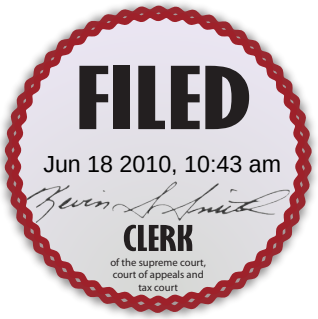

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IN THE
COURT OF APPEALS OF INDIANA

FK, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 56A05-0911-CV-654
	)	
SEE USA, LLC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge
Cause No. 56D01-0601-PL-1

June 18, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

FK, Inc., appeals the trial court's grant of summary judgment in favor of See USA, LLC. We affirm in part, reverse in part, and remand.

Issues

The issues before us are:

I. whether the trial court properly awarded $82,514.50 in damages and $85,778.35 in attorney fees to See USA in connection with its check fraud claim against FK; and

II. whether the trial court properly awarded $204,499.58 in alleged lost profits to See USA in connection with its breach of contract claim against FK.

Facts

See USA, an Indiana company, is a "qualified jobber" of Shell Oil Company ("Shell") that provides Shell gasoline and signage to gas stations. App. p. 16. FK is an Indiana company that owns two gas stations: one in Watseka, Illinois, and one in Kentland, Indiana. On December 16, 2003, See USA and FK entered into an "Open Dealer Supply and Sales Agreement" with respect to the Watseka gas station, which was to last for three years. App. p. 41. On August 6, 2004, the parties entered into a similar agreement for the Kentland gas station, which was to last for five years. Both contracts contained the following language:

> See USA hereby grants to Dealer [FK] the right to use SHELL'S identifications to identify Dealer's Station as a "Shell" station and to identify and advertise at Dealer's Station for sale the Petroleum Products and other Shell

> products Dealer may purchase from See USA for resale. Nothing herein contained shall obligate Dealer to make any purchases from See USA. However, Dealer shall not sell, under SHELL'S identifications, any products other than See USA's products, or any mixture or adulteration of any of the See USA products with each other or with any other product or material. If Dealer ceases to sell the Petroleum Products or uses SHELL'S identifications in a manner which deceives or causes a likelihood of confusion to the motoring public, or if this Agreement terminates for any reason, Dealer shall immediately and completely discontinue the use of SHELL'S identifications.

App. pp. 16, 41.[1] Both contracts listed the maximum amount of gasoline See USA could deliver to FK's stations in any given month, but did not list a minimum amount FK must purchase.

There were two ways in which FK paid for fuel deliveries to its stations by See USA. First, FK accepted Shell credit cards at the stations. Shell in turn would forward the credit card receipts to See USA, which then credited FK's ongoing account in the amount of those receipts. Additionally, See USA would invoice FK for fuel deliveries, and FK would approve automated clearing house ("ACH") electronic debits from its account for the amount of those invoices. Beginning in 2004, a number of FK's ACH debits to See USA were returned for insufficient funds. After this began occurring, See

[1] Curiously, in its brief See USA includes a block quote of this contract language, except that it deleted the crucial sentence, "Nothing herein contained shall obligate Dealer to make any purchases from See USA." Additionally, See USA includes the following sentence in its block quote, and the end of the language we have quoted: "Under the terms of the Watseka Agreement, any petroleum products sold by FK must be provided by See USA." Appellee's Br. p. 8. Because we do not automatically make nefarious assumptions, we will assume this was a formatting error, as this language appears nowhere in the contract. Rather, it is See USA's interpretation or paraphrasing of the contract.

USA's president, Roger Distler, took personal responsibility for approving any fuel delivery to FK's stations.

See USA last delivered fuel to the Kentland station in May 2005; it did not stop delivering fuel to the Watseka station at that time. FK arranged for a different fuel supplier for the Kentland station. The Kentland station continued accepting Shell credit cards after this date, and Shell forwarded the receipts on to See USA. FK contends that this resulted in See USA improperly receiving funds totaling $89,664.10 for fuel purchases for fuel that actually was supplied by a different company.

On January 24, 2006, FK filed suit against See USA to recover these funds that it alleged See USA had converted, and See USA filed an answer on February 23, 2006. See USA was still delivering fuel to the Watseka station at this time. On February 26 and March 1, 2006, See USA made fuel deliveries to the Watseka station; See USA issued an invoice to FK for these deliveries in the amount of $12,362.55. On March 3, 5, and 8, 2006, See USA made fuel deliveries to the Watseka station; See USA issued an invoice to FK for these deliveries in the amount of $28,894.70. At some point, FK authorized ACH withdrawals from its account for those amounts, but later issued stop payment orders for those withdrawals. See USA made no more fuel deliveries to the Watseka station.

On April 26, 2006, See USA filed an amended answer and included a counterclaim against FK. The counterclaim alleged that FK had breached the contracts for both the Watseka and Kentland stations and sought lost profits for those alleged

breaches. Additionally, the counterclaim alleged that FK had committed check fraud under Indiana Code Section 35-43-5-12 with respect to its stop payment orders for the last two fuel purchase invoices at the Watseka station; the check fraud claim sought treble damages and attorney fees. The contracts between the parties were silent as to attorney fees in the event of a breach.

In the ensuing litigation, See USA filed a motion to compel FK to respond to its discovery requests. After the trial court granted the motion, FK still failed to file the necessary discovery responses. On September 14, 2007, as a sanction the trial court entered default judgment against FK on both its complaint and See USA's counterclaim. On July 24, 2008, the trial court agreed to set aside the default judgment. In doing so, it sanctioned FK by requiring it to pay $14,063.06 in attorney fees to See USA. It also entered the following facts that it deemed established:

> 1. FK cannot deny that on December 16, 2003, FK and See USA entered into a binding contract for the sale and delivery of fuel products for a three (3) year term for FK's retail fuel station located at 1150 East Walnut, Watseka, Illinois ("Watseka Supply Agreement");
>
> 2. FK cannot deny that FK received fuel shipments from See USA on or about February 26, 2006 and March 1, 2006 at FK's Watseka, Illinois property (the "Watseka Shell");
>
> 3. FK cannot dispute the accuracy of the invoices submitted to FK for the February 26, 2006 and March 1, 2006 fuel deliveries;
>
> 4. FK cannot dispute the accuracy and/or validity of the notification See USA provided to FK for the required electronic, Automated Clearing House ("ACH") Draft,

payment by FK's bank to See USA in the amount of $12,362.55 for previous specific fuel shipments;

5. FK cannot deny that FK authorized an ACH Draft payment to See USA in the amount of $12,362.55 for the February 26, 2006 and March 1, 2006 fuel shipments;

6. FK cannot deny that FK, subsequent to the fuel deliveries and prior to the transfer of payment to See USA's bank, issued a stop payment order to its bank on the $12,362.55;

7. FK cannot deny that FK received fuel shipments from See USA on or about March 3, March 5, and March 8, 2006 at the Watseka Shell;

8. FK cannot dispute the accuracy of the invoices See USA sent to FK for the March 3, March 5, and March 8, 2006 fuel deliveries;

9. FK cannot dispute the accuracy and/or validity of the notification See USA provided to FK for the ACH Draft payment by FK's bank to See USA in the amount of $28,894.70 for the March 3, March 5, and March 8, 2006 fuel shipments;

10. FK cannot deny that FK authorized an ACH payment to See USA in the amount of $28,894.70 for the March 3, March 5, and March 8, 2006 fuel shipments;

11. FK cannot deny that FK, subsequent to the fuel deliveries and prior to the transfer of payment to See USA's bank, FK issued a stop payment order to its bank for the $28,894.70;

12. FK cannot deny that FK sold the fuel delivered to the Watseka Shell on February 26, 2006 and March 1, March 3, March 5, and March 8, 2006, to the general public and has not offered or made alternate payment to See USA;

> 13. FK cannot deny that See USA notified FK, on or about March 21, 2006, that FK's authorization to its bank for payment had been blocked by subsequent stop payment orders;
>
> 14. FK cannot deny that FK was aware of the stop payment orders on the February 26, 2006 and March 1, March 3, March 5, and March 8, 2006 fuel shipments and that FK knew that See USA was not paid for these fuel shipments;
>
> 15. FK cannot deny that FK has not purchased fuel from See USA for the Watseka Shell since March, 2006;
>
> 16. FK cannot deny that FK has sold non-Shell Oil Company fuel at the Watseka Shell since March, 2006;
>
> 17. FK cannot deny that on August 6, 2004, FK and See USA entered into an Open Dealer Supply and Sales Agreement ("Kentland Supply Agreement"), wherein FK agreed to purchase from See USA certain petroleum products for five (5) years;
>
> 18. FK cannot deny that on numerous occasions FK failed to make timely payments for petroleum products supplied by See USA to FK at the Kentland Truck Stop location;
>
> 19. FK cannot deny that FK last purchased fuel from See USA for the Kentland property in May 2005;
>
> 20. FK cannot deny that the Kentland Truck Stop is a Shell Oil Company branded retail fuel station and that FK has failed to return to See USA certain Shell branded signage as required by the Kentland Supply Agreement . . . .

App. pp. 94-95. FK paid the attorney fees as awarded to See USA and did not attempt an interlocutory appeal from this order.

On July 1, 2009, See USA filed a motion for summary judgment on its counterclaim against FK. On September 29, 2009, the same date as the hearing on See

USA's summary judgment motion, FK filed its own motion for summary judgment on its conversion claims against See USA. On October 15, 2009, the trial court entered summary judgment in favor of See USA on its counterclaims. The trial court awarded a judgment against FK in the amount of $41,257.25, representing the actual amount of the unpaid fuel invoices from February and March 2006, plus interest at the contract rate of twelve percent, which came to $20,736.95. The trial court also entered a judgment against FK in the amount of $82,514.50, which is a doubling of the base invoice amount and which, when added to the base amount, represented a trebling of the damages to $123,771.75 because of the trial court's conclusion that FK committed check fraud. It also awarded See USA lost profits of $10,605.90 with respect to the Watseka gas station, and $193,893.68 with respect to the Kentland gas station. Those amounts represented an approximation based on the average monthly fuel delivered to each station in the past, multiplied by the number of months left on each contract and the average profit margin on each gallon of fuel. Finally, the trial court awarded attorney fees to See USA in the amount of $85,778.35. FK now appeals the granting of See USA' summary judgment motion; FK's summary judgment motion is still pending.

Analysis

We review de novo a grant of summary judgment.[2] Williams v. Tharp, 914 N.E.2d 756, 761 (Ind. 2009). All reasonable inferences must be drawn in favor of FK as the non-moving party, and summary judgment is appropriate only "'if the designated

[2] FK has appealed the present summary judgment ruling as an interlocutory appeal as of right under Indiana Appellate Rule 14(A)(1), because it ordered the payment of money.

evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" See id. (quoting Ind. Trial Rule 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, . . . or if the undisputed material facts support conflicting reasonable inferences . . . ." Id. If See USA has demonstrated there are no genuine issues of fact as to a determinative issue, they are entitled to summary judgment unless FK has come forward with contrary evidence showing a triable issue for the trier of fact. See id. at 761-62.

As See USA notes, appellate opinions sometimes also state that a summary judgment ruling is presumed to be valid and an appellant bears the burden of demonstrating that the ruling was erroneous. See id. at 762. We previously have held, however, that in light of the fact that we review a grant of summary judgment de novo, "such burden is largely symbolic and nominal." Beta Steel v. Rust, 830 N.E.2d 62, 68 (Ind. Ct. App. 2005). "All trial court rulings should be presumed to be correct, but in the context of summary judgment proceedings we will not hesitate to reverse a trial court's ruling if it has misconstrued or misapplied the law, failed to consider material factual disputes, or improperly considered immaterial factual disputes." Id.

Before turning to the substance of the arguments, we first address See USA's repeated contention in its brief that FK is somehow attempting a belated, improper interlocutory appeal from the trial court's sanctions order of July 24, 2008 and the deemed admitted facts listed in that order. See USA included this order in its summary

judgment designation of evidence. We see no indication that FK is attempting an improper appeal from the order. It merely is arguing that even in light of the deemed admitted facts and other designated evidence, those facts fail to establish as a matter of law that FK committed check fraud or that See USA is entitled to lost profits. FK is not challenging the substance of the deemed admitted facts or the manner in which they were entered.

I. Check Fraud

FK first challenges the trial court's conclusion that it committed check fraud as a matter of law when it stopped the ACH electronic debit payments for the last five fuel deliveries See USA made to the Watseka gas station. Indiana Code Section 34-24-3-1 permits victims of certain crimes, including check fraud, to bring a civil action against the person who caused the loss and seek, among other things, treble damages and attorney fees. The check fraud statute provides in part:

> A person who knowingly or intentionally obtains property, through a scheme or artifice, with intent to defraud . . . by issuing or delivering a check, a draft, an electronic debit, or an order on a financial institution . . . knowing that the check, draft, order, or electronic debit will not be paid or honored by the financial institution upon presentment in the usual course of business . . . commits check fraud . . . .

Ind. Code § 35-43-5-12(b)(1)(A).

This court has adopted the following definition of "defraud" in the context of the check fraud statute:

> "Fraud," "fraudulent," "deceit," and "defraud" means a misrepresentation of a material fact, a promise or representation or prediction not made honestly or in good faith, or the failure to disclose a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Childers v. State, 813 N.E.2d 432, 435 (Ind. Ct. App. 2004) (quoting I.C. § 23-2-1-1(d) (see now I.C. § 23-19-1-2(9))). Intent to defraud may be established, even if the defrauded party is only temporarily deprived of funds, so as long as there is evidence that the deprivation was accomplished through material misrepresentation or deception. See id.

See USA posits that the deemed admitted facts from the July 24, 2008 order, together with the affidavit of its president, Distler, conclusively establishes the following timeline: that FK issued authorizations for ACH debits before the fuel shipments were made, that Distler relied on those authorizations in allowing the fuel to be shipped, and that FK then issued stop payment orders after the fuel was delivered. In fact, the plain language of the deemed admitted facts is only that FK authorized ACH payments for the February 26 and March 1, 3, 5, and 8, 2006 fuel shipments; it does not say when such authorization occurred. To the extent it suggests otherwise, See USA has misrepresented the record.

Distler, in his affidavit, does indicate that FK authorized ACH payments in the amounts of $12,362.55 and $28,894.70 for fuel "to be delivered" on February 26 and March 1, 3, 5, and 8, 2006. App. p. 127. He also states that See USA relied on those

authorizations before delivering the fuel to the Watseka Shell. However, Distler's affidavit also references two exhibits, "ACH Withdrawal Notification" forms sent by See USA to FK, that he claims supports those assertions regarding the pre-shipment authorizations. Id. at 136, 147. Instead, those exhibits contradict his assertions. The "Withdrawal Notification" for the $12,362.55 payment is dated March 3, 2006, after the deliveries of February 26 and March 1, 2006, that the payment was intended to cover. Moreover, the $12,362.55 payment amount was calculated only after deductions had been made from the total invoice, on February 28 and March 2, 2006, for Shell credit card receipts. In other words, it appears FK and See USA did not know ahead of time what the total amount of the invoice for these shipments would be until after they had been made and credit for Shell credit card receipts was applied. The "Withdrawal Notification" for the $28,894.70 payment suffers from exactly the same timing conundrums. It is dated March 9, 2009, after the last shipment on March 8, and again references a credit for credit card receipts that was applied on March 9.

In sum, despite Distler's affidavit, there is a genuine issue of material fact raised by See USA's own designated evidence regarding whether FK authorized the ACH debit withdrawals before or after See USA delivered the fuel. It might be assumed that FK made some kind of representation to See USA that it would pay for the fuel deliveries, but there is a considerable difference for purposes of check fraud between making such a representation and actually issuing a check or authorizing an ACH debit before shipment occurred. The check fraud statute requires the acquisition of property through "a scheme

or artifice" that includes the issuance of a check, draft, electronic debit, or payment order. See I.C. § 35-43-5-12(b)(1)(A). This clearly goes beyond merely representing that such a debit will be issued or authorized in the future. Indeed, "[a]ctual fraud may not be based on representations of future conduct, on broken promises, or on representations of existing intent that are not executed." Bilimoria Computer Systems, LLC v. America Online, Inc., 829 N.E.2d 150, 155 (Ind. Ct. App. 2005); cf. also National Fleet Supply, Inc. v. Fairchild, 450 N.E.2d 1015, 1019 (Ind. Ct. App. 1983) (holding that simple refusal to pay a debt will not support finding of conversion and award of treble damages), abrogated on other grounds by Mitchell v. Mitchell, 695 N.E.2d 920, 923 (Ind. 1998).

We conclude the designated evidence does not support the conclusion that FK committed check fraud under Indiana Code Section 35-43-5-12 as a matter of law. As such, we reverse $82,514.50 of the trial court's judgment against FK on the check fraud claim, which represented a trebling of the base amount of the unpaid invoices, or $41,257.25. FK does not appear to challenge the awarding of the base amount plus interest in the amount of $20,736.95, and that part of the judgment remains intact. Additionally, the only basis upon which See USA sought and obtained attorney fees from FK was because of its alleged commission of check fraud. As such, the attorney fee award of $85,778.35 also must be vacated.

II. Lost Profits

We now address FK's contention that the trial court erred in awarding lost profit damages to See USA based on FK's ceasing to buy fuel from See USA for its Watseka

and Kentland gas stations before the end date of the parties' contracts. FK contends that the contracts were unenforceable "indefinite quantities" contracts and, thus, See USA cannot be awarded lost profits based upon FK's decision to stop buying fuel from See USA. See USA does not directly respond to FK's contract interpretation arguments in its brief. Rather, it relies upon the deemed admitted facts from the July 2008 order as conclusively establishing that it is entitled to collect lost profits from FK.

Again, See USA is overstating the effect of the deemed admitted facts. We read those facts as establishing only that FK entered into fuel purchase contracts with See USA for set periods of time and that FK stopped purchasing fuel from See USA before the end dates of the contracts. We do not believe those facts conclusively establish that See USA is entitled to collect lost profits from FK or answer the question of what type of contracts the parties entered into.

If the terms of a contract are unambiguous, they will be given their plain and ordinary meaning. Arrotin Plastic Materials of Indiana v. Wilmington Paper Corp., 865 N.E.2d 1039, 1041 (Ind. Ct. App. 2007). Clear and unambiguous contract terms are conclusive, and we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id. A contract is ambiguous only if reasonable persons could find its terms susceptible to more than one interpretation. Id. "If the language of a contract is unambiguous, the intent of the parties is determined from the four corners of the document." Id.

By contrast, if an instrument is ambiguous, "all relevant evidence may properly be considered in resolving the ambiguity." University of Southern Indiana Found. v. Baker, 843 N.E.2d 528, 535 (Ind. 2006).[3] If a contract is ambiguous, it should be construed against the party who furnished and drafted the agreement. Keithley's Auction Serv. v. Children of Jesse Wright, 579 N.E.2d 657, 659 (Ind. Ct. App. 1991). "If the contract is ambiguous or uncertain in its terms and if the meaning of the contract is to be determined by extrinsic evidence, its construction is a matter for the factfinder." First Fed. Sav. Bank of Indiana v. Key Mkts., Inc., 559 N.E.2d 600, 604 (Ind. 1990).

We believe the key question in this case is whether the contracts at issue were valid and enforceable exclusive requirements contracts or unenforceable indefinite quantities contracts. We have described the difference between the two types of contracts as follows:

> A requirements contract is one in which the purchaser agrees to buy all of its needs of a specified material exclusively from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract. On the other hand, an indefinite quantities contract is a contract under which the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from the seller. A requirements contract differs from an indefinite quantities contract in that, under a requirements contract the buyer agrees to turn exclusively to the seller to purchase his requirements as they develop.

[3] Baker specifically concerned trust instruments. Its holding abandoning the distinction between patent and latent ambiguities has been applied in the context of other written instruments, including contracts. See Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). Before Baker, extrinsic evidence could only be used to address latent ambiguities in written instruments, i.e. ambiguities that arose only by reference to extrinsic facts, and not patent ambiguities, which arose from the language of the instrument itself. Baker, 843 N.E.2d at 534.

> However, in an indefinite quantities contract, even if the buyer needs the commodity in question, he is not obligated to purchase it from the seller. Thus, an indefinite quantities contract, without at least the requirement that the buyer purchase a guaranteed minimum quantity from the seller, is illusory and unenforceable.

Indiana-American Water Co., Inc. v. Town of Seelyville, 698 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1998) (citations omitted); see also In re Anchor Glass Container Corp., 345 B.R. 765, 769-70 (M.D. Fla. 2006) (noting "a true requirements contract exists where the seller agrees to supply all of the buyer's requirements" but that "where one party's promised performance depends upon that party's wish, will or desire or where one party is free to perform or withdraw at its unrestricted pleasure the promise of that party is illusory and is not sufficient consideration for the other party's promise.").

A buyer's promise to purchase exclusively from the seller may be implied, rather than express, if it is apparent that the parties intended there to be a binding exclusive requirements contract. Id. at 1260. We also note that Section 2-306 of the Uniform Commercial Code provides:

> (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
>
> (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best

> efforts to supply the goods and by the buyer to use best efforts to promote their sale.

I.C. § 26-1-2-306.

Essentially, by awarding See USA damages for lost profits, the trial court implicitly concluded that the contracts were exclusive requirements contracts as a matter of law. We believe that is a premature conclusion. Instead, we conclude the contracts here are ambiguous, particularly given the following two sentences: "Nothing herein contained shall obligate Dealer to make any purchases from See USA. However, Dealer shall not sell, under SHELL'S identifications, any products other than See USA's products, or any mixture or adulteration of any of the See USA products with each other or with any other product or material." App. pp. 16, 41.

There is considerable tension in the contract language, whereby in one sentence it expressly states that FK is under no obligation to buy anything from See USA, and in the next sentence it expressly states that FK can only sell See USA petroleum products under Shell signage. In other words, the first sentence is indicative of an unenforceable indefinite quantities contract, as it does not obligate any performance by FK. The next sentence, on the other hand, is indicative of an exclusive requirements contract, at least insofar as it affects FK wanting to operate Shell stations.[4] That is, in conjunction with

[4] It appears See USA is not the exclusive wholesaler of Shell gasoline. Judging by comments made by See USA's attorney at the summary judgment hearing, other wholesale companies exist that sell Shell gasoline to gas stations, and FK had obtained an alternate source of Shell gasoline from one such company for the Watseka gas station. The attorney also commented that the Kentland gas station had been "de-branded," however, apparently meaning it was no longer operated as a Shell station. Tr. p. 12.

Section 2-306 of the UCC, the contracts might be read as imposing a good faith obligation upon FK to operate Shell stations at both the Watseka and Kentland locations, with the fuel for those stations having to be provided by See USA for the stated period of the contracts.

Here, no extrinsic evidence was presented that might help shed light upon the parties' intentions when entering into these contracts. "Extrinsic evidence is evidence relating to a contract but not appearing on the face of the contract because it comes from other sources, such as statements between the parties or the circumstances surrounding the agreement." CWE Concrete Const., Inc. v. First Nat'l Bank, 814 N.E.2d 720, 724 (Ind. Ct. App. 2004), trans. denied. It is not even definitively clear who drafted these contracts so as to know against whom any ambiguity should be resolved.[5] We conclude it is necessary to reverse the grant of summary judgment in See USA's favor on the lost profits issue and to remand for further proceedings at which a record regarding extrinsic evidence could be developed. The present record is insufficient to allow us to definitively resolve what type of contracts the parties entered into. If the contracts are indefinite quantities contract, See USA cannot collect any damages for their alleged breach by RK because they were illusory and unenforceable. If the contracts are requirements contracts, See USA may be entitled to damages for their breach; we need not address at this time whether lost profits would be an appropriate measure of damages or whether See USA presented sufficient evidence to support such an award.

[5] It appears that See USA was the primary drafter of the contracts, although the record does not show whether FK contributed any language to them.

Conclusion

We reverse the trial court's award of $82,514.50 in damages and $85,778.35 in attorney fees to See USA on its claim that FK committed check fraud. We also reverse the trial court's award of $204,499.58 in lost profits damages to See USA on its breach of contract claim against FK. The designated evidence was inadequate to support granting summary judgment to See USA on either issue, and we remand for further proceedings consistent with this opinion.[6]

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MAY, J., concur.

[6] As mentioned, FK does not challenge the award of $41,257.25 plus interest of $20,736.95 to See USA on the unpaid fuel delivery invoices. It also does not challenge an award to See USA of $702.52 associated with various "incentives and recaptures" for the Kentland gas station. App. p.8. Those awards remain intact.