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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 IceMOS Technology Corporation,
10 Plaintiff/Counter-Defendant,
11 v.
12 Omron Corporation,
13 Defendant/Counter-Claimant.
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No. CV-17-02575-PHX-JAT

ORDER

15 Pending before the Court, among other things, are IceMOS Technology
16 Corporation's ("Plaintiff") Motion for Partial Summary Judgment (Doc. 153), Omron
17 Corporation's ("Defendant") Motion for Partial Summary Judgment (Doc. 229), and
18 Defendant's Motion to Preclude Testimony of Plaintiff's Business Valuation Expert Greg
19 Mischou (Doc. 296). This Order substantially addresses these motions and also rules on
20 other pending motions.

21 **I. BACKGROUND**

22 The Court has previously articulated the basic facts underlying this case:

23 Plaintiff offers super junction metal oxide semiconductor field-effect
24 transistors ("MOSFETs"), microelectromechanical systems solutions, and
25 advanced engineering substrates to third parties. (Doc. 25 at 2). To produce
26 these products, Plaintiff needs fabrication services. (Id.). In 2007, Defendant
27 purchased a fabrication facility and began fabricating "complementary
28 metal-oxide semiconductor" products. (Id.). Around this time, Defendant
approached Plaintiff to suggest that Defendant and Plaintiff enter into
business together. (Id.).

1 Plaintiff and Defendant came to an agreement (“Supply Agreement”)
2 on February 28, 2011 after negotiations. (See *id.*). Their agreement included,
3 *inter alia*, that Defendant would “perform the fabrication requested by
4 Plaintiff” and that Defendant would “fully resource the development of all
5 generations of” Plaintiff’s super junction MOSFET (“SJ MOSFET”) for the
6 duration of the Supply Agreement. (*Id.*; see also Doc. 59 at 10; Doc. 60 at
7 15). Defendant asserts that Plaintiff represented that “[d]emand for Plaintiff’s
8 Super Junction MOSFETs is estimated to reach a volume of up to three
9 thousand and five hundred (3,500) wafers per month by year 2014.” (See
10 Doc. 28 at 42 (alteration in original) (quoting Doc. 14-1 at 2)). Defendant
11 also alleges that the parties forecasted, based on Plaintiff’s representations
12 regarding expected demand for its product, that “monthly demand would
13 reach 3,850 wafers per month by the fourth quarter of 2012.” (*Id.* (citing Doc.
14 14-1 at 14)). On March 6, 2018, the Supply Agreement terminated. (Doc. 60
15 at 37).

16 Plaintiff alleges breach of contract and fraud and seeks damages. (Doc. 59 at 33–
17 38). Plaintiff claims that Defendant breached several provisions of the Supply Agreement.
18 (*Id.* at 33–35). Plaintiff’s allegations include that Defendant improperly terminated the
19 Supply Agreement, which, according to Plaintiff, has resulted in lost profits, lost business
20 value, and lost development support costs. (*Id.*).

21 Defendant has counterclaimed and alleges breach of the implied covenant of good
22 faith and fair dealing, two counts of breach of contract, and fraud in the inducement
23 (relating to the alleged projections by Plaintiff) and also seeks damages. (Doc. 28 at 46–
24 50).

25 **II. LEGAL STANDARD**

26 A party is entitled to summary judgment when it “shows that there is no genuine
27 dispute as to any material fact and [it] is entitled to judgment as a matter of law.” Fed. R.
28 Civ. P. 56(a). As such, a court must grant summary judgment “against a party who fails to
make a showing sufficient to establish the existence of an element essential to that party’s
case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*
Catrett, 477 U.S. 317, 322 (1986).

The movant must establish the basis for summary judgment and the elements of the
claims upon which the nonmovant will be unable to show a genuine issue of material fact.

1 Id. at 323. Then, the burden shifts to the nonmovant to show the existence of any dispute
2 of material fact. Id. at 323–24. To meet this burden, the nonmovant must point to competent
3 evidence, meaning that the evidentiary content—but not necessarily its form—must be
4 admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).¹ This evidence
5 “must do more than simply show that there is some metaphysical doubt as to the material
6 facts,” it must show “that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v.*
7 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting Fed. R. Civ. P. 56(e) (1963)).
8 A genuine issue of material fact exists if the disputed issue of fact “could reasonably be
9 resolved in favor of either party.” *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir.
10 2004). A dispute is about a material fact when the dispute is about “facts that might affect
11 the outcome of the suit.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The
12 Court must “construe all facts in the light most favorable to the non-moving party.” *Ellison*,
13 357 F.3d at 1075–76 (citing *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257
14 (9th Cir. 2001)). However, the nonmovant’s bare assertions, standing alone, are insufficient
15 to create a material issue of fact that would defeat the motion for summary judgment.
16 *Anderson*, 477 U.S. at 247–48.

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21 ¹ Plaintiff objects to certain evidence that Defendant cites in its controverting statement of
22 facts (Doc. 193). (Doc. 223 at 8 n.1). In short, Plaintiff’s objections to leading, relevance,
23 and improper legal conclusion are inappropriate for summary judgment because they are
24 either superfluous to the summary judgment standard or are objections relating to form
25 rather than content. See *Fraser*, 342 F.3d at 1036; *Dillon v. Cont’l Cas. Co.*, 278 F. Supp.
26 3d 1132, 1137 (N.D. Cal. 2017). Thus, these objections are overruled. Plaintiff also objects
27 to Takahiro Hasegawa’s deposition, suggesting Hasegawa did not have personal
28 knowledge sufficient to testify on behalf of Defendant as a corporation. (Doc. 223 at 8 n.1).
However, Plaintiff’s counsel specifically states during the deposition that Hasegawa was
testifying as Defendant’s “corporate representative,” and the transcript indicates that
Hasegawa’s deposition was under Federal Rule of Civil Procedure 30(b)(6). (Doc. 190-7
at 1, 4–5). This fact belies Plaintiff’s objection. Moreover, it is not clear what specific
testimony Plaintiff is objecting to. This objection is thus overruled. Plaintiff’s objection to
Docs. 190-9 to 109-11 and Doc. 190-13 are overruled because the Court did not consider
these materials. Defendant’s objection to Doc. 190-14 as an unauthenticated document is
moot because the Court did not rely on this evidence in its analysis.

1 **III. ANALYSIS**

2 **a. Plaintiff’s Motion for Partial Summary Judgment**

3 Plaintiff seeks summary judgment on Defendant’s counterclaims for fraud and
4 breach of contract. (Doc. 153 at 7–21).²

5 **1. Fraud Counterclaim**

6 Plaintiff moves for summary judgment on Defendant’s fraud counterclaim. Plaintiff
7 argues that Defendant’s fraud counterclaim is barred by the statute of limitations. (Doc.
8 153 at 7–8). It also asserts that Defendant cannot prove certain elements of its fraud
9 counterclaim as a matter of law. (Id. at 9–13).

10 **A. Statute of Limitations**

11 First, Plaintiff contends that summary judgment must be entered on the fraud
12 counterclaim because it is barred by the statute of limitations under Arizona law. (Doc. 153
13 at 7–8). As the Court has noted, Arizona law applies to Defendant’s fraud counterclaim for
14 choice of law purposes. (See Doc. 152 at 9; see also Doc. 25 at 19–20 (stating Arizona law
15 applies to Plaintiff’s fraud claim)). As such, the Court must apply the Arizona statute of

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18 ² Plaintiff argues that the Court must grant its Motion for Partial Summary Judgment
19 (Doc. 153) because it asserts Defendant did not comply with District of Arizona Local Rule
20 of Civil Procedure 56.1. (Doc. 223 at 7–10). Specifically, Plaintiff contends that Defendant
21 “failed to controvert [Plaintiff]’s facts as required by LRCiv. 56.1(b),” and thus, the Court
22 should deem Plaintiff’s entire statement of facts as admitted, or alternatively, disregard
23 additional explanation or argument. Plaintiff’s argument relies on *Marceau v. International*
24 *Brotherhood of Electrical Workers*, 618 F. Supp. 2d 1127, 1141 (D. Ariz. 2009). (Doc. 153
25 at 9–10). There, the court stated “LRCiv 56.1 ‘does not permit explanation and argument
26 supporting the party’s position to be included in the . . . statement of facts.’” *Marceau*, 618
27 F. Supp. 2d at 1141 (citation omitted). The *Marceau* court adopted that proposition from
28 *Pruett v. Arizona*, 606 F. Supp. 2d 1065, 1075 (D. Ariz. 2009). See *Marceau*, 618 F. Supp.
2d at 1141 (quoting *Pruett*, 606 F. Supp. 2d at 1075). In *Pruett*, the defendant identified
specific responses in the plaintiff’s controverting statement of facts that it asserted violated
Local Rule 56.1. 606 F. Supp. 2d at 1075. The *Pruett* court did not strike the entire
controverting statement of facts but instead disregarded the additional explanation and
argument that the defendant specifically objected to. 606 F. Supp. 2d at 1075. In contrast,
here, Plaintiff makes a vague challenge to the entirety of Defendant’s controverting
statement of facts, and the Court cannot identify any particular response within it that
Plaintiff takes issue with as violative of Local Rule 56.1 or why Plaintiff specifically
objects to any of Defendant’s responses. The issue is further complicated by the fact that
Plaintiff itself is guilty of the same briefing technique in its controverting statement of facts
to Defendant’s Motion for Partial Summary Judgment (Doc. 229). (See Doc. 308).
Accordingly, the Court will take no action.

1 limitations for Defendant’s counterclaim. See *Albano v. Shea Homes Ltd. P ’ship*, 634 F.3d
2 524, 528 (9th Cir. 2011).

3 Arizona law provides that the statute of limitations for a fraud claim is three years.
4 *Ariz. Rev. Stat. Ann. § 12-543(3)*. However, the time for calculating the statute of
5 limitations does not begin to “accrue[] until the discovery by the aggrieved party of the
6 facts constituting the fraud or mistake.” *Id.* In other words, “[t]he statute of limitations
7 begins to run for [fraud claims] when the plaintiff knew or through reasonable diligence
8 could have learned of the fraud or the misrepresentation.” *Cavan v. Maron*, 182 F. Supp.
9 3d 954, 962 (D. Ariz. 2016) (citing *Coronado Dev. Corp. v. Superior Court*, 678 P.2d 535,
10 537 (Ariz. Ct. App. 1984)); see *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*,
11 898 P.2d 964, 966 (Ariz. 1995).

12 Plaintiff argues that it provided the forecasts that serve as the basis of Defendant’s
13 fraud counterclaim in September 2011, and thus, Defendant should have known that these
14 forecasts, assuming they were fraudulent representations, were inaccurate in September
15 2011, which started the clock on the statute of limitations. (Doc. 153 at 7–8). Plaintiff also
16 argues Defendant knew that Plaintiff was not meeting the projections at least as early as
17 March 6, 2015, which it contends was the latest date that the time on Defendant’s fraud
18 counterclaim could have begun accruing. (*Id.*). As such, Plaintiff argues that Defendant’s
19 fraud counterclaim was barred by the Arizona statute of limitations because Defendant did
20 not file the counterclaim until July 16, 2018. (*Id.*). Defendant responds that the time to file
21 its fraud counterclaim did not begin accruing until it could have discovered the fraud with
22 reasonable diligence, which is a question of fact that precludes summary judgment. (Doc.
23 189 at 9–11; see e.g., Doc. 191 at 3–5³; Doc. 192 at 2–4; Doc. 193 at 27–28).

24 “[D]etermination of a claim’s accrual date usually is a question of fact”
25 *Logerquist v. Danforth*, 932 P.2d 281, 287 (Ariz. Ct. App. 1996) (citation omitted). “[T]he
26 inquiry center[s] on the plaintiff’s knowledge of the subject event and resultant injuries,

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28 ³ Plaintiff’s relevance objection to particular paragraphs within Takahiro Hasegawa’s
declaration (Doc. 191), (Doc. 223 at 11 n.7), is overruled because it is an inappropriate
objection at the summary judgment stage. See *Dillon*, 278 F. Supp. 3d at 1137.

1 whom the plaintiff believed was responsible, and plaintiff’s diligence in pursuing the
2 claim.” Id. (citation omitted). Whether to apply the discovery rule generally “depends on
3 resolution of such factual issues,” and thus, a court cannot resolve these questions on
4 summary judgment. See id.; see also Gust, Rosenfeld & Henderson, 898 P.2d at 969 (“The
5 statute of limitations did not commence on [plaintiff]’s claim until [plaintiff] knew or in
6 the exercise of reasonable diligence should have known that it had been injured. The trial
7 court was correct to let the jury decide when that event occurred.”).

8 Defendant asserts there is a dispute of material fact as to when it discovered
9 Plaintiff’s alleged fraud. (Doc. 189 at 11). The Court agrees. Arizona law makes clear that
10 when a claim begins to accrue is a question of fact that generally cannot be determined on
11 summary judgment. But, Plaintiff argues that a party cannot “invoke[] the discovery rule
12 in the [r]esponse” to a motion for summary judgment. (Doc. 223 at 12 (quoting Breeser v.
13 Menta Grp., Inc., 934 F. Supp. 2d 1150, 1159 (D. Ariz. 2013))). Plaintiff cites Breeser, 934
14 F. Supp. 2d 1150, for this proposition. Breeser did not proclaim such an edict. Cf. Long v.
15 Ford Motor Co., No. CV07-2206-PHX-JAT, 2008 WL 2937751, at *8 (D. Ariz. July 23,
16 2008) (allowing plaintiff to raise discovery rule despite the fact that plaintiffs did not plead
17 factual allegations relevant to the discovery rule in its complaint). Rather, the issue in
18 Breeser was that both parties indicated that the date of accrual of the plaintiff’s claim was
19 beyond the limitations period. 934 F. Supp. 2d at 1158–60. Indeed, there, plaintiff’s “own
20 words” established the date of accrual. See id. Although plaintiff contradicted her earlier
21 statements regarding the date of accrual, the court invoked the doctrine of judicial estoppel
22 in determining that her later inconsistent statements did not create a genuine issue of
23 material fact as to the issue of accrual. See id. In contrast, here, it is disputed as to when
24 Defendant discovered Plaintiff’s alleged fraud, and thus, when the Defendant’s fraud
25 counterclaim began to accrue. Thus, Breeser is distinguishable because there was no
26 genuine dispute of fact there, id. at 1159–60, while there is one here. Because there is a

1 genuine dispute of material fact as to the fraud counterclaim’s date of accrual, the Court
2 cannot grant summary judgment.⁴

3 **B. Merits of Fraud Counterclaim**

4 Plaintiff also argues that summary judgment should be entered on the fraud
5 counterclaim because Defendant cannot establish all its elements. (Doc. 153 at 9–13). The
6 gist of Defendant’s fraud counterclaim is that Plaintiff fraudulently induced Defendant to
7 enter into the Supply Agreement with Plaintiff based on projections of monthly demand
8 that it knew it could never meet. (See Doc. 28 at 49–50; Doc. 152 at 3; Doc. 189 at 6–8).
9 Defendant asserts that, during the negotiations that ultimately culminated in the Supply
10 Agreement, Plaintiff fraudulently represented to Defendant that monthly demand for its SJ
11 MOSFETs would be at a forecasted volume of up to 3,500 wafers per month by 2014. (See
12 Doc. 189 at 6–8). Moreover, Defendant contends that it relied on these projections in
13 deciding to enter into the Supply Agreement with Plaintiff. (Doc. 189 at 6–8, 16).

14 A party must show the following elements to establish a fraud claim under Arizona
15 law:

- 16 (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s
17 knowledge of the [representation’s] falsity or ignorance of its truth; (5) the
18 speaker’s intent that it be acted upon by the recipient in the manner
19 reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) the
20 hearer’s reliance on its truth; (8) the right to rely on it; [and] (9) [the hearer’s]
consequent and proximate injury.

21 ⁴ Should the jury find for Defendant on its fraud counterclaim and should it conclude that
22 the date of discovery was on July 15, 2015, or earlier, Plaintiff may raise the statute of
23 limitations issue again. The Court notes that it has made no determination as to whether
24 the statute of limitations was tolled or suspended as a result of Plaintiff’s action being filed
25 on August 2, 2017. Compare *W.J. Kroeger Co. v. Travelers Indem. Co.*, 541 P.2d 385, 397
26 (Ariz. 1975) (in division) (“[I]f a claim would be barred originally by a statute of limitation,
27 it is barred as a counterclaim even if it arises from the same transaction except as it falls
28 within the principles of recoupment.”), quoted in *Unispec Dev. Corp. v. Harwood K. Smith
& Partners*, 124 F.R.D. 211, 214 (D. Ariz. 1988), and *Occidental Chem. Co. v. Connor*,
604 P.2d 605, 607 (Ariz. 1979) (“If one is not entitled to relief in a direct action, he is not
entitled to assert a setoff or counterclaim.”), with *Religious Tech. Ctr. v. Scott*, 82 F.3d 423
(9th Cir. 1996) (table) (“[A] compulsory counterclaim relates back to the filing of the
original complaint.”), and *Charles Alan Wright, Arthur R. Miller & Mary Kay Kane*,
Federal Practice and Procedure § 1419, at 179 (3d ed. 2010) (“[T]he majority view
appears to be that the institution of plaintiff’s suit tolls or suspends the running of the statute
of limitations governing a compulsory counterclaim.”).

1 Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 631 (Ariz. 1982) (in division); see
2 Comerica Bank v. Mahmoodi, 229 P.3d 1031, 1033–34 ¶ 14 (Ariz. Ct. App. 2010). Plaintiff
3 contends that the undisputed facts prevent Defendant from establishing the first, second,
4 third, seventh, and eighth elements of its fraud counterclaim. (Doc. 153 at 9). Defendant
5 responds that Plaintiff has not shown that Defendant cannot prove each element of its fraud
6 counterclaim. (Doc. 189 at 13).

7 **i. Representation**

8 A projection can be a representation for purposes of establishing fraud. See Law v.
9 Sidney, 53 P.2d 64, 66 (Ariz. 1936). “[T]he promise to perform a future act” is actionable
10 when it “was made with a present intention on the part of the promisor that he would not
11 perform it.” Id.; see also Allstate Life Ins. v. Robert W. Baird & Co., 756 F. Supp. 2d 1113,
12 1165 (D. Ariz. 2010) (determining forward-looking statements made “with actual
13 knowledge that projections, promises, or expectations will not be met” are actionable
14 representations). Plaintiff argues that there is no dispute of material fact as to whether
15 Defendant can establish a representation because Defendant “has provided no evidence to
16 support any allegation that [Plaintiff] did not intend to perform its obligations under the
17 Supply Agreement.” (Doc. 153 at 12). Therefore, Defendant must show that it has evidence
18 to support that there is an actionable representation here. See Celotex Corp., 477 U.S. at
19 322–23.

20 Although Defendant did not specify in its Response that it has evidence that shows
21 Plaintiff never intended to perform,⁵ it does offer evidence that Plaintiff knew its
22 projections were false. (See Doc. 189 at 14–15; Doc. 193 at 22–24). For example,
23 Defendant offers evidence that Plaintiff only ordered approximately two percent of the

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25 ⁵ The Court notes that Defendant seems to rely on the Court’s holding on Plaintiff’s Motion
26 for Judgment on the Pleadings (Doc. 69). (See Doc. 189 at 13–14 (citing Doc. 152 at 11–
27 12)). At summary judgment, a party cannot rely on bare allegations alone, and thus,
28 Defendant cannot base its argument that summary judgment is not appropriate on the issue
of representation simply because the Court has previously determined that, based on
Defendant’s allegations, it had stated a claim for fraud. Anderson, 477 U.S. at 247–48. It
is axiomatic that allegations are not sufficient on summary judgment; instead, the
nonmovant must offer proof of its claims. See Butler v. San Diego Dist. Attorney’s Office,
370 F.3d 956, 963 (9th Cir. 2004).

1 forecasted volume. (Doc. 193 at 22 (citing Doc. 191 at 5); see also Doc. 241-1 at 8–9). A
2 reasonable fact-finder could find that such a disparity means that Plaintiff knew its
3 forecasts were false. Construing the evidence in the light most favorable to Defendant,
4 there is a dispute of material fact as to whether Plaintiff knew its projections were false,
5 and thus, whether it never intended to meet the projections of monthly demand.⁶ See
6 *Orlando v. Carolina Cas. Ins.*, No. CIV F 07-0092AWISMS, 2007 WL 781598, at *8 (E.D.
7 Cal. Mar. 13, 2007). Thus, the Court cannot say Defendant will be unable to establish that
8 Plaintiff made an actionable representation.⁷

9 **ii. Falsity of Representation**

10 Plaintiff contends that Defendant cannot establish that the representation was false.
11 (See Doc. 153 at 9). In response, Defendant offers evidence that supports its claim that
12 Plaintiff knew its projections of monthly demand were false. (See Doc. 189 at 14–16; Doc.
13 193 at 22–24; see also Doc. 241-1 at 8–9). A projection or estimate typically cannot be
14 deemed a false representation. See *Allstate Life Ins.*, 756 F. Supp. 2d at 1164–65; *Sidney*,
15 53 P.2d at 66. However, if one makes a projection or estimate “with actual knowledge that
16 projections, promises, or expectations will not be met,” there is a false representation. See
17 *Allstate Life Ins.*, 756 F. Supp. 2d at 1164–65. Thus, for the same reason that the Court
18 found that Defendant has offered sufficient evidence to create a dispute of material fact on

19 ⁶ Plaintiff objects to a statement in Susumu Nukii’s declaration (Doc. 192) as being
20 irrelevant, (Doc. 223 at 16 n.10), an inappropriate objection that the Court therefore
21 overrules. See *Dillon*, 278 F. Supp. 3d at 1137. Plaintiff objects to a statement in Takahiro
22 Hasegawa’s declaration (Doc. 191) as being an inadmissible legal conclusion, (Doc. 223
23 at 17 n.11), another objection that is inappropriate at the summary judgment stage. See
24 *Dillon*, 278 F. Supp. 3d at 1137.

25 ⁷ Plaintiff also suggests that Defendant’s fraud counterclaim fails as a matter of law because
26 it cannot show the projections were a representation as Defendant “has admitted that the
27 ‘Supply Agreement contains no representations, promises, or guarantees by [Plaintiff] as
28 to demand or minimum monthly purchases.’” (Doc. 153 at 9 (quoting Doc. 60 at 18)).
Although that might be true, Defendant has made clear that its fraud counterclaim is based
on the projections of monthly demand Plaintiff made during negotiations prior to signing
of the Supply Agreement. (Doc. 189 at 14). The Court even noted this fact when it denied
Plaintiff’s Motion for Judgment on the Pleadings (Doc. 69). (Doc. 152 at 11–12). If
Defendant’s admission that the “Supply Agreement contains no representations, promises,
or guarantees by [Plaintiff] as to demand or minimum monthly purchases” did not entitle
Plaintiff to judgment on the pleadings, it is unclear why Plaintiff believes it entitles it to
summary judgment now.

1 the issue of representation here, it has done the same on the issue of the falsity of such a
2 representation.

3 **iii. Materiality of Representation**

4 Plaintiff contends that Defendant cannot establish the materiality of its alleged
5 fraudulent representation because Defendant admitted in the pleadings that “[t]he material
6 terms of the Supply Agreement had already been negotiated before the forecasts in Exhibit
7 A were prepared.” (Doc. 153 at 10 (quoting Doc. 60 at 19)). However, Plaintiff leaves out
8 a key part of Defendant’s Answer; Defendant “denie[d] that Exhibit A to the Supply
9 Agreement contains the only forecasts that [Plaintiff] provided to [Defendant].” (Doc. 60
10 at 19; Doc. 193 at 3–4; see also Doc. 191-1 at 15 (draft agreement with projections)).
11 Additionally, as the Court noted above, Defendant’s fraud counterclaim relates to alleged
12 false representation that occurred during negotiations prior to signing of the Supply
13 Agreement; it is not necessarily based on the terms of the Supply Agreement alone.

14 At any rate, “[q]uestions about materiality . . . usually are for the jury.” See *Lerner*
15 *v. DMB Realty, LLC*, 322 P.3d 909, 914 ¶ 15 (Ariz. Ct. App. 2014). “A misrepresentation
16 is material if a reasonable person ‘would attach importance to its existence or nonexistence
17 in determining [his or her] choice of action in the transaction in question.’” *Caruthers v.*
18 *Underhill*, 287 P.3d 807, 815 ¶ 28 (Ariz. Ct. App. 2012) (quoting Restatement (Second) of
19 Torts § 538(2)(a) (1977)); see also *M & I Bank, FSB v. Coughlin*, No. CV 09-02282-PHX-
20 NVW, 2011 WL 5445416, at *4 (D. Ariz. Nov. 10, 2011). Defendant has offered sufficient
21 evidence to create a dispute of material fact as to whether the alleged false representation
22 mattered to it because it has evidence showing Plaintiff’s projections of monthly demand
23 were relevant to its decision to enter the Supply Agreement. (Doc. 189 at 16; Doc. 193 at
24 24); see *M & I, FSB*, 2011 WL 5445416, at *4 (holding alleged false representation was
25 material because plaintiff offered evidence that false representation was relevant to
26 plaintiff’s decision to agree to a loan); *Lerner*, 322 P.3d at 915 ¶ 19 (noting that materiality
27 depended on whether the “alleged misrepresentation was material to the transaction”
28 (emphasis added)).

1 For example, it is “simple business sense” that projections specifying monthly
2 demand would be material to Defendant’s decision to enter the Supply Agreement. See M
3 & I, FSB, 2011 WL 5445416, at *4; see Radware, Ltd. v. F5 Networks, Inc., 147 F. Supp.
4 3d 974, 1012 (N.D. Cal. 2015). The jury could reasonably infer that the projections
5 included in a prior draft agreement, (Doc. 191-1 at 15), would translate to future business
6 revenue for Defendant, and thus, would be material. Indeed, as Caruthers makes clear,
7 materiality is an objective standard, and thus, the jury must determine if a reasonable
8 person, under the circumstances, would attach importance to the projections of monthly
9 demand in deciding whether to enter the Supply Agreement. Additionally, Defendant offers
10 evidence that the projections were relevant to Defendant’s decision to enter the Supply
11 Agreement. (See Doc. 191 at 2–3).⁸ In sum, Defendant has offered sufficient evidence to
12 create a genuine dispute of material fact as to materiality.

13 **iv. Reliance on Representation**

14 Next, Plaintiff asserts Defendant cannot establish that Defendant relied on the
15 projections. (Doc. 153 at 10–11). Plaintiff raises three primary arguments: (1) the
16 projections “were not representations but rather just estimates of future events based on
17 factors beyond [Plaintiff’s] control,” (2) that Plaintiff’s ability to meet the forecasts
18 depended on Defendant, and (3) that Defendant signed the Supply Agreement because it
19 was “desperate for customers” and the projections were irrelevant to its decision to enter
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24 ⁸ Plaintiff objects to a statement regarding the materiality of the projections in Takahiro
25 Hasegawa’s declaration (Doc. 190), arguing that it is based on a lack of personal
26 knowledge. (Doc. 223 at 17 n.12). However, Plaintiff’s Reply specifically asserts “the only
27 people [Defendant] identified as participating in the negotiation of the Supply Agreement
28 were Yoshio Sekiguchi and Takahiro Hasegawa.” (Doc. 223 at 14 n.8; see also Doc. 204-
01 at 49 (“[Defendant] states that Yoshio Sekiguchi and Takahiro Hasegawa negotiated the
Supply Agreement with [Plaintiff].”)). It is unclear how Hasegawa would lack personal
knowledge as to the materiality of the projections if he was part of the negotiations that led
to the signing of the Supply Agreement. At any rate, although the Hasegawa declaration is
relevant as to this issue, the other evidence that the Court discussed that is relevant to this
issue sufficiently creates a dispute of material fact. The objection is overruled.

1 the Supply Agreement. (Id.). Defendant responds that evidence supports a finding that
2 Defendant did rely on the projections. (Doc. 189 at 16–17; Doc. 193 at 5–6, 24).

3 A party relies on a misrepresentation when the party acts or refrains from acting
4 based on it. See *Sw. Non-Profit Hous. Corp. v. Nowak*, 322 P.3d 204, 212 ¶ 29 (Ariz. Ct.
5 App. 2014). Defendant asserts that it acted on the alleged misrepresentation because it
6 “spent a large amount of money out of pocket” that resulted in losses. (Doc. 189 at 17).
7 Defendant also points to the fact that it agreed to resource the development of the SJ
8 MOSFET and that it agreed to take on fifty percent of the cost of producing the “mask sets”
9 of the SJ MOSFETs. (Id. (citing Doc. 190-1 at 5–6 (§§ 4.0 and 4.2.1 of the Supply
10 Agreement))). In fact, at thirty thousand feet, Defendant’s claim is that it would not have
11 entered into the Supply Agreement with Plaintiff and sustained monetary losses but for the
12 alleged misrepresentations as to the projections of monthly demand. This fact alone creates
13 a dispute as to whether Defendant relied on the alleged misrepresentation. Cf. *Int’l*
14 *Franchise Sols. LLC v. BizCard Xpress LLC*, No. CV13-0086 PHX DGC, 2013 WL
15 2152549, at *3 (D. Ariz. May 16, 2013) (denying motion to dismiss on fraud claim where
16 the allegation was that party agreed to do business and lost money as a result of
17 misrepresentation). And, nothing indicates that Defendant did not believe the projections,
18 which would show it did not rely on the projections. See *Sw. Non-Profit Hous. Corp.*, 322
19 P.3d at 212 ¶ 29; (cf. Doc. 191 at 2–5). Simply put, none of Plaintiff’s arguments overcome
20 the fact that Defendant has evidence that it did rely on the projections of monthly demand
21 when it decided to enter the Supply Agreement with Plaintiff. Thus, there is a dispute of
22 material fact on this issue as well.

23 v. Right to Rely on Representation

24 Finally, Plaintiff contends that Defendant cannot establish that Defendant had a
25 right to rely on Plaintiff’s alleged representation because it “cannot establish that such
26 forecasts are representations of fact to be relied upon.” (Doc. 153 at 9). Plaintiff notes that
27 Defendant “has admitted that the ‘Supply Agreement contains no representations,
28 promises, or guarantees by [Plaintiff] as to demand or minimum monthly purchases.’” (Id.

1 (quoting Doc. 60 at 18)). As the Court has noted, a promise of future performance is
2 generally not an actionable basis for fraud unless the party that made the promise had no
3 intent to perform. See supra Section III.a.1.B.i.

4 Here, Defendant has offered evidence to create a dispute of material fact as to
5 whether Plaintiff never intended to perform its promise. Therefore, the Court cannot say
6 that Defendant cannot establish its right to rely on Plaintiff’s alleged representation because
7 that question must be answered by the jury. Lerner, 322 P.3d at 914 ¶¶ 15–16; cf. Staheli
8 v. Kauffman, 595 P.2d 172, 175 (1979) (in division) (noting there is no right to rely on
9 promises, expressions of intent, or statements regarding future events “unless such were
10 made with the present intention not to perform”).

11 As indicated above, Defendant offers evidence that supports a reasonable inference
12 that Plaintiff knew it would never reach the monthly demand it was projecting and that
13 Plaintiff’s alleged representations of forecasted monthly demand were material to
14 Defendant’s decision to agree to the provisions of the Supply Agreement.⁹ “Reliance is
15 justifiable where the misrepresentation is material.” *St. Joseph’s Hosp. & Med. Ctr. v.*
16 *Reserve Life Ins.*, 742 P.2d 808, 817 (Ariz. 1987) (holding that party reasonably relied on
17 misrepresentation because misrepresentation was material); see *Maki v. N. Sky Partners II*
18 *LP*, No. CV-15-02625-PHX-SRB, 2017 WL 10128386, at *6 (D. Ariz. Dec. 11, 2017)
19 (“Yet justifiability is effectively subsumed into the materiality inquiry.” (quoting *Sitton v.*
20 *Deutsche Bank Nat’l Tr. Co.*, 311 P.3d 237, 243 ¶ 31 (Ariz. Ct. App. 2013))). Plaintiff has
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24 ⁹ Plaintiff objects to statements in Susumu Nukii’s declaration (Doc. 192) and Takahiro
25 Hasegawa’s declaration (Doc. 191) relating to whether Defendant took part in creating the
26 forecasts that were incorporated into the Supply Agreement. (Doc. 223 at 13–14 n.8).
27 Plaintiff appears to argue that Nukii and Hasegawa lack personal knowledge on this
28 subject. (Id.) But, Plaintiff indicates that Defendant identified Hasegawa as being a
participant in the negotiation of the Supply Agreement. (Id.). Because Plaintiff effectively
acknowledges Hasegawa took part in the Supply Agreement negotiations, the objection to
Hasegawa’s statements is overruled, and thus, the objection to Nukii’s statements on this
topic is rendered moot for purposes of deciding Plaintiff’s Motion for Partial Summary
Judgment (Doc. 153).

1 not shown, based on the undisputed material facts, that Defendant cannot establish at trial
2 that it had a right to rely on Plaintiff’s alleged representations.¹⁰

3 Accordingly, because there are genuine disputed issues of material fact on the
4 elements of Defendant’s fraud counterclaim, Plaintiff’s motion for summary judgment on
5 this counterclaim is denied.¹¹

6 **2. Breach of Contract Counterclaims**

7 Plaintiff asserts it is entitled to summary judgment on Defendant’s breach of
8 contract counterclaims. (Doc. 153 at 13–21). Defendant alleges that Plaintiff breached the
9 Supply Agreement by failing to make timely payments (“Late Payment Counterclaim”).
10 (Doc. 28 at 47–48). Defendant also alleges Plaintiff breached the Supply Agreement by
11 failing to pay invoices (“No Payment Counterclaim”). (Id. at 48–49).

12 Preliminarily, the Supply Agreement provides that New York law governs the
13 Supply Agreement. (Doc. 59-1 at 9 (§ 9.2 of the Supply Agreement)). To prevail on a
14 breach of contract action under New York law, a plaintiff must show “the existence of a
15 contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and
16 resulting damages.” *Harris v. Seward Park Hous. Corp.*, 913 N.Y.S.2d 161, 162 (App.
17 Div. 2010).

18 **A. Late Payment Counterclaim**

19 Plaintiff makes three general arguments in support of its claim that it is entitled to
20 summary judgment on the Late Payment Counterclaim. First, Plaintiff argues that

21 ¹⁰ Plaintiff also seems to argue that Defendant did not have a right to rely on the projections
22 in deciding whether to enter the Supply Agreement because Defendant understood the
23 projections of monthly demand were not guarantees. (Doc. 153 at 9–10; Doc. 193 at 6–7).
24 Plaintiff then cites a bevy of quotes from discovery that it suggests support this proposition.
25 (Doc. 153 at 9–10; Doc. 193 at 6–8). Though it may be understood that Plaintiff’s
26 projections were not guarantees, this undisputed fact does not prevent Defendant from
establishing that Plaintiff’s projections were representations, and, if so, whether Defendant
had a right to rely on them. See *Anderson*, 477 U.S. at 247–48; cf. *Meinhold v. U.S. Dep’t*
of Def., 34 F.3d 1469, 1475 n.4 (9th Cir. 1994) (concluding that a dispute of fact was not
material when it was not dispositive to court’s legal analysis).

27 ¹¹ Plaintiff did not raise arguments as to whether Defendant can establish the fourth, fifth,
28 sixth, or ninth element of its fraud claim. As such, Plaintiff has failed to shift the burden to
Defendant on these elements because Plaintiff, as the movant, must show that the
Defendant, as the nonmovant, will be unable to establish a genuine issue of material fact
as to these elements.

1 Defendant committed material breaches of the Supply Agreement that excused Plaintiff
2 from further performance, including having to pay any invoice on time. (Doc. 153 at 13–
3 16). Second, Plaintiff contends that it did not breach the Supply Agreement as a matter of
4 law based on the undisputed facts. (Id. at 16–17). Third, Plaintiff claims Defendant waived
5 the right to timely payment. (Id. at 17–19). The Court evaluates each argument in turn.

6 **i. Material Breach**

7 If a party commits a material breach, the other party is excused from further
8 performance. See *Hadden v. Consol. Edison Co. of N.Y.*, 312 N.E.2d 445, 449 (N.Y. 1974);
9 *Markham Gardens L.P. v. 511 9th LLC*, 954 N.Y.S.2d 811, 815 (Sup. Ct. 2012). But, when
10 a material breach occurs, the party must elect to either terminate the contract or to continue
11 under it. *Awards.com, LLC v. Kinko’s, Inc.*, 834 N.Y.S.2d 147, 156 (App. Div. 2007). If it
12 chooses the latter, “it loses its right to terminate the contract because of the default.” Id.

13 A breach is material when it is “so substantial that it defeats the object of the parties
14 in making the contract.” *In re Dissolution of Ongweoweh Corp.*, 14 N.Y.S.3d 212, 213
15 (App. Div. 2015); *Residential Holdings III LLC v. Archstone-Smith Operating Tr.*, 920
16 N.Y.S.2d 349, 352 (App. Div. 2011) (stating that a breach is not material unless “the act
17 failed to be performed [goes] to the root of the contract or . . . render[s] the performance of
18 the rest of the contract a thing different in substance from that which was contracted for”
19 (alterations in original)). Whether a breach is material is generally a question of fact for the
20 jury that precludes summary judgment. See *F. Garofalo Elec. Co. v. N.Y. Univ.*, 754
21 N.Y.S.2d 227, 230 (App. Div. 2002); see also *Bear, Stearns Funding, Inc. v. Interface*
22 *Group-Nevada, Inc.*, 361 F. Supp. 2d 283, 295 (S.D.N.Y. 2005) (“[T]he question of
23 materiality of breach is a mixed question of fact and law—usually more of the former and
24 less of the latter—and thus is not properly disposed of by summary judgment.”). Therefore,
25 because Plaintiff suggests that Defendant’s breach of contract claim is barred due to
26 Defendant’s alleged material breaches of the Supply Agreement, which is a question of
27 fact that the Court cannot determine on summary judgment, this argument fails.

1 **ii. No Breach**

2 Plaintiff also contends that Defendant cannot show breach of the Supply Agreement.
3 There are thirty-three invoices that Defendant alleges Plaintiff did not pay on time that
4 serve as the basis of its breach of contract claim for late payments.

5 Plaintiff argues that one of the invoices that it did not pay on time “is not covered
6 by the Supply Agreement” because it “relates to cavity lid wafer process,” which is not an
7 SJ MOSFET product. (Doc. 153 at 16). Although Defendant agrees that this invoice relates
8 to cavity lid wafer process, (Doc. 193 at 11), Defendant asserts that this invoice is
9 nonetheless covered by the Supply Agreement but provides no evidence to support this
10 assertion. (Doc. 189 at 20). The Court finds that Defendant did not carry its burden in
11 rebutting Plaintiff’s argument that the Supply Agreement does not apply to this invoice
12 (No. MD140611OM150514). Defendant, as the nonmovant, “must do more than simply
13 show that there is some metaphysical doubt as to the material facts” by “com[ing] forward
14 with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus.*
15 *Co.*, 475 U.S. at 586–87 (quoting Fed. R. Civ. P. 56(e) (1963)). Accordingly, the Court
16 grants summary judgment on this issue in favor of Plaintiff.

17 Plaintiff also claims it did not breach the Supply Agreement by failing to pay Invoice
18 No. MD140401-2. (Doc. 153 at 16). Plaintiff specifically argues that this invoice relates to
19 development costs and that Defendant is required to pay all development costs under
20 § 4.2.1 of the Supply Agreement, which relieved Plaintiff of any duty to pay Invoice No.
21 MD140401-2 under the Supply Agreement. (Id.). However, it is unclear what “fully
22 resource the development of all generations of Super Junction MOSFETs” means under
23 § 4.2.1 of the Supply Agreement. (See Doc. 59-1 at 6). In other words, this provision is
24 ambiguous. Indeed, neither party even attempted to provide the Court with an argument as
25 to whether the provision applies to Invoice No. MD14040401-2 based on a reasonable
26 construction of § 4.2.1.¹² Thus, there is a dispute of material fact as to whether Plaintiff

27 ¹² Section 4.2.1 of the Supply Agreement is also at issue in Defendant’s Motion for Partial
28 Summary Judgment (Doc. 229). The parties do offer conflicting interpretations of the
provision within that discussion, as will be discussed. *Infra* Section III.b.1.C.

1 breached the Supply Agreement by not paying Invoice No. MD140401-2. See *Five Corners*
2 *Car Wash, Inc. v. Minrod Realty Corp.*, 20 N.Y.S.3d 578, 579 (App. Div. 2015).

3 Finally, Plaintiff contends it was not required to pay for any late paid invoices where
4 the invoice is for a lot that Plaintiff asserts it was not required to pay for under the Supply
5 Agreement. (Doc. 153 at 16–17). Specifically, Plaintiff argues that the Supply Agreement
6 required that Defendant meet a target yield¹³ of eighty percent for each lot and that certain
7 lots did not meet this alleged requirement. (Id.). Thus, Plaintiff claims it does not need to
8 pay invoices relating to the lots that did not meet the target yield requirement. (See id.).
9 Defendant responds that there was no agreement that it needed to meet an eighty-percent
10 target yield, and even if there was, such a requirement would not relieve Plaintiff of its
11 duty to pay. (Doc. 189 at 20–21; Doc. 191 at 1–2 (“There was never any agreement reached
12 on the meaning of ‘Target Yield[.]’”)).

13 The parties therefore dispute whether there was an agreement on target yield,
14 (Doc. 193 at 16–17), which precludes the Court from granting summary judgment. And,
15 even if Plaintiff is correct that there was an agreement as to target yield, as noted above, a
16 party is only relieved from performance of a contractual provision if the other party
17 commits a material breach. See *supra* Section III.a.2.A.i. Under New York law, Plaintiff is
18 not relieved from timely payment of invoices unless Defendant’s failure to produce lots
19 with a target yield of eighty percent—assuming that this requirement exists under the
20 Supply Agreement—constituted a material breach, which creates another dispute of
21 material fact that the Court cannot answer on summary judgment. See *supra* Section
22 III.a.2.A.i. In short, Plaintiff, as the movant, has not carried its burden of establishing that
23 there are no disputes of material fact relating to whether Defendant has failed to establish
24 breach of the Supply Agreement for invoices that relate to SJ MOSFET lots that Plaintiff
25 claims were below eighty-percent target yield.

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28 ¹³ The Supply Agreement defines “Target Yield” as “an average number of good Products
resulting from production wafers which shall be agreed between [Plaintiff] and
[Defendant].” (Docket 59-1 at 4 (§ 1.0 of the Supply Agreement)).

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17 **iii. Waiver**

The Court also rejects Plaintiff’s argument that Defendant waived the requirement for timely payment “by repeatedly and knowingly accepting late payments from [Plaintiff] over an extended period of time.” (Doc. 153 at 17–18). The Supply Agreement specifies, “No term or condition of this A[greement] shall be deemed waived unless such a waiver is in a writing executed by the Party against whom the waiver is sought to be enforced.” (Doc. 59-1 at 9 (§ 9.1 of the Supply Agreement)). Non-waiver clauses are “uniformly enforced” under New York law. *Awards.com, LLC*, 834 N.Y.S.2d at 155–56 (holding that contractual provision specifying there was no waiver of a provision of the contract unless the provision was waived in writing meant that acceptance of late payments did not effectuate a waiver of the requirement for timely payments). Plaintiff has offered no evidence that Defendant waived timely payment in writing. Moreover, whether a party waived a contractual provision is a question of fact for the jury because the party asserting waiver must show that there was an intent to waive. See *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653, 658 (N.Y. 2006). Thus, Plaintiff has not shown it is entitled to summary judgment on the Late Payment Counterclaim as a result of waiver.

18 **B. No Payment Counterclaim**

19 Plaintiff also contends that it is entitled to summary judgment on the No Payment
20 Counterclaim for invoices Defendant alleges Plaintiff did not pay. (Doc. 153 at 19–21).
21 First, the Court again denies summary judgment to Plaintiff on its argument that it was not
22 required to pay these invoices because the lots were below the eighty-percent target yield
23 it claims Defendant was required to meet or because Defendant did not timely produce the
24 lots. *Supra* Section III.a.2.A.ii; (see Doc. 153 at 19–20). Second, Plaintiff’s argument that
25 it is entitled to summary judgment because Defendant said Plaintiff did not have to pay
26 these invoices fails as well. (Doc. 153 at 19–21). Plaintiff states that Defendant agreed that
27 Plaintiff would not have to pay for these two invoices if Plaintiff destroyed the lots. (*Id.* at
28 20). No proof has been offered that Plaintiff destroyed the lots. (See *id.* at 19–21; Doc. 153-

1 21 at 8–11; Doc. 189 at 22; Doc. 193 at 19). Thus, there are disputed issues of material fact
2 that preclude summary judgment on the No Payment Counterclaim.

3 **3. Conclusion**

4 Accordingly, the Court grants summary judgment in Plaintiff’s favor on
5 Defendant’s breach of contract counterclaim for Invoice No. MD140611OM150514 for
6 the reason specified above. The Court denies summary judgment as to the rest of
7 Defendant’s counterclaims.

8 **b. Defendant’s Motion for Partial Summary Judgment**

9 Defendant seeks summary judgment on Plaintiff’s claims for lost profits damages,
10 lost business value damages, and lost development support cost damages which Plaintiff
11 asserts arise from its breach of contract claim. (Doc. 229 at 9–22). Defendant also asserts
12 summary judgment must be entered on Plaintiff’s fraud claim. (Id. at 22).

13 **1. Breach of Contract Claim**

14 Defendant only asserts that certain types of damages Plaintiff seeks for its breach of
15 contract claim are unavailable, not that summary judgment is appropriate on Plaintiff’s
16 breach of contract claim in toto. The Court will evaluate each type of damages Defendant
17 asserts is unavailable here in turn.

18 As the Court has noted, New York law governs the Supply Agreement. See *supra*
19 Section III.a.2. There are two overarching classifications of damages that can arise from a
20 breach of contract under New York law. First, “the nonbreaching party may recover general
21 damages which are the natural and probable consequence of the breach.” *Yenrab, Inc. v.*
22 *794 Linden Realty, LLC*, 892 N.Y.S.2d 105, 110 (App. Div. 2009). Second, a party may
23 recover “‘special’ or extraordinary damages that do not flow directly from the breach.” *Id.*
24 A party seeking special damages must “plead that the damages were foreseeable and within
25 ‘the contemplation of the parties at the time the contract was made.’” *Id.* (quoting *Am. List*
26 *Corp. v. U.S. News & World Report*, 549 N.E.2d 1161, 1164 (N.Y. 1989)).

1 2015 WL 6437456, at *24 (S.D.N.Y. Oct. 14, 2015) (quoting *Coastal Aviation, Inc. v.*
2 *Commander Aircraft Co.*, 937 F. Supp. 1051, 1066 (S.D.N.Y. 1996)).

3 As such, the first question is whether Plaintiff's sale of SJ MOSFETs constituted a
4 new business or venture. Plaintiff argues because it had been in business for years at the
5 time of Defendant's alleged breach, it does not constitute a new business. (See Doc. 306 at
6 9–10). Defendant responds that "New York law requires a track record of profits" in the
7 relevant market to support lost profits or the party is a new business. (Doc. 327 at 7–8).

8 An established business that attempts to enter into a new or different market is a
9 new business. See *Blinds to Go (U.S.), Inc.*, 931 N.Y.S.2d at 108. For example, in *Blinds*
10 *to Go (U.S.), Inc. v. Times Plaza Development*, the plaintiff operated a chain of stores. *Id.*
11 at 107–08. A lease dispute arose between plaintiff and defendant, and plaintiff was left
12 without space to sell its product in a new location that it had not sold in previously. *Id.* at
13 107. Plaintiff sought lost profit damages it asserted arose from that dispute. See *id.* The
14 court found that the plaintiff's assertion that it was attempting "to break into a new market"
15 illustrated it was a new business. See *id.* at 108; see also *Ho Myung Moolsan, Co. v.*
16 *Manitou Mineral Water, Inc.*, No. 07 CIV.07483 RJH, 2010 WL 4892646, at *7 n.3
17 (S.D.N.Y. Dec. 2, 2010) ("The critical newness is not of the business itself or of the
18 logistical foundations for sales, but for the attempt to sell a new product." (citing *Aviation*
19 *Inc.*, 937 F. Supp. at 1068)).

20 Because Plaintiff was also breaking into a new market, it must be considered a new
21 business. It is undisputed that Plaintiff never sold its SJ MOSFET until July 2011 and that
22 Plaintiff was attempting to enter the Chinese SJ MOSFET market. (Doc. 308 at 33, 36).
23 And importantly, Plaintiff has not offered any proof of a history of profit in the SJ
24 MOSFET market. (*Id.* at 47). Plaintiff even notes in its Response to the Motion that it "was
25 a new entrant to the SJ MOSFET market." (Doc. 306 at 14). Thus, just as in *Blinds to Go*
26 (*U.S.*), *Inc.*, here, Plaintiff is a new business under New York law because it is breaking
27 into a new market, and the Court must apply the stricter evidentiary standard.

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1 When a business is new, projections of future profit typically will not be enough to
2 establish reasonable certainty. *Kenford Co.*, 493 N.E.2d at 236. Indeed, in *Kenford Co. v.*
3 *Erie County*, the New York Court of Appeals concluded, “despite [a] massive quantity of
4 expert proof” that it found was reliable, the experts’ projections of future profit were not
5 sufficient to establish reasonable certainty as to lost profit damages. *Id.* The experts based
6 their projections of profits on the following hypothetical scenario: “that the facility was
7 completed, available for use and successfully operated by [the plaintiff] for 20 years,
8 providing professional sporting events and other forms of entertainment, as well as hosting
9 meetings, conventions and related commercial gatherings.” *Id.* The court held that this type
10 of speculation requiring a “multitude of assumptions” did not establish “proof with
11 reasonable certainty” of lost profits. *Id.*

12 To establish reasonable certainty, a new business must generally support its lost
13 profits damages claim with evidence of a history of profit or comparison of the new
14 business with other comparable and profitable businesses. See, e.g., *Schonfeld v. Hilliard*,
15 218 F.3d 164, 173–75 (2d Cir. 2000); *Blinds to Go (U.S.), Inc.*, 931 N.Y.S.2d at 108–09;
16 *Vasquez v. Gesher Realty Corp.*, 985 N.Y.S.2d 819, 821 (App. Term. 2014) (per curiam).
17 Moreover, a new business must account for “general market risks” that might negatively
18 affect its future profits, such as: “(1) the entry of competitors; (2) technological
19 developments; (3) regulatory changes; or (4) general market movements.” *Schonfeld*, 218
20 F.3d at 174–75; see also *Trademark Research Corp.*, 995 F.2d at 333 (“On this record, the
21 future of the CD-ROM market is subject to too many uncertain variables to project lost
22 profits with the requisite certainty.”).

23 Plaintiff has offered insufficient proof to show lost profit damages with reasonable
24 certainty. Plaintiff’s principal support for lost profits is the projections of its president, Sam
25 Anderson (“Anderson”), and its experts Walter Bratic (“Bratic”) and Uzi Sasson
26 (“Sasson”).¹⁴ (Doc. 306 at 12–14). But, for a new business, like Plaintiff, projections are

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28 ¹⁴ Plaintiff also apparently offers the fact that its business valuation expert, Greg Mischou,
“so believed in [Plaintiff] and its products that he spent years working to help the company
raise capital with no guarantee of any compensation unless he was successful” to show

1 generally not sufficient under New York law to establish lost profits with reasonable
2 certainty. At bottom, if the “massive quantity of expert proof” behind the projections in
3 Kenford Co. was not enough for the New York Court of Appeals to find reasonable
4 certainty of lost profits there, then the opinion of Anderson and the expert testimony that
5 relied upon it certainly cannot establish lost profits with reasonable certainty here.

6 Indeed, Plaintiff has failed to show a history of lost profits or any comparison with
7 the profitability of other like ventures or businesses. It is undisputed that Plaintiff’s lost
8 profits experts failed to make comparisons between IceMOS and its competitors. Sasson
9 failed to compare IceMOS to its competitors or Plaintiff’s product to any of its competitors’
10 products. (Doc. 308 at 35–36). Similarly, Bratic did not compare the efficacy of Plaintiff’s
11 product to competitors’ products, its sale resources to competitors, any of its competitor’s
12 entry to the MOSFET marketplace, or how Plaintiff would have competed with its
13 competitors. (Id. at 44). Without a history of profit or evidence showing the profitability of
14 other like-businesses, Plaintiff cannot establish lost profit damages with the reasonable
15 certainty New York law requires for new businesses.

16 It is also unclear if Plaintiff accounted for various factors that could affect its ability
17 to make profit. Plaintiff stated, “a semiconductor-industry sales forecast . . . depends upon
18 actions of third parties beyond the control of the forecaster.” (Doc. 232-22 at 3). Plaintiff
19 went on to say that these third parties include the buyers of the product, competitors who
20 could introduce new products, and new market entrants that could cause Plaintiff to reduce
21 the price for its product. (Id.) Plaintiff also suggested it may be required “to take other
22 actions to preserve customer relationships,” another scenario that could affects its ability
23 to meet its projections. (Id.). Plaintiff noted that economic recession, supply disruptions,
24 and “a myriad of other natural and man-made events” could affect its ability to make a
25 profit on its product as well. (See id. at 4). A party’s failure to account for “general market
26 risks,” such as “(1) the entry of competitors; (2) technological developments;
27 (3) regulatory changes; or (4) general market movements,” precludes a finding of
28 reasonable certainty of lost profits. (Doc. 306 at 14). As the case law above indicates, this
fact cannot be proof of Plaintiff’s lost profits claim.

1 reasonable certainty. *Schonfeld*, 218 F.3d at 174–75. Indeed, in *Trademark Research Co.*,
2 the court concluded the uncertainty in the market and the plaintiff’s failure to account for
3 this uncertainty rendered lost profits damages too uncertain. Similarly here, Plaintiff cannot
4 show the requisite certainty necessary to establish lost profit damages given the uncertainty
5 that the above factors could foster that even Plaintiff recognizes are “beyond [its] control.”
6 (Doc. 232-22 at 3–4).

7 In sum, the Court concludes Plaintiff did not establish lost profit damages with
8 reasonable certainty. As a new business, Plaintiff may not rely solely on projections but
9 instead must offer proof of profitability to establish lost profits with reasonable certainty.
10 Thus, Plaintiff’s lost profit damages claim is simply too speculative to survive Defendant’s
11 summary judgment motion.

12 Nonetheless, Plaintiff argues that it could rely on its projections to establish lost
13 profits damages with reasonable certainty because it has been an established business.
14 (Doc. 306 at 14). Plaintiff contends that *Kenford Co.* and its progeny turned on the fact
15 that, in those cases, evidence of lost profit “was based on products that never existed or
16 businesses that never operated,” and therefore, Plaintiff should not be classified as a new
17 business. (*Id.*). Not so. As noted above, when an established company enters into a new
18 market, it must show lost profits under the heightened evidentiary burden that New York
19 law applies to new businesses. See, e.g., *Blinds to Go (U.S.), Inc.*, 931 N.Y.S.2d at 108.

20 But, even if the Court assumes Plaintiff is correct, Plaintiff still must prove lost
21 profit damages with reasonable certainty. *Ashland Mgmt. Inc.*, 624 N.E.2d at 1011
22 (“Whether the claim involves an established business or a new business, however, the test
23 remains the same, i.e., whether future profits can be calculated with reasonable certainty.”).
24 While a party can approximate lost profits damages, the approximation must be “based
25 upon known reliable factors without undue speculation.” *Id.* at 1010–11 (citations omitted);
26 cf. *Uncas Int’l LLC v. Crimson Rose, Inc.*, No. 16 CIV. 9610 (JSR), 2017 WL 2839668, at
27 *7 (S.D.N.Y. June 26, 2017) (noting a court can dismiss a claim for lost profit damages
28 where it “would require an unreasonable level of speculation”). “[P]rojections of future

1 profits” based upon assumptions that require “speculation and conjecture” do not establish
2 reasonable certainty of lost profit damages. *Louis Hornick & Co. v. Darbyco, Inc.*, No.
3 12CV5892 (VSB) (DCF), 2015 WL 13745787, at *7–8 (S.D.N.Y. Aug. 19, 2015) (citation
4 omitted) (concluding that plaintiff’s claim for lost profits was not reasonably certain
5 because plaintiff failed to provide any data behind its projections of profit despite plaintiff
6 having “a successful and established product line”), adopted, No. 12-CV-5892 (VSB),
7 2015 WL 9478239 (S.D.N.Y. Dec. 29, 2015).

8 Thus, Plaintiff has failed to establish lost profits with reasonable certainty even if
9 the Court assumes it was not a new business for the same reasons the Court articulated
10 above. Plaintiff has not cited to any reliable evidence in support of its lost profits damages.
11 Its experts’ opinions are laden with assumptions, and Plaintiff has failed to connect any
12 quantifiable data to its projections of lost profits, just like the plaintiff in *Louis Hornick &*
13 *Co.*, rendering its lost profit damages claim not reasonably certain. As noted above, the
14 principal support for Plaintiff’s lost profits damages is projections, and Plaintiff itself
15 recognizes the numerous factors that are beyond its control that could affect the accuracy
16 of these projections, rendering the projections too speculative to support lost profit
17 damages with reasonable certainty.

18 Plaintiff highlighted *Ashland Management* at oral argument; however, *Ashland*
19 *Management* provides Plaintiff no refuge from the speculativeness of its lost profits claim.
20 Indeed, *Ashland Management* illustrates exactly why Plaintiff cannot establish its lost
21 profits claim with reasonable certainty. In *Ashland Management*, the court determined that
22 the projection of future profits there was not only based on the “parties’ carefully studied
23 professional judgments” but also that the company had a “substantial presence” in the
24 market for “several years” and the venture was part of a strategy that had a strong track
25 record, among other things. 624 N.E.2d at 1012. Thus, the projections in *Ashland*
26 *Management* were unlike the speculative nature of the projections in *Kenford Co.*, which
27 were marred by “speculative assumptions and few known factors.” *Id.* (citing *Kenford Co.*,
28 493 N.E.2d at 236). The court made clear that reasonable certainty requires that “damages

1 be capable of measurement based upon known reliable factors without undue speculation.”
2 Id. at 1010. At bottom, the key takeaway from Ashland Management is that a lost profits
3 claim cannot be based on projections of profit that are built on assumptions and speculation.
4 See id.

5 Accordingly, Plaintiff’s claim for lost profits fails under Ashland Management.
6 Plaintiff’s projections of future profit include far too many speculative assumptions and
7 few, if any, known factors to establish its claim with reasonable certainty. Plaintiff has not
8 had a “substantial presence” in the Chinese SJ MOSFET market for years; rather, Plaintiff
9 referred to itself as “a new entrant to the SJ MOSFET market.” (Doc. 306 at 14); see
10 Ashland Mgmt., 624 N.E.2d at 1012. Nor are Plaintiff’s projections based on the reliable
11 track record that helped establish reasonable certainty in Ashland Management. As noted,
12 Plaintiff has failed to show that its SJ MOSFET had a history of profit and Plaintiff
13 recognized the numerous factors beyond its control that could affect its ability to make
14 profit on its product. Thus, Ashland Management shows why Plaintiff’s lost profit claim
15 fails.

16 The newness of the business only affects the quantity and quality of the evidence
17 Plaintiff must offer to establish its lost profits claim. Because Plaintiff has not cited
18 sufficient reliable evidence on which to base its lost profits damages claim, its claim is not
19 based on the reasonable certainty that New York law demands, and summary judgment
20 will be granted in favor of Defendant on this claim. Given this conclusion, the Court need
21 not determine whether these damages were foreseeable or within the contemplation of the
22 parties when the Supply Agreement was formed.

23 **B. Lost Business Value Damages Claim**

24 Defendant argues that lost business value damages are unavailable because IceMOS
25 was not destroyed, Plaintiff cannot prove lost valuation with reasonable certainty, and that
26 lost business value damages were not within the contemplation of the parties or foreseeable
27 from breach. (Doc. 229 at 18–20). Because the Court concludes that Plaintiff has failed to
28 establish business value damages with reasonable certainty, it need not address whether

1 these damages were within the contemplation of the parties or whether these damages were
2 foreseeable from breach.

3 “[T]he ‘most accurate and immediate measure of damages’” of a new business can
4 be its “market value . . . at the time of breach.” *Washington v. Kellwood Co.*, 714 F. App’x
5 35, 41 (2d Cir. 2017) (ellipsis in original) (citation omitted). Fair market value is usually
6 determined by calculating “capitalization of expected future profits.” *24/7 Records, Inc. v.*
7 *Sony Music Entm’t, Inc.*, 566 F. Supp. 2d 305, 317 (S.D.N.Y. 2008); see also *Matter of*
8 *Seagroatt Floral Co., Inc.*, 583 N.E.2d 287, 290 (N.Y. 1991). Calculating lost business
9 value based on its market value at the time of breach is “inherently less speculative” than
10 measuring damages through lost profits because it is “measured by proof of ‘what a buyer
11 is willing to pay for the chance’ that the business will produce substantial income.”
12 *Washington*, 714 F. App’x at 41 (quoting *Schonfeld*, 218 F.3d at 177). However, a party
13 must still show lost business value damages with reasonable certainty because lost business
14 value damages are special damages. *Id.*; *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of*
15 *N.Y.*, 886 N.E.2d 127, 129–30 (N.Y. 2008). To do so a party must typically offer a history
16 of profit. See *24/7 Records, Inc.*, 566 F. Supp. 2d at 316–17 (rejecting that past revenue
17 was sufficient to establish lost business value damages with reasonable certainty given that
18 business was unprofitable for a year-and-a-half); *S.A.B. Enters., Inc. v. Village of Athens*,
19 *564 N.Y.S.2d 817, 822* (App. Div. 1991) (rejecting plaintiff’s lost business value damages
20 calculation because it was not based on proof of profit); cf. *In re Ford*, 312 N.Y.S.2d 966,
21 973 (App. Div. 1970) (noting, in litigation involving valuation of businesses that had been
22 condemned by the government, that basing business valuation on “hypothetical future
23 profits” is too speculative to establish lost business value).

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1 It is undisputed that Plaintiff’s lost business value damages expert, Greg Mischou
2 (“Mischou”),¹⁵ based his business valuation on revenue projections for 2017 and 2018 that
3 he made in 2014. (Doc. 308 at 50–52). Mischou’s expert report reads:

4 In summary, in 2014, based on Comparable M&A Transactions analysis, I
5 determined that a conservative financial valuation base for IceMOS in a
6 M&A transaction would be 1.9 to 4.1 times revenue, resulting in a value
7 range based on [Plaintiff]’s financial forecast of [redacted] for 2017 and
8 extending this analysis to [Plaintiff]’s 2018 projected revenues results in a
9 transaction valuation range of [redacted] for 2018. Likewise, based on
10 Comparable Public Company Valuation analysis, a conservative financial
11 valuation base for IceMOS in a company sale would be [redacted] times
12 revenue, resulting in a value range of [redacted] for 2017 and [redacted] for
13 2018.

14 (Doc. 296-4 at 16). Consequently, Plaintiff’s lost business value damages claim is
15 speculative because it is based on hypothetical future revenue without any proof of profit.
16 As discussed supra Section III.b.1.A., it is undisputed that Plaintiff had no history of profit
17 at the time of the alleged breach. (Doc. 308 at 33, 36). Plaintiff points to no other relevant
18 evidence in support of its lost business value damages that overcomes this fact. Thus,
19 because Plaintiff’s lost business value claim is based only on projections and because
20 Plaintiff has failed to establish a history of profit, Plaintiff has not established lost business
21 value damages with reasonable certainty. Accordingly, the Court grants the motion for
22 summary judgment as to Plaintiff’s lost business value damages claim.¹⁶

23 ¹⁵ Although the Court grants Defendant’s motion to exclude Mischou’s expert testimony
24 (Doc. 296) due to the Court’s conclusion that lost business value damages are unavailable
25 as discussed below, *infra* Section IV, the Court assumes, for purposes of analyzing whether
26 lost business value damages are available, that Mischou’s expert testimony is reliable.

27 ¹⁶ Given this conclusion, the Court will not address Defendant’s claim that lost business
28 value damages are only available under New York law where a business is destroyed.
(Doc. 229 at 18–19). But see *Stanacard, LLC v. Rubard LLC*, No. 12 CIV. 5176 (CM),
2016 WL 6820741, at *4 (S.D.N.Y. Nov. 10, 2016) (indicating lost business value damages
would be available where business was “almost completely destroyed”); Kenneth M.
Kolaski & Mark Kuga, *Measuring Commercial Damages via Lost Profits or Loss of
Business Value: Are these Measures Redundant or Distinguishable?*, 18 J.L. & Comm. 1,
5 n.8 (1998) (noting business value damages may be available where business was
“permanently damaged”).

1 **C. Lost Development Support Damages Claim**

2 Defendant asserts that Plaintiff’s claim for lost development support damages are
3 unavailable because: (1) Plaintiff has failed to show any damage, (2) lost development
4 support damages were not foreseeable, and (3) Plaintiff has not offered proof that shows
5 lost development support damages with reasonable certainty. (Doc. 229 at 20). Plaintiff
6 responds that there is a genuine issue of material fact as to whether Defendant “was
7 contractually obligated to provide developmental support for various generations of the SJ
8 MOSFET.” (Doc. 306 at 21). Plaintiff’s claim for lost development support damages is
9 grounded in a provision in the Supply Agreement that provides, “[Defendant] agrees to
10 fully resource the development of all generations of Super Junction MOSFETs as indicated
11 in Exhibit B2, through the duration of this A[greement].” (Doc. 59-1 at 6 (§ 4.2.1 of the
12 Supply Agreement)).

13 If a contract’s language is ambiguous, there is a material dispute of fact that the
14 court cannot resolve on a motion for summary judgment. *Five Corners Car Wash, Inc.*, 20
15 N.Y.S.3d at 579. Whether a contract’s language is ambiguous must be determined by the
16 court. See *Amusement Bus. Underwriters, a Div. of Bingham & Bingham, Inc. v. Am. Int’l*
17 *Grp., Inc.*, 489 N.E.2d 729, 732 (N.Y. 1985). A contract is ambiguous “when specific
18 language is ‘susceptible of two reasonable interpretations.’” *Ellington v. EMI Music, Inc.*,
19 21 N.E.3d 1000, 1003 (N.Y. 2014) (citation omitted).

20 Defendant asserts that the phrase “fully resource” merely refers to Defendant’s
21 obligations as a foundry, not that Defendant must pay for development support costs.
22 (Doc. 327 at 18). Plaintiff responds that “fully resource” could include development
23 support costs. (Doc. 306 at 19). Thus, Plaintiff claims there is a genuine issue of material
24 fact that precludes summary judgment. (Id.). Plaintiff also contends that whether these
25 development support costs are general or special damages is a question of fact that is not
26 properly before the Court on a motion for summary judgment. (Id. at 19–20).

27 “Resource” means “[t]o provide or supply with resources.” *Resource*, Oxford
28 English Dictionary (3d ed. 2010). “Resources” are “[s]tocks or reserves of money,

1 materials, people, or some other asset, which can be drawn on when necessary.” Resources,
2 Oxford English Dictionary, *supra*. Given these definitions, Plaintiff’s interpretation, based
3 on the text of § 4.2.1 of the Supply Agreement, is not foreclosed as a matter of law because
4 “to resource” includes providing monetary support when necessary. As such, there is a
5 genuine issue of material fact because the term “fully resource” is ambiguous.

6 Additionally, just as Plaintiff suggests, this genuine issue of material fact precludes
7 the Court from deciding whether Plaintiff’s claimed development support damages are
8 general or special. If Plaintiff’s interpretation of the provision prevails, then it may be that
9 lost development costs are the natural and probable consequence of breach of the Supply
10 Agreement. *Yenrab, Inc.*, 892 N.Y.S.2d at 110. Defendant’s criticism that Plaintiff has not
11 offered sufficient evidentiary support for the specific amount of damages Plaintiff claims
12 as its lost development support costs cannot be resolved on a motion for summary
13 judgment. See *Anderson*, 477 U.S. at 248 (stating “[a]ny proof or evidentiary requirements
14 imposed by the substantive law are not germane” to the materiality analysis).

15 In short, because there is a genuine issue of material fact as to what Defendant’s
16 obligations under the Supply Agreement were as to development support costs, the Court
17 cannot grant summary judgment on Plaintiff’s claim for these damages.

18 **2. Fraud Claim**

19 Defendant also moves for summary judgment on Plaintiff’s fraud claim. (Doc. 229
20 at 22). Defendant argues that the fraud claim is barred by the economic loss doctrine
21 because the subject matter of Plaintiff’s fraud claim relates only to issues regarding the
22 Supply Agreement. (*Id.*). Plaintiff responds that the economic loss doctrine does not apply
23 here because it asserts the doctrine is generally inapplicable to fraud claims and because it
24 claims its “damages directly relate to losses caused by fraudulent conduct that is unrelated
25 to [Defendant]’s performance of the Supply Agreement.” (Doc. 306 at 21–23).¹⁷

26 ¹⁷ Plaintiff’s Response violated District of Arizona Local Rule of Civil Procedure 7.2(e)(1),
27 which provides that a response may only be seventeen pages. Plaintiff’s brief is eighteen
28 pages. Although Defendant argues that the Court should strike the entirety of Plaintiff’s
argument on why the economic loss doctrine does not apply here, (Doc. 327 at 19–20), the
Court has wide discretion on whether to sanction a party for violation of Local Rule 7.2(e).
See *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002). The Court finds no

1 As the Court previously noted, Arizona law applies to Plaintiff’s fraud claim. (See
2 Doc. 25 at 19–20). Under Arizona law, the economic loss doctrine precludes common law
3 tort actions that seek “pecuniary damage[s] not arising from injury to the plaintiff’s person
4 or from physical harm to property.” *Sullivan v. Pulte Home Corp.*, 306 P.3d 1, 3 ¶ 8 (Ariz.
5 2013) (alteration in original) (citation omitted). Thus, a contracting party is limited to
6 contractual remedies for the recovery of purely economic loss that is not accompanied by
7 physical injury to persons or other property. *Flagstaff Affordable Hous. Ltd. P’ship v.*
8 *Design All., Inc.*, 223 P.3d 664, 667 ¶ 12 (Ariz. 2010). “Economic loss” is “pecuniary or
9 commercial damage, including any decreased value or repair costs for a product or property
10 that is itself the subject of a contract between the plaintiff and defendant, and consequential
11 damages such as lost profits.” *Id.* ¶ 11.

12 The rationale behind the economic loss doctrine is that contract law better protects
13 a party’s expectations while tort law is designed to protect the safety of persons and
14 property. See *Gilbert Unified Sch. Dist. No. 41 v. CrossPointe, LLC*, No. CV 11-00510-
15 PHX-NVW, 2012 WL 1564660, at *4–5 (D. Ariz. May 2, 2012) (citing *Flagstaff*
16 *Affordable Hous. Ltd. P’ship*, 223 P.3d at 667 ¶¶ 11–12). To determine whether the
17 economic loss doctrine applies, the court must analyze “whether the facts preponderate in
18 favor of the application of tort law or commercial law exclusively or a combination of the
19 two.” *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*,
20 694 P.2d 198, 210 (Ariz. 1984). When the allegations underlying a tort claim “are
21 inseparable from the essence of the contractual agreement,” the court should apply contract
22 law rather than tort law because the facts preponderate in favor of applying contract law.
23 *CITFin. LLC v. Treon, Aguirre, Newman & Norris PA*, No. CV-14-00800-PHX-JAT, 2016
24 WL 6610604, at *5 (D. Ariz. Nov. 9, 2016) (holding plaintiff’s claim was barred by
25 economic loss doctrine because the alleged misrepresentations at the foundation of the

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sanction is warranted though the Court warns Plaintiff that future rule violations may result
in sanctions. See *Kimoto v. McDonald’s Corp.*, No. CV063032PSGFMOX, 2007 WL
9711198, at *2 n.1 (C.D. Cal. July 5, 2007).

1 plaintiff's tort claim were "inseparable from the essence of the contractual agreement");
2 Gilbert Unified Sch. Dist. No. 41, 2012 WL 1564660, at *4–6 (same).

3 Preliminarily, Plaintiff appears to contend that fraud claims are exempt from the
4 economic loss doctrine. (See Doc. 306 at 21–22 ("[T]he ELR should not apply simply
5 because, as a matter of necessity, damages incurred for fraud 'will relate to the subject of
6 the parties' contract.'" (quoting *Jes Solar Co. v. Matinee Energy, Inc.*, No. CV 12-626
7 TUC DCB, 2015 WL 10943562, at *5 (D. Ariz. Nov. 2, 2015))). But, the cases Plaintiff
8 cites do not stand for the proposition that a fraud claim is never barred by the economic
9 loss doctrine. For example, in *Jes Solar Co. v. Matinee Energy, Inc.*, the plaintiffs
10 specifically alleged that the defendants there "never intended to perform on the contracts."
11 2015 WL 10943562, at *5. Therefore, the *Jes Solar Co.* court found that the facts there
12 preponderated in favor of applying tort law because the plaintiffs would not have expected
13 the defendants to have no intention of performing the contracts. See *id.* No such claim is
14 presented here. Arizona law does not otherwise provide for a fraud exception to the
15 economic loss doctrine. See, e.g., *CIT Fin. LLC*, 2016 WL 6610604, at *5 (concluding
16 fraud claim was barred by economic loss doctrine).

17 The economic loss doctrine bars Plaintiff's fraud claim here because the essence of
18 Plaintiff's breach of contract claim and fraud claim are the same. In short, each of
19 Plaintiff's allegations relating to Defendant's alleged fraudulent misrepresentations
20 concern issues regarding Defendant's performance of various provisions of the Supply
21 Agreement. (Doc. 59 at 35–38). As such, like *CIT Finance LLC*, Plaintiff's fraud claim is
22 inseparable from its breach of contract claim, and thus, the facts preponderate in favor of
23 applying contract law. Moreover, the policy considerations underlying the economic loss
24 doctrine identified above also weigh in favor of applying the doctrine here. Both Plaintiff
25 and Defendant are sophisticated parties that had equal bargaining power, and thus, each
26 party could negotiate and bargain to order their contractual relationship and allocate the
27 risks of breach according to their preferences. See *Gilbert Unified Sch. Dist. No. 41*, 2012
28 WL 1564660, at *4–5. As a result, there are contractual remedies available to Plaintiff

1 should Plaintiff show Defendant did not perform its end of the bargained-for Supply
2 Agreement. The fact that Plaintiff seeks punitive damages does not affect this analysis. See
3 CIT Fin., 2016 WL 6610604, at *5–6. Consequently, the facts here preponderate in favor
4 of applying contract law; thus, Plaintiff’s fraud claim is barred by the economic loss
5 doctrine.

6 **3. Conclusion**

7 Accordingly, the Court grants Defendant’s Motion for Partial Summary Judgment
8 (Doc. 229) as to Plaintiff’s lost profits claim, lost business value claim, and its fraud claim
9 (and thus its prayer for punitive damages as well (Doc. 59 at 38)). The Court denies the
10 Motion as to Plaintiff’s development support costs claim. The Court clarifies that this Order
11 does not address any claim for general damages arising from Plaintiff’s breach of contract
12 claim.

13 **IV. DEFENDANT’S DAUBERT MOTION TO EXCLUDE MISCHOU**

14 As noted above, also pending before the Court is Defendant’s Motion to Preclude
15 Testimony of Plaintiff’s Expert Greg Mischou (Doc. 296).

16 A party seeking to offer an expert opinion must show that the opinion satisfies the
17 requirements set forth by Federal Rule of Evidence 702 (“Rule 702”). Rule 702 requires
18 that the court “ensure that any and all scientific testimony or evidence admitted is not only
19 relevant, but reliable.” See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).
20 To be relevant, an expert’s testimony must fit the case. See *id.* at 591.

21 Mischou’s expert testimony regarding Plaintiff’s lost business value damages is
22 now irrelevant in light of the Court’s decision that these damages are unavailable. See *supra*
23 Section III.b.1.B. Plaintiff does not identify any other relevant issue Mischou’s expert
24 testimony will be offered for. (Doc. 324 at 18–20 (stating that Mischou was “retained
25 merely” to opine on lost business value damages)). Nor is it apparent, based on Mischou’s
26 expert report, that his testimony could be offered for any other relevant issue. (See Doc.
27 296-4 at 4 (Mischou’s report) (noting that Mischou was “asked to consider and provide
28 [his] opinions regarding the potential value [Plaintiff] would have been able to obtain from

1 a merger and acquisition or company sale” absent alleged breaches of the Supply
2 Agreement)). As such, Defendant’s motion to exclude Mischou as an expert is granted
3 because his expert testimony is irrelevant, and thus, not fit for this case.¹⁸

4 **V. MOTIONS TO SEAL**

5 Plaintiff and Defendant have filed various motions to seal in connection with the
6 partial summary judgment motions (Docs. 153; 229) and Defendant’s motion to exclude
7 Mischou from offering expert testimony (Doc. 296). (See Docs. 194; 228; 304; 309; 321;
8 323; 345; 346). Because review of the unredacted materials was unnecessary to the Court’s
9 resolution of these motions, the requests to file unredacted versions of these materials into
10 the record are denied as unnecessary. See Maui Elec. Co. v. Chromalloy Gas Turbine, LLC,
11 No. CIV. 12-00486 SOM, 2015 WL 1442961, at *16–17 (D. Haw. Mar. 27, 2015). All
12 documents filed lodged under seal will thus remain lodged under seal.

13 **VI. CONCLUSION**¹⁹

14 Based on the foregoing,

15 **IT IS ORDERED** that Plaintiff’s Motion for Partial Summary Judgment (Doc. 153)
16 is **GRANTED IN PART** and **DENIED IN PART**. The Motion is **GRANTED** as to
17 Defendant’s breach of contract counterclaim for payment of Invoice No.
18 MD140611OM150514. The Motion is **DENIED** as to Defendant’s fraud counterclaim, the
19 Defendant’s Late Payment Counterclaim relating to the thirty-two other invoices (i.e., each
20 invoice other than Invoice No. MD140611OM150514), and Defendant’s No Payment
21 Counterclaim.

22 ¹⁸ Although the Court had previously indicated that granting Defendant’s Motion for Partial
23 Summary Judgment on the issue of lost profits damages could be a ground to exclude the
24 expert testimony of Bratic and Sasson, (Doc. 343 at 1 n.1), the parties’ briefing on
25 Defendant’s motions to exclude Bratic and Sasson did not discuss the other issues that
26 Bratic and Sasson have opined on. (See Doc. 293 (motion to exclude Bratic); Doc. 299
27 (motion to exclude Sasson)). Upon further review of Bratic’s expert report (Doc. 293-1)
and Sasson’s expert report (Doc. 299-1), the Court finds that the expert testimony of Bratic
and Sasson may be relevant despite the unavailability of lost profit damages. Accordingly,
the Court will rule on Defendant’s motions to exclude Bratic and Sasson in a separate order
to follow.

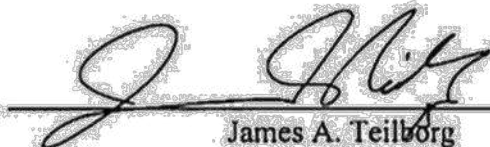
28 ¹⁹ To be clear, any claim that is not subject to the parties’ motions for partial summary
judgment may proceed to trial.

1 **IT IS FURTHER ORDERED** that Defendant’s Motion for Partial Summary
2 Judgment (Doc. 229) is **GRANTED IN PART** and **DENIED IN PART**. The Motion is
3 **GRANTED** as to Plaintiff’s lost profits claim, lost business value claim, and fraud claim.
4 The Motion is **DENIED** as to Plaintiff’s lost development support costs claim.

5 **IT IS FURTHER ORDERED** that Defendant’s Motion to Preclude Testimony of
6 Plaintiff’s Business Valuation Expert Greg Mischou (Doc. 296) is **GRANTED** as his
7 expert testimony is irrelevant.

8 **IT IS FURTHER ORDERED** that the following motions to seal (Docs. 194; 228;
9 304; 309; 321; 323; 345; 346) are **DENIED** for the reason indicated above. The Clerk of
10 Court shall not unseal the related documents and shall instead leave Docs. 195; 230; 298;
11 305; 307; 310; 325; 329; 336 lodged under seal.

12 Dated this 13th day of November, 2019.

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17 James A. Teilborg
18 Senior United States District Judge
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