**IN THE SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
*ASSOCIATE JUDGE*

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET
WILMINGTON, DELAWARE 19801
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November 23, 2005

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**Re:** ***Premiere Packaging, Inc., et al. v. PVC Container Corp. v. Custom Bottle, Inc., et al.***
**C.A. No. 01C-03-210-JRS**
*Upon Consideration of Third Party Defendant Custom Bottle, Inc.'s Motion for Summary Judgment.* **DENIED.**

Dear Counsel:

I have now had an opportunity carefully to consider Third Party Defendant, Custom Bottle, Inc.'s ("Custom Bottle") motion for summary judgment and Third Party Plaintiff, PVC Container Corp.'s ("PVC") response thereto. I have concluded that the motion must be DENIED.

While it is true Custom Bottle has demonstrated that no material issue of

disputed fact exists on the question of whether it forwarded to PVC its "Standard Terms and Conditions of Sale" (hereinafter "standard terms"), and that the standard terms clearly, prominently and expressly disclaimed all warranties express or implied, the Court still is unable to determine the legal ramifications of the standard terms in the context of the parties' ongoing relationship. Specifically, it appears that the parties were operating under a contract of some form at the time Custom Bottle forwarded its standard terms to PVC. As such, the standard terms would constitute "additional terms" to the parties' existing contract and would, therefore, be governed by Uniform Commercial Code, Section 2-207(2)(b).[1] Pursuant to this section of the U.C.C., additional contractual terms proposed among merchants "become part of the contract unless . . . they materially alter it."[2]

Documents containing terms which purport to disclaim otherwise existing warranties have been held materially to alter existing contracts.[3] In this case, PVC

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[1] *See* DEL. CODE ANN., tit. 6, § 2-207(2)(b)(1999)("The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract **unless . . . they materially alter it**.")(Emphasis supplied).

[2] *Id.*

[3] *See Falcon Tankers, Inc. v. Litton Sys., Inc.*, 355 A.2d 898, 905 (Del. Super. Ct. 1976)("A major consideration of the section is the prevention of the imposition of harsh conditions upon one party merely as a result of his 'accepting' a price quotation or a purchase order form."). *See also Pfizer, Inc. v. Advanced Monobloc, Corp.*, 1998 Del. Super. LEXIS 31, at *11-12 (finding that "boilerplate language in a confirmatory memo" was not negotiated by the parties and may not have been read by the receiving party and, accordingly, the terms in the memo materially altered the existing contract in a manner that would create "surprise and hardship" on the receiving party.).

has no record of receiving the standard terms and apparently no one within the organization recalls any discussion with Custom Bottle about the standard terms. For its part, Custom Bottle cannot locate a signed copy of the standard terms, but instead relies upon its usual practice of forwarding standard terms to its customers to establish that it did so with respect to PVC. While the Court has concluded that this record is sufficient to establish as a matter of undisputed fact that Custom Bottle did forward its standard terms to PVC, the record is not adequate to demonstrate in what manner, if any, this document would have modified the existing contractual relationship between the parties. Such a determination can be made only after evidence regarding the specifics of the existing contractual relationship is presented, and then only to the extent that evidence is presented regarding the manner in which the standard terms may differ from the existing contractual terms (be they oral, written or implied). Until such evidence is presented, the Court deems it desirable to inquire more thoroughly into the facts to determine how such facts might affect the application of the law.[4]

Based on the foregoing, the motion for summary judgment is **DENIED.**

[4] *See Guy v. Judicial Nominating Com'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

**IT IS SO ORDERED.**

Very truly yours,

Joseph R. Slights, III

JRS, III/sb
Original to Prothonotary

cc: Richard K. Goll, Esquire
John G. Harris, Esquire