

1 **II. BACKGROUND**¹

2 Al-Misehal is a Saudi Arabian company. It received an order from the Minister of
3 Defense and Aviation of Saudi Arabia for seven customized vehicles. TAG is an
4 Arizona corporation that does customization work. On March 20, 2006, Al-Misehal
5 contracted with TAG for the purchase of seven customized Ford Excursions. Three of
6 the vehicles were to be armored and equipped with remotely operated weapons
7 systems. Four of the vehicles were to be equipped with BombJammers (“jammers”) to
8 defend against improvised explosive devices. The vehicles were to be delivered by
9 September 22, 2006. The total contract price was \$1,892,000. Al-Misehal provided
10 TAG with a \$946,000 deposit.²

11 On April 10, 2006, TAG contracted with Homeland Security Strategies, Inc.
12 (“HSS”) for supply and installation of the jammers. TAG almost immediately
13 communicated to Al-Misehal concern as to HSS’s ability to perform.³ By May 13, 2006,
14 TAG sought assurance from HSS that it would perform.⁴ TAG never received
15 assurance from HSS, but as late as June 10, 2006, conveyed to Al-Misehal that it
16 believed HSS would perform under the contract.⁵ Al-Misehal cancelled its contract with
17 TAG on June 29, 2006, ostensibly because HSS’s failure to perform meant that TAG
18 could not meet the September 2006 deadline.⁶

19 TAG ultimately sued HSS for breach of contract in the Southern District of New
20 York and won a \$1,018,400 judgment plus interest.⁷ That court determined, among

21 ¹Most of this background is taken from the order at docket 81.

22 ²See doc. 63-1 at 1.

23 ³Doc. 71-2 at 2–3.

24 ⁴Doc. 65-1 at 1–2.

25 ⁵Doc. 63-5 at 2.

26 ⁶Doc. 1 ¶ 12.

27 ⁷Doc. 63-3.

1 other things, that AI-Misehal cancelled its contract with TAG because of HSS's failure to
2 supply the jammers.⁸

3 AI-Misehal brought this lawsuit against TAG in June of 2010. AI-Misehal
4 asserted claims for breach of contract and, in the alternative, unjust enrichment. It
5 seeks damages for TAG's alleged breach in an amount to be determined at trial, or
6 return of its \$946,000 deposit.

7 On September 30, 2011, the court granted in part and denied in part AI-Misehal's
8 motion for summary judgment. The court determined that disputed issues of material
9 fact regarding TAG's repudiation of the contract precluded summary judgment on AI-
10 Misehal's breach-of-contract claim. The court also concluded that TAG was not
11 collaterally estopped from asserting that it did not breach its contract with AI-Misehal.
12 The court ruled that TAG was judicially estopped from asserting that AI-Misehal
13 cancelled the contract for a reason other than HSS's failure to supply the jammers.

14 **III. STANDARD OF REVIEW**

15 Summary judgment is appropriate where "there is no genuine dispute as to any
16 material fact and the movant is entitled to judgment as a matter of law."⁹ The materiality
17 requirement ensures that "only disputes over facts that might affect the outcome of the
18 suit under the governing law will properly preclude the entry of summary judgment."¹⁰
19 Ultimately, "summary judgment will not lie if the . . . evidence is such that a reasonable
20 jury could return a verdict for the nonmoving party."¹¹ In resolving a motion for summary
21 judgment, a court must view the evidence in the light most favorable to the non-moving
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25 ⁸Doc. 65-1 at 2–3.

26 ⁹Fed. R. Civ. P. 56(a).

27 ¹⁰*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

28 ¹¹*Id.*

1 party.¹² The reviewing court may not weigh evidence or assess the credibility of
2 witnesses.¹³ The burden of persuasion is on the moving party.¹⁴

3 4 **IV. DISCUSSION**

5 **A. The Statute of Limitations in A.R.S. § 47-2725(B) Does Not Bar Al-Misehal’s** 6 **Breach of Contract Claim**

7 TAG’s primary argument is that Al-Misehal’s breach-of-contract claim is barred
8 by the applicable limitations period. Section 47-2725 of the Arizona Revised Statutes
9 provides that “[a]n action for breach of any contract must be commenced within four
10 years after the cause of action has accrued.”¹⁵ TAG argues that Al-Misehal’s action
11 accrued no later than June 12, 2006, and that, because the complaint was filed on
12 June 21, 2010, the action is time-barred.

13 Section 47-2725 states that a claim for breach of a sales contract “accrues when
14 the breach occurs, regardless of the aggrieved party’s lack of knowledge of the
15 breach.”¹⁶ The problem with TAG’s contention is that Al-Misehal’s theory is based on
16 the premise that TAG repudiated the contract. A repudiation is not necessarily a
17 breach.¹⁷ Arizona Revised Statute § 47-2610 states that “[w]hen either party repudiates
18 the contract with respect to a performance not yet due . . . the aggrieved party may . . .
19 await performance by the repudiating party . . . or . . . [r]esort to any remedy for breach
20 . . . even [if] he has notified the repudiating party that he would await the latter’s
21 performance and has urged retraction.”¹⁸

22 ¹²*Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000).

23 ¹³*Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005).

24 ¹⁴*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

25 ¹⁵A.R.S. § 47-2725(A).

26 ¹⁶*Id.* § 47-2725(B).

27 ¹⁷*See id.* § 47-2610(1), (2).

28 ¹⁸*Id.*

1 Even though a buyer may elect to treat an anticipatory repudiation as a breach
2 when seeking a remedy—as Al-Misehal does here—that does not mean that they are
3 equivalent for other purposes. It does not make sense to treat anticipatory repudiation
4 as a breach for purposes of the limitations period in § 47-2725 given the buyer’s option
5 to await performance.¹⁹ In other words, anticipatory repudiation only becomes a breach
6 when the aggrieved party elects to treat it as such. Regardless of when TAG
7 repudiated the contract, it would not constitute a breach until Al-Misehal cancelled the
8 contract on June 29, 2006.

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10 **V. CONCLUSION**

11 For the reasons above, TAG’s motion for summary judgment at docket 97 is
12 **DENIED**. It still appears to the court that this case should be settled by the parties, and
13 they are again encouraged to do so.

14 DATED this 30th day of May 2012.

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16 /s/

17 JOHN W. SEDWICK
18 UNITED STATES DISTRICT JUDGE
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¹⁹A.R.S. § 47-2610(1).