]. Respondent filed its Response to the Statement of Claim on April 30, 2018 (after the motion practice described in footnote 1 and below, and thus after the number of respondents was reduced). Respondent denied the "existence, validity and accuracy of the contracts relied upon by Claimant." Respondent further stated that "to the extent the specified documents did form the basis of a valid contract, Claimant first breached the terms thereof, such that the Respondent is entitled to complete or partial relief from any obligations thereunder."

[8]. Each of the Contracts at issue contains an arbitration clause. While Respondent disputes that the contract language is determinative of the relevant business terms of the subject transactions, including price and date and place of "delivery," Respondent does not contest that it is bound to arbitrate the subject dispute. Each contract is labeled as a CIP Sales Contract. It is numbered and dated and each of the nine Contracts at issue contains identical terms. (ECTUS Exhibits 1 to 9.) Section XI of the contract form provides as follows regarding arbitration and governing law:
... If the parties fail to reach settlement of their dispute, controversy or claim by means of negotiations, such dispute, controversy or claim shall be referred to arbitration in Tampa, Florida in accordance with the rules of the Society of Marine Arbitrators (hereinafter referred to as "the SMA") and the procedures set forth below.... The dispute shall be settled by a sole arbitrator..., on the basis of the provisions of the present Contract as well as the laws of the State of Florida. The award shall be rendered in accordance with the Arbitration Rules of the SMA and be final and binding upon both parties. The award shall contain the amount and the apportionment of the Arbitration costs.

Thus, the SMA Arbitration Rules govern the proceeding and the laws of Florida, as well as the terms of the Contracts, govern the dispute. (The parties waived the requirement that the arbitration hearing take place in Tampa.)

[9]. As noted above, Claimant sought preliminary injunctive relief and a writ of attachment to preserve the assets of both WS AG and the non-signatories. Respondent and the non-signatories opposed such relief and concurrently sought an order dismissing the non-signatories. As noted above in note 1, I

sent an indication of decision, by email, on March 15, 2018, both indicating that I intended to dismiss the non-signatories and that, with respect to the motion for preliminary relief, "an evidentiary hearing — to last no more than one day — is necessary." In response to my email, counsel agreed that a full decision (which was close to complete) should not be issued and that Claimant would proceed to a hearing on the merits (after a period of discovery) against Respondent WS AG only.

[10]. The Arbitrator conducted the final pre-hearing conference call with the parties on September 4, 2018 and made the following rulings during that conference call:
First, Claimant moved to exclude certain evidence — including any evidence relating to the defenses of "price protection," and delayed or defective product — on the basis of the *parol* evidence rule. I denied the motion, noting that the substantive implication of granting said motion would be to "gut" the defense of Respondent and that I was not willing to do so just before the hearing. I also noted that "Section 21 of the SMA Arbitration Rules states that the 'rules of evidence used in judicial proceedings need not be applied;' although the *parol* evidence rule is not viewed as an evidentiary rule, Section 21 reflects a leniency with respect to the admission of evidence that will be applied with respect to this issue." Finally, however, I reserved on the issue of whether the Contract should be interpreted and applied without any reference to *parol* or extrinsic evidence, particularly when such evidence is allegedly being introduced to contradict a clear term in the Contract.

Second, Claimant moved that the scope of the hearing not include any counter-claims based on the theories of "price protection," delayed product or defective product. I granted the motion to the extent of disallowing any counter-claims on these theories, but I did not preclude Respondent from litigating defenses based on such theories (subject to the above reservation regarding the applicability of the *parol* evidence rule) and from seeking offsets on these theories. The basis of this ruling was that Respondent never gave notice - prior to its pre-hearing memorandum, served on August 30, 2018 - that it was litigating any counter-claims or affirmatively seeking damages.

Third, Claimant moved to exclude the testimony (on behalf of WS AG) of Joginder Saini on the basis that Saini's testimony would be *parol* evidence and would otherwise be irrelevant. Respondent described Saini as a fact witness who would be testifying to the issue of the "price protection" he allegedly received from WS AG. I denied this motion, subject to Saini only testifying as a fact witness to his own experience and subject to the above reservation regarding the applicability of the *parol* evidence rule.

[11]. A two-day hearing was conducted on September 6 and 7, 2018. Five fact witnesses testified and 175 exhibits were introduced into the record.

[12]. I made the below-described evidentiary rulings during the course of the hearing, and thereafter, regarding WS AG's efforts to have the following used both to refresh recollection and also as evidence: a) contracts between the parties, other than those put at issue by Claimant, some of which allegedly were not executed by one or the other or both of the parties, as evidence of a course of dealing between the parties that was inconsistent with the terms of the Contracts relied upon by Claimant; b) certain other documents related to the just-described contracts being offered by Respondent, such as emails between the parties or others, that Respondent attached to a particular contract for purposes of the hearing, also as evidence of a course of dealing; and c) notes made by witness Christina Ganske on many of the just referenced contracts, written not in the normal course of business but for purposes of this hearing.

[13]. The following are the rulings I made with respect to each of the preceding:

1. During the hearing, I allowed into evidence the just referenced contracts between the parties that were not put at issue by Claimant. ECTUS objected only on the basis that these contracts constitute *parol* evidence as they were being introduced to contradict the terms of the Contracts upon which Claimants did sue. I reserved on the *parol* evidence objection, as I had prior to the hearing, and allowed the contracts offered by Respondent to be made part of the record and allowed Ms. Ganske to testify to them.

2. I also allowed into the record the documents that Respondent attached to the contracts that came from its files and related to the transaction reflected in the contract. These documents were arguably business records so Claimant did not object on the basis of hearsay, but objected on the basis that they were *parol* evidence. I reserved on the *parol* evidence objection and allowed the documents to be made part of the record and allowed Ms. Ganske to testify to them.

3. The contracts, and attachments, are WS AG Exhibits 1 to 73.

4. Many of the particular versions of the contracts referenced in the prior paragraphs did not have the signature of either one or the other or both parties. (Respondent argued that the absence of the signature reflected the fact that the course of dealing of the parties did not attach much importance to written contracts.) I allowed Claimant, after the hearing, to put into evidence other versions of the same contracts with the signatures of both parties. (I note below the significance of the fact that all these contracts did appear to have been executed.) These executed versions of contracts in WS AG Exhibits 1 to 73 are ECTUS Exhibits 30 to 84.

5. Many of the contracts referenced in paragraph 1 had notes on them written by Ms. Ganske for purposes of this hearing regarding the circumstances of the contract. Some of these notes consisted of dates taken from the contract itself or the documents attached to it; some of the notes reflected her own conclusions. In response to an objection by Claimant at the beginning of the hearing, I allowed the notes to be used by Ms. Ganske during her testimony to refresh her recollection, if she needed them for that purpose, and reserved on the objections to admissibility based on lack of foundation and hearsay. I also reserved, as also noted above with respect to the contracts and the other documents offered by Respondent, on an objection to the notes based on the notes being *parol* evidence.

6. Ms. Ganske used the notes to refresh her recollection with respect to some of the contracts. In order to shorten her testimony, as the two-day hearing was coming to an end, Respondent again moved to have the notes admitted as evidence of the course of dealing between the parties (and that these exhibits be reviewed by the Arbitrator independently of Ms. Ganske's testimony). Claimant objected on grounds of *parol* evidence, relevancy, and as being outside the scope of the arbitration; while Claimant also objected on grounds of hearsay, it acknowledged that the notes were not subject to a hearsay objection to the extent that they were "consistent with the backup" documentation they summarized. I ruled that the notes were admissible, subject to a) the understanding that her conclusions in the notes represent only her conclusions — in other words, that this is how she would testify had she the time to testify on all of the contracts Respondent offered — and b) the objection to the notes based on the notes being *parol* evidence, on which I reserved.

7. After the hearing, Respondent sought to have admitted additional notes and other documents in order to supplement the record regarding the alleged course of dealing between the parties. In response to an objection, by email dated September 23, 2018, I ruled that:

"At the end of the hearing on September 7, 2018, and after discussion among counsel and the Arbitrator, I formally closed the record, subject to only one exception — the submission by EuroChem [ECTUS] of the executed versions of the same contracts that had previously been submitted by WS AG.... Accordingly, because the record was closed, the exhibits newly submitted by WS AG are not admitted into the record.... (But, note, as discussed, one possible outcome of this matter is that a) I rule against [ECTUS] on the *parol* evidence issue and b) re-open the record for more evidence by WS AG regarding off-sets. I am not signaling that this is the likely outcome, but just affirming the off-the-record discussion we had on this issue towards the end of the September 7 session (as well as the meaning of the reference in the transcript that "all issues" should be briefed). As noted, it is also possible that I will rule that either [ECTUS] is correct on the *parol* evidence issue and/or WS AG had the opportunity to put in its necessary proof at the hearing on the offsets but did not do so.)"

[14]. Finally, on October 16, 2018, both parties submitted post-hearing memorandum. ECTUS objected to certain attachments to the Respondent's posthearing memorandum. I reserved on the objections pending further review. [2]

III. Analysis

A. *Parol* Evidence and Contractual Bar to Oral Amendments

[15]. ECTUS argues that it has a straightforward claim for breach of contract and account stated in that WS AG breached the Contracts by failing to pay for the goods delivered under the Contracts. It offers evidence, including the Contracts and invoices, to support its claim. According to ECTUS, the evidence offered by WS AG to refute these claims either is barred by the *parol* evidence rule or, if admitted or reviewed, does not undercut the enforceability of the Contracts as written or provide a defense to either liability or the damages sought, and is otherwise unreliable. [3]

[16]. WS AG contends that the parties' actual agreements were reflected in oral promises and confirming emails, not in the Contracts relied on by ECTUS, and that payments were made on a revolving account basis not pursuant to the written Contracts. In advancing this vision of the relationship between the parties, WS AG relies exclusively on extrinsic evidence, primarily purported oral promises made by Mr. Boasher, both before and after the execution of the Contracts on which ECTUS sues. A key promise, allegedly made numerous times by Mr. Boasher, was that he would "take care of' WS AG, meaning WS AG would receive a credit in the form of a discount on the price it would have to pay for product in future transactions to make up for (1) costs improperly incurred by WS AG as a result of past transactions (or pursuant to the Contracts on which ECTUS now sues)

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[2] I deny this objection and admit the referenced attachments.

[3] As noted herein, for the most part, the proffered evidence should be precluded from the record by the *parol* evidence rule and is therefore rejected as the basis for a decision herein. But, to the extent considered - and all of the testimony was heard by the Arbitrator and at least a sampling of the Respondent exhibits were reviewed by the Arbitrator - most of it, as also noted herein, is not sufficiently specific or reliable either to lead me to reopen the record to allow Respondent to introduce additional similar evidence or to base this decision upon it.

in which ECTUS either delivered defective product or delivered product either too early or too late or (2) costs improperly incurred by WS AG as a result of ECTUS, including through Ben-Trei, a company acquired by ECTUS, selling product to third-parties below prevailing market prices, thus undercutting WS AG in the marketplace.[4]

[17]. ECTUS is correct that, under both Florida common law and Florida's commercial code, the just described evidence is barred by the *parol* evidence rule to the extent such evidence is being introduced to contradict the terms of the Contracts. To the extent that there are exceptions to barring any consideration of such evidence, ECTUS is also correct that none of the exceptions apply here at least to the extent of allowing the extrinsic evidence to supersede the provisions of the Contracts (which is what Respondents seek for me to do).

[18]. I conclude that it is clear that under Florida common law "[a]s a general rule, when the terms and provisions of a contract are unambiguous and complete, *parol* evidence is not admissible to define or explain them." *NCP Lake Power, Inc. v. Fla. Power Corp.,* 781 So. 2d 531, 536 (Fla. Dist. Ct. App. 2001).[5] It follows that *parol* evidence is not admissible to contradict the unambiguous language of an agreement.

[19]. Similarly, it is clear that under section 672,202, of Florida's Uniform Commercial Code ("UCC"), which applies because the dispute involves the sale of goods, *parol* evidence is also excluded, subject to limited, albeit broader, exceptions to those found in the common law:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (1) By course of dealing or usage of trade (s. 671,205) or by course of performance (s. 672,208); and
>
> (2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
>
> Fla. Stat. § 672,202.

[20]. I conclude that Florida common law, thus, only allows consideration of *parol* evidence when a) there is an ambiguity in the contract as an aid to interpretation (but not to contradict unambiguous language), or b) if the contract is not complete (to fill in terms). I further conclude that neither of these bases for admission is applicable here. First, the Contracts are unambiguous, including with respect to the main issues in this proceeding — pricing, date and place of delivery, and the means of making a claim for defective product. Second, the Contracts are final and complete as they appear on their face to "contain all the essential terms of the agreement," including with respect to the

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[4] To be sure, Mr. Boasher denied such promises. The extrinsic evidence referenced in the text came primarily in the form of testimony by WS AG's principal, Kent Ganske. (*See* 9/7/18 Tr. at 487-496 (Mr. Ganske explaining the meaning of the promise to "take care of' WS AG).) Ms. Ganske sought to bolster this testimony by Mr. Ganske (her father).

[5] While, under the Florida common law, extrinsic evidence may be considered when the terms of a contract are highly technical, here, apart from references to different types of agricultural products, the terms of the contract do not involve highly technical terms and thus extrinsic evidence cannot be admitted on that ground, *Cf. NCP Lake Power, Inc.,* 781 So. 2d at 537 (extrinsic evidence admitted to interpret "technical terminology intended for electrical engineers and scientists").

preceding important business terms. *Duval Motors Co.* v. *Rogers,* 73 So. 3d 261, 266 (Fla. Dist. Ct. App. 2011). Furthermore, there are no competing written instruments regarding the same transactions that would cast doubt on the completeness of the agreements. [6]

[21]. As for the UCC, I conclude that the UCC permits consideration of *parol* evidence not only where there is an ambiguity but also, even if there is no ambiguity, a) to explain or supplement contract terms, and, in a limited manner, b) to determine if the contract is a "final expression of agreement" or a "complete and exclusive statement of the terms of the agreement." But, most importantly, while section 672,202(1) permits evidence of course of dealing, usage of trade, or course of performance as just noted to "explain or supplement" the provisions of a contract, it does not allow the introduction of such evidence to *contradict* the terms of a written instrument. As stated in section 671,205(5), when the "express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade" cannot reasonably be construed "as consistent with each other[,]" the express terms of the contract "prevail over course of performance, course of dealing, and usage of trade[…]" Likewise, while section 672,202(2) permits the introduction of evidence of *consistent* additional terms, it does not permit the introduction of inconsistent terms. [7] Thus, like the common law, the UCC does not permit consideration of *parol* evidence to contradict the terms of an agreement that is unambiguous, final, and complete; and, having concluded that the Contracts are unambiguous, final, and complete, I conclude the evidence WS AG seeks to introduce is not admissible under the UCC. [8]

[22]. Finally, that at least some of the alleged oral, contradictory promises were allegedly made after the execution of the Contracts must be analyzed as possibly constituting binding oral amendments to or waivers of rights under the Contracts. This is because the *parol* evidence rule applies to preclude extrinsic evidence of an agreement only "where such agreement was made before or at the time of the instrument in question," *Duval Motors Co., 73* So. 3d at 265, and therefore extrinsic evidence of events following entry into a contract is not necessarily precluded by the *parol* evidence rule.

[23]. However, I find that section XIII(C) of the Contracts states that amendments and waivers are not binding unless they are in writing and signed by the parties. Thus, any supposed additional, subsequent oral agreements between the parties purporting to modify the Contracts, or waive particular provisions, would be unenforceable for this reason. *See, e.g., Bradley* v. *Sanchez,* 943 So. 2d 218, 222 (Fla. Dist. Ct. App. 2006) (holding that a provision similar to section XIII(C) prevented

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[6] In addition, the Contracts contain merger clauses and, under the Florida common law, "a merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing *parol* evidence to vary or contradict the written terms." *Duval Motors Co.,* 73 So. 3d at 265 (citation omitted).

[7] Section 672,202(2) also does not permit the introduction of evidence of terms that, if they had been agreed upon, would have been reduced to writing. As noted elsewhere in this ruling, I find it incongruous that the "agreements" testified to by Mr. Ganske would not have been put into a writing - had such "agreements" been reached. Accordingly, the extrinsic evidence offered by Respondent is not admissible under this section of the UCC. *See* Fla. Stat. § 672,202, cmt. 3 ("If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.").

[8] The extrinsic evidence Respondent seeks to introduce - *e.g.,* industry practice of not using contracts, binding pre-contract promises relating to pricing and delivery terms, and assurances that ECTUS would "take care of" WS AG - is not admissible under the UCC framework set forth in the text for two reasons. First, the proffered evidence does not "explain" or "supplement" the terms of the Contracts - it totally contradicts those terms - and therefore cannot be introduced under either section 672,202(1) or (2). Second, the proffered extrinsic evidence supports the above findings that the contracts were intended to be final, complete and exclusive (thus making that evidence inadmissible under 672,202(2]). While WS AG's witnesses testified that the parties operated without regard for the Contracts and that the issuance of credits for future deals was a common course of dealing as between the parties and in the trade, I conclude that the weight of the evidence - which includes the hearing testimony, billing invoices, over seventy (70) contracts, plus amendments thereto, entered into over the course of the parties' business relationship, together with Mr. Boasher's denials of having committed ECTUS to "take care of' WS AG - establishes that the Contracts reflected the actual, final and complete transactions the parties into which the had entered.

oral modification or waiver of a contract term). [9]

[24]. Despite the general enforceability of contract provisions barring subsequent oral modifications, Florida common law "allows an oral modification of a written contract under circumstances of detrimental reliance even though the contract contains a provision prohibiting its alteration except in writing." *Fid. & Deposit Co. of Md.* v. *Tom Murphy Const. Co.,* 674 F.2d 880, 884-85 (11th Cir. 1982) (citation omitted); *see Prof'l Ins. Corp. v. Cahill,* 90 So. 2d 916, 918 (Fla. 1956) ("A written contract or agreement may be altered or modified by an oral agreement if the latter has been accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it.").

[25]. But there are several reasons why I find that WS AG has not met the preceding standard, including the lack of clear and unequivocal evidence of any mutual agreement to modify or waive the relevant provisions of the Contracts. *See Fid. & Deposit Co., 674* F.2d at 885. Second, even if the alleged promise of a future unspecified discount was made, it is too vague to constitute a mutual agreement.

[26]. Third, and finally, even if Mr. Boasher had promised Mr. Ganske that ECTUS would "take care of' WS AG on future deals, it would not "work a fraud" on WS AG to refuse to enforce such "agreements." Even assuming situations arose where WS AG suffered economic harm from ECTUS' conduct, this is not a situation where WS AG alleges detrimental reliance on the oral modification of one particular contract. It repeatedly entered into written contracts and was repeatedly held by ECTUS to the terms of those written contracts. Given how many times this situation allegedly occurred — executing written contracts, which ECTUS enforced - any reliance on purported oral modifications of any particular contract would not be reasonable. [10]

B. Fraudulent Inducement

[27]. In the alternative, WS AG argues that the Contracts are not enforceable because they were fraudulently induced in that Mr. Boasher "promised that WSAG would be charged the market price that the parties agreed to, not the price identified in the [nine] Documents that he requested [Mr. Ganske] sign, often 6-8 months after the product was delivered" and that Mr. Boasher told Mr. Ganske "not to worry about" signing the Contracts, because "he just needed documentation for his home office." Resp. Pre-Hearing Mem. at 13-14.

[28]. Under Florida law, "[t]he elements of a claim for fraudulent inducement are: (1) a false statement of

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[9] It also follows that to the extent the notes written by Ms. Ganske on exhibits WS AG 1 to 73 do not reflect claimed prior oral agreements, and instead reflect after-the-fact interpretations of the evidence, they are not barred by the *parol* evidence rule. (Certain of the notes would be barred by the *parol* evidence rule as they do reflect evidence of discussions had, or alleged agreements made, prior to the effective date of the Contracts and are being offered to contradict the terms of the Contracts.) Moreover, as noted, I over-ruled the suggestion by Claimant of an objection at the hearing based on the notes being hearsay; I ruled then that the notes could be admissible as reflecting Ms. Ganske's statement of mind. But, even if the notes constituted hearsay and were being offered for the truth of what was contained therein, hearsay is admissible under the applicable arbitration rules; however, upon review of those notes not barred by the *parol* evidence rule, I do not afford them much weight.

[10] I also note that under section 672,209(2) of the UCC, any modification of a contract for a sale of goods exceeding $500 must be made in writing. As explained in the commentary thereto, the writing requirement is "intended to protect against false allegations of oral modifications." Thus, evidence of any such oral modifications is irrelevant for this reason as well.

material fact; (2) the maker of the false statement knew or should have known of the falsity of the statement; (3) the maker intended that the false statement induce another's reliance; and (4) the other party justifiably relied on the false statement to its detriment." *Prieto v. Smook, Inc.,* 97 So. 3d 916, 917 (Fla. Dist. Ct. App. 2012) (citations omitted). "Generally, the fraudulent statement must concern a past or existing fact, But, if the person making the representation... makes a future promise to perform with no intent of doing so, the requirement of a past or present fact does not apply." *Gemini Inv'rs III, L.P. v. Nunez,* 78 So. 3d 94, 97 (Fla. Dist. Ct. App. 2012) (citation omitted).

[29]. I find that WS AG has not established a claim for fraudulent inducement. First, it has not conclusively established that Mr. Boasher made the statements attributed to him or that the latter had no intent to perform the Contracts as written. No admissions by Mr. Boasher were adduced nor does there appear to be any gaps in the course of conduct whereby contracts were executed and enforced. Second, WS AG has not established that it justifiably or reasonably relied on the alleged statements. Among other reasons that I have concluded that WS AG has not proven justifiable or reasonable reliance is that it is not reasonable for a businessperson, such as Mr. Ganske, to rely on the representation that a contract has no legal force or effect nor would it be reasonable (as also noted above) for WS AG to continue to enter into contracts, year after year, where the "real" amount continued to differ from the contract amount, particularly where there is history of ECTUS having previously enforced these written contract terms.

C. ECTUS Has Established Liability and Damages

[30]. Although I have concluded that WS AG has not been successful in rendering unenforceable the Contracts at issue, ECTUS still must prove that these Contracts were breached. I turn my attention to that analysis.

[31]. Under Florida law, "in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach." *Knowles* v. *C. I. T. Corp.,* 346 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977). ECTUS has established each of these elements.

[32]. First, the evidence shows that the parties entered into nine written contracts, dated December 9, 2015, March 30, 2016, May 3, 2016, June 7, 2016, August 24, 2016, and November 18, 2016, each of which is signed by both parties. (ECTUS Exs. 1-9; 9/6/18 Tr. at 53; 9/7/18 Tr. at 443-444.)

[33]. Second, ECTUS has established breach - the failure of WS AG to pay the amounts due for the product delivered — and damages - consisting of the amounts still owing under the contracts — has been established through evidence of ECTUS' compliance with the contracts, invoices from ECTUS requesting payment (ECTUS Exs. 10-23), the addendums to most of the Contracts (ECTUS Exs. 2-9), WS AG's entry into a payment schedule for repayment of over $21 million by May 31, 2017 (ECTUS Ex, 24), and other testimony at the hearing *(see, e.g.,* 9/6/18 Tr. at 17-21; 63; 65-67; 232; 235-237).

[34]. WS AG's arguments that ECTUS failed to comply with the terms of the Contracts are unsubstantiated. As noted above, there is no dispute that ECTUS provided the goods called for by each Contract. Instead, WS AG claims that ECTUS failed to abide by the Contracts by not delivering the goods on

schedule or by delivering defective product. Neither claim is supported by the record (including evidence that Respondent and that was considered notwithstanding the *parol* evidence rule).

[35]. With regard to timely delivery, under section II of the Contracts, the "Place of Delivery" is New Orleans, Louisiana, and the "date of delivery" is the date on which ECTUS "hands the Goods over to the carrier at the Place of Delivery." The record does not establish that ECTUS failed to make delivery in New Orleans by the time specified in the Contracts. Rather, WS AG presented evidence indicating that it did not receive the goods from the barge carriers by the date specified for delivery to New Orleans; under the terms of the Contracts, even if the preceding is true, it is not a breach. [11]

[36]. As to defective product, under section IV of the Contracts, there is a procedure for WS AG to present "claims relating to the quality of the Goods," including specifics regarding how a claim should be presented. Furthermore, section XI contemplates that the parties first attempt to resolve disputes as to the quality of the goods pursuant to section IV, followed by negotiation, and, if no agreement is reached, there is to be arbitration.

[37]. The record - including testimony by Mr. Ganske - does not allow me to find that any goods delivered under the Contracts were shown to be defective in conformity with section IV. WS AG Exhibits 74 and 75 do not reveal whether the product at issue came from ECTUS; and WS AG did not present any documentary evidence indicating that these emails and photos were forwarded to ECTUS as a claim under section IV or, if they were, what happened next (including whether WS AG sought to enforce its rights through arbitration). WS AG Exhibit 76 does not relate to any of the nine Contracts on which ECTUS asserts a claim; and, as with the other exhibits, WS AG has not provided documentary evidence showing that these photos were forwarded to ECTUS or, if they were, what happened next. (In contrast, WS AG Exs. 82A and 82B show that in 2017 WS AG made a written claim relating to the quality of the goods sold by ECTUS; ECTUS sent an inspector to inspect the product; and ECTUS thereafter agreed to a $10 per short ton discount).

[38]. Finally, although WS AG claims that the parties operated on a revolving account basis, ECTUS has established that the invoices it introduced as exhibits were tied to the specific barge shipments under the Contracts (ECTUS Exs. 10-23) and that payments made by WS AG were applied to specific invoices (9/6/18 Tr. at 230-231), and thus I find that ECTUS has established the fact of damages relating from the specific Contracts at issue. [12]

D. WS-AG Is Not Entitled to Off-Sets

[39]. WS AG has not established a claim for off-sets under the Contracts. First, for the reasons discussed

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[11] Mr. Ganske's testimony that he and Mr. Boasher "would discuss when the barges would arrive" in Iowa, Illinois, or Minnesota prior to the time the contracts were entered into, is *parol* evidence which cannot alter the express terms of the contracts. Likewise, the express terms of the contract regarding delivery cannot be contradicted by Mr. Ganske's evidence about industry practice. I also note that evidence was submitted by Claimant showing that industry practice is for the date of delivery to be when the goods are handed over to the barge operator. (ECTUS Ex. 29.)

[12] Alternatively, ECTUS has established a claim for account stated. In addition to the nine Contracts, ECTUS submitted email correspondence, establishing that on or about November 16, 2016, WS AG agreed to a payment schedule with ECTUS for repayment of $21 million by May 31, 2017. (ECTUS Ex. 24, 9/6/18 Tr. at 232.) Thereafter, addendums to the Contracts were executed extending the payment due dates to match the payment schedule in ECTUS Exhibit 24. (*See also* ECTUS Exs. 25, 27.) The evidence also shows that while WS AG made some payments, it did not make any payments after March 2017, leaving a balance of $14,283,519.42. (9/6/18 Tr. at 235.)

throughout this Partial Final Award, any claim for an entitlement to off-sets based on the purported promise from Mr. Boasher to "take care of" WSAG (or to provide "price protection") fails for lack of proof. Second, WS AG cannot seek off-sets based on harms caused as a result of ECTUS' performance on prior contracts because the combined effect of the merger clauses in the Contracts and the lack of reference in the Contracts to WS AG's entitlement to off-sets based on prior contracts is to preclude claims for off-sets as a matter of contract. Third, for the reasons just discussed, WS AG's evidence does not show either late or defective delivery. Fourth, the proof submitted to establish and quantify its damages is highly general and, for the reasons stated on pages 9 through 13 of Claimant's Post-Hearing Memorandum, often erroneous.

[40]. One notable example of lack of sufficient proof from WS AG as to any offsets is that WS AG counts as "losses" the amount of additional product purchased from another supplier based on the alleged late delivery of product; however, WS AG's calculation does not take into account that it later sold the product originally delivered by ECTUS. Likewise, when it comes to claims of losses due to defective product, WS AG failed to produce evidence that it suffered concrete losses (such as by not being able to sell the product or that it had to sell the product for a lower price). There was some evidence of the need to use a "lump buster" prior to WS AG's delivery of product to its customers, which may have caused WS AG to incur storage and certain other costs, but such costs were not quantified.

[41]. Finally, apart from the bars on both *parol* evidence and oral amendments to the Contracts, the purported assurances that ECTUS would "take care of" WS AG with respect to future deals to make up for past losses is too vague to be treated as a binding obligation to cure the past harms WS AG alleges it incurred during the course of the parties' business relationship, and thus no off-sets are due to WS AG on this basis. Indeed, ECTUS could not have committed to credit WS AG any specific amount because WS AG did not attempt to quantify its damages until the hearing. WS AG could not have had a reasonable basis to believe it would ever receive the credits because there was no certainty that it would continue to contract with ECTUS or that Mr. Boasher would remain in a position to ensure that ECTUS would carry out a promise made orally and not included in the parties' written contracts. (*Cf* ECTUS 1-9, 30-75, 76-77, 79-81 at § C" Ex. 75, 78, 82 at § VI. C (limiting the parties' liability for direct economic loss or damage).) While it is plausible that the parties' relationship included representations not reflected in a writing, and even that Mr. Ganske was told that Mr. Boasher would "take care of' WS AG, it is a whole other matter to conclude that those assurances were intended to be binding or that they are sufficiently concrete to be enforceable. The Arbitrator concludes that they are not.

E. ECTUS Is Not Entitled to Liquidated Damages

[42]. ECTUS seeks liquidated damages of $1,428,351.94. The basis for this request is the $14,283,519.42 owed under the Contracts, and section X(A)(1) of the Contracts, which states that "the parties agree to a liquidated damages amount of 10 percent of each invoice from Buyer that is not paid in time. The parties recognize this liquidated damages amount represents a reasonable determination of the amount of damages that Seller will suffer and is not a penalty."

[43]. While this clause may suggest a blanket entitlement to liquidated damages of 10 percent for late-

paid invoices, the Arbitrator denies this relief for two principle reasons. First, ECTUS has not shown that the 10 percent sought is reasonable, as applied to the facts of this case. While there are general references in the record to harm to ECTUS by virtue of the non-payment of invoices, or delays in payment, there is no, or at least insufficient, specificity as to even the nature of such harm. As such, the Arbitrator cannot ascertain whether, as applied, an award of liquidated damages is a reasonable approximation of damages or is an illegal penalty.

[44]. Second, while the Arbitrator is unwilling to reduce the amount owed by WS AG due to the claimed off-set amounts, it is plausible that WS AG incurred certain costs, such as the cost of storing early product or damage to a "lump buster," and that WS AG believed it would receive discounts on future product based on the parties' relationship. Thus, while there might not be a basis for enforcing the preceding discounts as a contract, or as a right to off-set under one of the Contracts, the denial of liquidated damages also serves to acknowledge the complexity of the parties' dealings.

[45]. All other arguments or claims by the parties have been considered and are rejected.

IV. Conclusion and Partial Final Award

[46]. Based upon the above analysis, the undersigned Arbitrator makes the following Partial Final Award:
1. Claimant has established liability against WS AG on Claimant's claim for breach of contract under the nine Contracts and, alternatively, under Claimant's claim for account stated;

2. Claimant's request for liquidated damages is denied;

3. Claimant is entitled to compensatory damages of $14,283,519.42;

4. Claimant is entitled to pre-judgment interest on the $14,283,519.42. This pre-judgment interest is to be calculated pursuant to sections 687.01 and 55.03 of the Florida Statutes, at the statutory interest rate of 6.09%, commencing from June 1, 2017 until the effective date of this Partial Final Award. Claimant is to provide the Arbitrator with a calculation of how much interest accrues each day. Claimant is also entitled to said prejudgment interest from the effective date of this Partial Final Award until the date of confirmation of what will be a Final Award or until the date of payment, whichever is sooner;

5. If Claimant wishes to seek reimbursement of its attorneys' fees and costs, it shall submit a brief, on or before fourteen (14) calendar days after the actual issuance by JAMS of this Partial Final Award, explaining the basis of its entitlement to same, setting forth the specific amounts claimed and explaining why said amount is reasonable. Respondent may respond (both to the request for reimbursement of Claimant's attorneys' fees and costs, and to Claimant's calculation of pre-judgment interest, on or before fourteen (14) calendar days after the service on it by Claimant of the just described submission. No reply shall be filed unless leave is given to Claimant to file a reply, nor shall oral argument be had unless requested by the Arbitrator; and

6. All other claims, by either party, are denied.