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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EXPORT DEVELOPMENT
CANADA,

Plaintiff,

v.

E.S.E. ELECTRONICS, ET AL.

Defendants.

Case No. CV 16-02967- BRO (RAOx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AFTER
COURT TRIAL**

I.

INTRODUCTION AND PROCEDURAL HISTORY

This case stems from the agreement between Export Development Co. (“Plaintiff” or EDC”) and ESE Electronics (“E.S.E.”) regarding the sale of

1.

1 Thrustmaster TX Ferrari 458 Italia Edition Racing Wheel (the “TX Wheel”)¹, and
2 E.S.E.’s alleged failure to pay for the TX Wheels it received. EDC filed its original
3 Complaint in the Central District of California on April 29, 2016. (Dkt. No. 1.) On
4 June 17, 2016, Plaintiff filed its First Amended Complaint. (Dkt. No. 18 (“FAC”).)
5 In its FAC, Plaintiff brought four causes of action against Defendants E.S.E.
6 Electronics and E.S.E.’s chief executive officer, David Kazemi²: (1) Action for the
7 price; (2) Restitution/Quasi Contract; (3) Constructive Trust; and, (4) Promissory
8 Fraud (against Kazemi). (*See* FAC.) Defendants answered the FAC on September 1,
9 2016. (Dkt. No. 34). On December 12, 2016, Plaintiff sought partial summary
10 judgment. (Dkt. No. 38 (“Summary Judgment Motion”).) On February 6, 2017, the
11 Court denied Plaintiff’s Summary Judgment Motion. (Dkt. No. 57 (“Summary
12 Judgment Order”).)

13 On June 20, 2017, the Court having reconsidered its Summary Judgment Order,
14 granted partial summary judgment in favor of Plaintiff with respect to 926 non-
15 defective TX Wheels units because Defendant was liable for such units under both a
16 contract for sale and a consignment contract theory. (*See* Dkt. No. 164 (“MSJ2
17 Order”).) On July 14, 2017, the Court approved the parties’ Final Pretrial Conference
18 Order. (*See* Dkt. No. 186 (“PTCO”).) On July 25, 2017, EDC filed its Trial Brief.
19 (Dkt. No. 191 (“PBR”).) On July 26, 2017, Defendant filed its Trial Brief. (Dkt. No.
20 192 (“DBR”).)

21 On August 1 and 2, 2017, this Court presided over the bench trial in this matter.
22 (*See* Dkt. Nos. 200, 201.)

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25 _____
26 ¹ TX Wheels are used to play certain video games.

27 ² On April 21, 2017, EDC dismissed without prejudice its claims against Defendant Kazemi. (*See*
28 Dkt. No. 121.)

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II.
JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1332. Further, venue is proper under 28 U.S.C. § 1391.

III.
FINDINGS OF FACT³

1. Plaintiff EDC is a Canadian Crown corporation headquartered in Ottawa, Canada. It is a non-profit government agency that insures Canadian exporters selling goods in the U.S. against non-payment.

2. Non-party Guillemot Inc. (“Guillemot”) is a merchant that designs and manufactures electronic equipment, including gaming consoles.

3. Defendant E.S.E. is a merchant wholesaler and distributor of electronics and other items.

4. All claims asserted in this action have been assigned to EDC by Guillemot.⁴

5. On November 11, 2014, E.S.E. sent purchase order no. P201411049 to Guillemot for 2,800 units of TX Wheels.

6. On November 17, 2014, E.S.E. received 200 units of the TX Wheel.

7. E.S.E. subsequently received an additional 2,269 units of the TX Wheel from Guillemot. E.S.E. commingled the TX Wheels with additional merchandise in its warehouse.

8. E.S.E. did not pay for 1,119 units of the TX Wheel.

9. The agreed price for the goods was \$202.49 per unit.

10. On November 20, 2014, defendant Kazemi emailed Jonathan Tanner,

³ Any finding of fact which constitutes a conclusion of law is hereby adopted as a conclusion of law.

⁴ Guillemot and E.S.E. are referred to collectively as the “contracting parties.”

1 Mark Crane, and Maher Chammas of Guillemot purporting to confirm the terms of the
2 parties' agreement.

3 11. Defendant Kazemi's November 20, 2014 email stated:

4 Jonathan,

5 I just want to confirm the following as per our agreement:

6 1. my cost is \$202.00 as per the email below

7 2. I will be refunded/credited the difference when you bill me for
8 \$235

9 3. Items are on consignment basis and I can return items that were not
10 sold

11 Please confirm.

12 12. On November 28, 2014, E.S.E. started reselling the TX Wheels with its
13 first sale of 18 units to non-party Wintec Industries, Inc. ("Wintec"). Those 18 units
14 were sold to Wintec for \$238 per unit.

15 13. On December 5, 2014, E.S.E. emailed Guillemot purchase order no.
16 P201411049 for 2,200 units of the TX Wheel.

17 14. On December 8, 2014, E.S.E. sold 16 units of the TX Wheel to Wintec
18 for \$238 per unit.

19 15. On December 12, 2014, E.S.E. sold 15 units of the TX Wheel to Wintec
20 for \$238 per unit.

21 16. On December 16, 2014, E.S.E. sold 48 units of the TX Wheel to Wintec
22 for \$238 per unit.

23 17. On January 23, 2015, Guillemot emailed E.S.E. stating that payment of
24 invoice no. 29459 was due the next day.

25 18. On January 26, 2015, E.S.E. made its first sale of 627 units of the TX
26 Wheel to non-party Bright Light Business ("Bright Light").

27 19. On February 3, 2015, Guillemot emailed E.S.E. stating "[a]ccount is past
28 due. Expecting full payment this week."

20. On February 3, 2015, E.S.E. received a revised invoice no. 29459 from
Guillemot stating the price for the TX Wheels was \$202.49 per unit.

1 21. On February 10, 2015, E.S.E. sold 48 units of the TX Wheel to Wintec
2 for \$238 per unit.

3 22. On February 12, 2015, E.S.E. made its first payment for the TX Wheels
4 to Guillemot in the amount of \$40,498.00.

5 23. On February 20, 2015, E.S.E. made its second payment to Guillemot for
6 the TX Wheels in the amount of \$20,249.00.

7 24. On February 25, 2015, E.S.E. made its third payment to Guillemot for the
8 TX Wheels in the amount of \$40,498.00.

9 25. On March 4, 2015, E.S.E. sold 48 units of the TX Wheel to Wintec.

10 26. On April 13, 2015, E.S.E. made its fourth payment to Guillemot for the
11 TX Wheels in the amount of \$40,498.00.

12 27. On April 24, 2015, Guillemot called E.S.E. and told David Kazemi it
13 needed the TX Wheels back from Wintec or, alternatively, E.S.E. was required to pay
14 the full amount due.

15 28. Also on April 24, 2015, Guillemot emailed E.S.E. stating it “must collect
16 the total balance of the account without any further delay.”

17 29. On May 11, 2015 EDC wrote to E.S.E. demanding payment for the TX
18 Wheels.

19 30. The same day, E.S.E. made its second sale of 600 units of the TX Wheel
20 to Bright Light for \$600 per unit.

21 31. On May 14, 2015, Guillemot emailed E.S.E.’s counsel of record to
22 inquire if E.S.E. wished to resolve the dispute.

23 32. The same day, E.S.E. made its fifth payment to Guillemot for the TX
24 Wheels in the amount of \$10,124.50.

25 33. On May 22, 2015, Guillemot emailed E.S.E.’s counsel of record to
26 inquire as to the status of E.S.E.’s account.

27 34. On May 27, 2015, Guillemot emailed E.S.E.’s counsel of record stating
28 “Any luck for collaboration with ESE?”

1 35. The same day, E.S.E.’s counsel of record replied stating it was his
2 “understanding is that the merchandise was shipped to ESE on consignment.”

3 36. Guillemot responded the same day stating “[n]o, we did not approve
4 consignment.” Guillemot also requested information as to where the TX Wheels
5 were, how many had been sold, and whether E.S.E. would return the unsold units.

6 37. On May 29, 2015, Guillemot offered to have E.S.E. sell 1,000 units of
7 the TX Wheel to Amazon. E.S.E. never responded to that offer.

8 38. On June 3, 2015, Guillemot again emailed E.S.E.’s counsel of record
9 stating “\$308k of past due, inventory not sold to Walmart as was promised, no
10 response to provide reports on inventory and sell-through, no response to our
11 suggestion to sell to Amazon and all you can say is asking: “what is it you expect to
12 happen?” E.S.E. declined to make any proposal to resolve its account.

13 39. On June 4, 2015, E.S.E.’s counsel of record emailed Guillemot stating
14 that the “deal was on consignment and E.S.E. continues to make payments as it sells
15 merchandise.”

16 40. On June 8, 2015, Guillemot again emailed E.S.E.’s counsel of record
17 noting that E.S.E. had not responded to Guillemot’s request for information
18 concerning E.S.E.’s inventory of the TX Wheels or Guillemot’s offer to transfer 1,000
19 units of the TX Wheels to Amazon. E.S.E. did not respond to that email.

20 41. The same day, E.S.E. sold 300 units of the TX Wheel to Wintec for \$230
21 per unit.

22 42. On June 10, 2015, E.S.E. sold another 282 units of the TX Wheel to
23 Bright Light for \$230 per unit.

24 43. On June 16, 2015, E.S.E. made its sixth and seventh payments to
25 Guillemot for the TX Wheels, each in the amount of \$40,498.00 (for a total of
26 \$80,996). Since then, E.S.E. has not made any further payments for the TX Wheels.

27 44. On July 9, 2015, E.S.E. made its first request to Guillemot for a return
28 merchandise authorization (“RMA”) for 45 units of the TX Wheel.

1 45. On July 13, 2015, Guillemot responded by stating “[w]ould you like an
2 RMA for all good and defective inventory?”

3 46. On around July 28, 2015, E.S.E. did an inventory report of its stock.

4 47. On July 28, 2015, E.S.E. emailed Wintec stating it had 144 units of the
5 TX Wheel and offered to sell them to Wintec.

6 48. On July 30, 2015, Guillemot emailed E.S.E. stating:

7 We would like to give ESE an RMA for all remaining inventory. Is
8 that something that ESE will agree to? I know that you’re waiting on
9 an RMA for 45 units. We will provide the RMA for those defective
 units, but we would also like the return of all remaining stock as well.

10 49. On September 3, 2015, E.S.E. sold another 61 units of the TX Wheel to
11 Bright Light for \$235 per unit.

12 50. On September 21, E.S.E. requested an RMA for 200 units of the TX
13 Wheel from Guillemot.

14 51. The same day, Guillemot emailed E.S.E. stating “[w]e would like to give
15 E.S.E. RMA [sic.] for all remaining inventory (defective and unsold). Is that
16 something that E.S.E. will agree to?” E.S.E. did not respond to this offer.

17 52. Guillemot repeated its offer to take back all defective and unsold
18 inventory from E.S.E. on September 25, September 29, and October 22, 2015. E.S.E.
19 did not respond to any of those offers.

20 53. On November 10, 2016, E.S.E. assigned all rights to any claims it has
21 against Bright Light to its credit insurer, Euler Hermes (“Euler”).

22 54. The next day, Euler paid E.S.E. \$337,667.10. This insurance payment
23 was not for the TX Wheels E.S.E. sold to Bright Light, but for different products that
24 E.S.E. did not receive from Guillemot.

25 55. E.S.E.’s initially responded to EDC’s interrogatories no. 11 and 12 by
26 interposing a relevancy objection to the question of whether and how much E.S.E. was
27 paid by its customers for the TX Wheels.

28 56. E.S.E. resold all the TX Wheels to Wintec and Bright Light.

1 57. E.S.E. presently has 193 units of the TX Wheel in its possession, which it
2 claims are defective.

3 58. E.S.E. first learned some of the TX Wheels were allegedly defective in
4 late February 2015.

5 59. E.S.E. does not know what defects, if any, exist in the 193 allegedly
6 defective units in its possession.

7 60. E.S.E. has never notified Guillemot what defects, if any, exist in the 193
8 allegedly defective units in its possession.

9 61. David Kazemi's November 20, 2014 email purporting to confirm the
10 terms of the parties' agreement did not include any terms concerning attorneys' fees
11 or default interest.

12 62. The purchase orders E.S.E. submitted to Guillemot did not include any
13 terms concerning attorneys' fees or default interest.

14 63. The purchase orders E.S.E. submitted to Guillemot did not not expressly
15 limit any sale on the acceptance of the terms on E.S.E.'s purchase orders.

16 64. Guillemot had no control over the price at which E.S.E. resold the TX
17 Wheels and E.S.E. was free to resell them for any price it wanted without Guillemot's
18 prior consent.

19 65. Guillemot had no control over to whom E.S.E. resold the TX Wheels.

20 66. The parties did not agree that E.S.E. would receive a commission for its
21 sales of the TX Wheels and E.S.E. was to retain the profits from its sales.

22 67. Exhibits 13 and 15, the invoices E.S.E. received from Guillemot, all
23 included identical attorneys' fee and default interest provisions at the bottom.

24 68. On November 21, 2014, E.S.E. received an invoice from Guillemot that
25 included the interest and attorneys' fee provisions.

26 69. On November 26, 2014, E.S.E. received an invoice from Guillemot that
27 included the interest and attorneys' fee provisions.

28

1 70. E.S.E. never objected to the interest or attorneys' fee provisions on any
2 invoices it received from Guillemot.

3 71. E.S.E. did not sell any TX Wheels directly to Walmart.

4 72. On March 11, 2015, Guillemot wrote to David Kazemi asking how many
5 units of the TX Wheel Walmart had at that time.

6 73. On March 23, 2015, Guillemot again wrote to David Kazemi asking how
7 many units of the TX Wheel Walmart had at that time.

8 74. Dan Barona of EDC did not contact E.S.E. on behalf of EDC in relation
9 to the debt at issue before this action was filed.

10 At trial in this matter, Plaintiff requested the Court take notice of certain
11 admissions of party opponent, E.S.E. E.S.E. did not object to the Court's notice of
12 such admissions. Accordingly, the Court hereby finds the following facts.

13 75. The Court received Kazemi's following deposition testimony, (Kazemi
14 Dep. Vol. 2 at 459:10–12), as an admission by E.S.E.:

15 Q. Was Guillemot entitled to recall the goods from E.S.E.?

16 A. No.

17 76. The Court received Kazemi's following deposition testimony, (Kazemi
18 Dep. Vol. 2 at 452:3–23), as an admission by E.S.E.:

19 Q Okay. And does that mean that when those units that were
20 supposedly on consignment left E.S.E.'s warehouse, at that point
E.S.E. was supposed to pay Guillemot?

21 A [Kazemi:] See, we didn't declare -- we didn't clear that one
22 if I'm paying the guys net 60. Some occasion I paid Guillemot before
23 even I get paid. Some occasion I was waiting for the payment. You
know, I was managing the ability of that. But E.S.E. intention was
no matter what -- I'm not going to go repeat this one again. No
matter what, E.S.E. was obligated to pay Guillemot.

24 Q Okay.

25 A If anybody pay or not to pay. We're going back –

26 Q No. You mean if any of E.S.E.'s customers pay?

27 A Anybody.

28 Q Right.

 A No matter if the merchandise get robbed by my warehouse.

 Q Yeah.

 A Any liability, I took over that.

1 77. The Court received Kazemi's following deposition testimony as an
2 admission by E.S.E., (Kazemi Dep. Vol. 1 at 111:17-24):

3 Q Okay. Let's look at the pictures. Let me -- answer my
4 question though. Should those stickers or pictures of those stickers
have been produced to EDC?

5 A Probably yes.

6 Q They are relevant, are they?

7 A They're relevant, yeah, what is wrong with the unit.

8 78. The Court received Kazemi's following deposition testimony, (Kazemi
9 Dep. Vol. 2 at 584:11-585:2), as an admission by E.S.E.:

10 Q Ask me if you don't understand this: Did you ever believe
11 Guillemot was unable to perform any part of the deal relating to the
12 TX Wheels? Like, did you think, for example, that Guillemot is not
13 able to ship the Wheels that I need or Guillemot is not able to --
14 so Guillemot's obligations in this transaction, for example, were to
15 ship the Wheels? Or according to you -- to you. Or according to
16 you, their obligation was to give a 10 percent rebate? Did you ever
17 say to yourself "Oh, Guillemot is insolvent. They can't afford to pay
18 the 10 percent rebate. They can't perform this deal"? I'm just giving
19 you examples that you might or might not say. Was there any part of
20 that transaction that you believed Guillemot was not able to uphold
21 what it was supposed to do?

22 A No.

23 79. The Court received Myra Urmeneta's following deposition testimony,
24 (Urmeneta Dep. 189:5-18), as an admission by E.S.E.:

25 Q Payment to Guillemot was due when E.S.E. shipped the TX
26 Wheels to E.S.E.'s customer, and E.S.E.'s customer received them; is
27 that right?

28 A Yes.

Q Not when E.S.E.'s customer paid E.S.E.?

A Yes.

Q So if E.S.E. shipped 1,000 units to Bright Light, and Bright
Light received the thousand units, is it correct that E.S.E. then owed
Guillemot for \$1,000 units?

A Yes.

Q And it didn't matter whether or not Bright Light paid
E.S.E.?

A Yes.

80. The Court received Myra Urmeneta's following deposition testimony,
(Urmeneta Dep. 193:24-194:4), as an admission by E.S.E.:

1 Q Okay. So this language saying that the client will be liable
2 for all expenses and 1.5 percent monthly interest, you mean there was
3 no reason to object to that because there was no dispute at that time?
4 A Yes.

5 Pursuant to Federal Rule of Civil Procedure 52, the Court makes the following
6 additional findings of fact.

7 81. Guillemot and EDC executed an assignment agreement, pursuant to
8 which Guillemot assigned its claims against E.S.E. to EDC.

9 82. David Kazemi is the chief executive officer and sole owner of Defendant
10 E.S.E. Electronics, Inc.

11 83. Kazemi is proficient in, and can read and understand the English
12 language. He can and does read books in English.

13 84. E.S.E. resold 1,570 units of the TX Wheel to Bright Light. E.S.E. issued
14 four invoices to Bright Light for those particular units. (*See* Tr. Ex. 61.) Bright Light
15 paid E.S.E. in full for the 1,570 units of the TX Wheel that E.S.E. shipped to Bright
16 Light. (*See also* Tr. Ex. 61.)

17 85. After ESE received the 200 TX Wheels on November 12, 2014, Kazemi
18 told Crane and Tanner that ESE would only accept more TX Wheels on consignment.
19 Crane acknowledged that Kazemi told him that additional TX Wheels had to be
20 received on consignment. However, Crane explained to Kazemi that Guillemot, rather
21 than Crane, would need to approve for consignment and that Guillemot never
22 approved the request.

23 86. On November 21, 2014, Tanner replied to Kazemi's November 20, 2014
24 email stating, "David [Kazemi], [w]e are putting together a spreadsheet that will detail
25 everything. Stay tuned." (Tr. Ex. 5.)

26 87. Guillemot's distributor, Petra Industries, shipped the 2,269 TX Wheels
27 units to E.S.E. on November 19 and 20, 2014. (*See* Tr. Ex. 91 ("Bills of Lading")).
28 At times relevant to this Action, Petra Industries was located at 5201 W Reno Ave #F,
Oklahoma City, OK 73127. (*See id.*)

1 88. E.S.E. received an invoice from Guillemot for 2,269 of the 2,469 TX
2 Wheel units delivered to E.S.E. on November 21, 2014. (*See* Tr. Ex. 15-1.) Exhibit
3 15-1 reflects a payment due date of January 24, 2015. (*Id.*)

4 89. The following language is printed at the bottom of Guillemot’s invoices,
5 (Tr. Ex. 15 (collectively, the “Invoices”)), to E.S.E.:

6 The client will be **LIABLE** for all expenses incurred to recover the
7 payment of said amount including all legal fees. These presents shall
8 be governed and interpreted by the law in force in the province of
9 QUEBEC. If any provision hereof is determined to be void or
10 unenforceable in a whole or in part, it shall be deemed not to affect or
impair any other provision hereof. See terms of sale on reverse side.
All merchandise remains GUILLEMOT INC. property until paid for
in full. No returns without our written consent. ***Past due accounts:
1.5% Monthly INTEREST.***

11 90. At times relevant to this Action, Kazemi maintained a schedule of
12 payments to Guillemot. (*See* Tr. Ex. 62 (“Schedule of Payments”).) This internal
13 E.S.E. spreadsheet reflects invoice and payment due dates for E.S.E.’s transaction
14 with Guillemot. (*See id.*) Exhibit 62 pertains to the TX Wheel transactions with
15 Guillemot. Exhibit 62 reflects a due date of January 24, 2015 for each of E.S.E.’s
16 payments to Guillemot. (*See id.*) Exhibit 62 also reflects that the underlying Invoice
17 had aged 144 days at the time the particular Schedule of Payments was memorialized
18 for trial. (*See id.*)

19 91. Kazemi’s recordkeeping (in the form of schedules of payments) differed
20 for consignment contracts versus contracts-for-sale. When E.S.E. entered into
21 consignment agreements, Kazemi would log the customer number in the “aging”
22 column, whereas when E.S.E. bought goods outright, Kazemi would enter the actual
23 aging date of the invoice in the “aging” column.

24 92. Kazemi inquired regarding a further order of TX Wheels on February 12,
25 2015. (*See* Tr. Ex. 83.)

26 93. Kazemi’s November 20, 2014 email to Tanner is the only documentary
27 evidence Kazemi has supporting his claim that the TX Wheels transaction was on
28 consignment, rather than an outright sale of goods.

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IV.

CREDIBILITY DETERMINATIONS

94. Ninth Circuit Model Jury Instruction 1.11 provides guidance to jurors when assessing credibility. The factors include: (1) the opportunity and ability of the witness to see or hear or know the things testified to; (2) the witness's memory; (3) the witness's manner while testifying; (4) the witness's interest in the outcome of the case and any bias or prejudice; (5) whether other evidence contradicted the witness's testimony; (6) the reasonableness of the witness's testimony in light of all the evidence; and, (7) any other factors that bear on believability. Ninth Cir. Model Jury Instr. 1.11 (Civil) (2007). The Court finds these factors helpful in assessing the credibility of the witnesses. The Court has assessed these factors when determining a witness or party's credibility.

95. The Court finds David Kazemi's testimony regarding central factual issues to be *not credible*. At trial, Kazemi admitted to no fewer than three instances⁵ when he made false statements on issues of critical importance during his prior depositions and in his January 9, 2017 declaration. Kazemi's explanation for his inaccurate or false statements is not credible. During direct examination, Kazemi claimed that he failed to look closely at the invoices underlying his transaction with Bright Light and Guillemot, respectively. Kazemi also testified that he failed to pay attention to the accuracy and correctness of his assertions in his January 9, 2017 declaration. (Tr. Ex. 56.) But significant evidence contradicts Kazemi's trial testimony. Most notably, Kazemi's did not volunteer that he made inaccurate or false statements in his declaration or at his deposition. Rather, as evidenced by Kazemi's trial testimony, Kazemi only retracted his prior statements when Plaintiff's counsel confronted

⁵ Kazemi admitted his interrogatory response No. 19, Ex. 46-2, was untrue. Kazemi admitted that his Declaration in opposition to Plaintiff's summary judgment contained untrue statements, Ex. 56. Kazemi admitted that the handwritten changes to Day 3 deposition testimony was not true. Kazemi admitted that his statement in Ex. 93-2 ¶ 3 was not true.

1 Kazemi at the second and third deposition days with countervailing evidence in form
2 of Bright Light receipts stamped paid, and Euler Hermes insurance documents
3 evidencing that Euler’s insurance payment to E.S.E. was for goods other than TX
4 Wheels.

5 96. Furthermore, even assuming that Kazemi did not pay attention when he
6 initially signed his declaration, Kazemi’s explanation for its inaccuracy is not credible.
7 Kazemi had multiple opportunities to review and correct his inaccurate statements.
8 For instance, Plaintiff’s counsel, David Mannion, presented Kazemi with his January
9 9, 2017 declaration at Kazemi’s deposition on March 16, 2017. Kazemi testified at
10 trial that he, in fact, read from his January 9, 2017 declaration *during* his deposition.
11 Yet Kazemi still failed to correct misstatements in the declaration. Kazemi also
12 testified at trial that he knew on Day 1 of his deposition that he had “messed [the
13 declaration’s assertions] up”; nevertheless, Kazemi failed to correct his prior
14 misstatements at that time. Kazemi’s inaccurate/false testimony pertains to this
15 litigation’s *central* issues. Kazemi’s extensive contradictory statements and the
16 pattern and timing of Kazemi’s retraction of prior, admittedly false testimony renders
17 Kazemi’s explanation for the inaccurate deposition testimony not credible.

18 97. The Court observed Kazemi’s demeanor while testifying regarding the
19 attorneys’ fees/interest provisions in particular. When Plaintiff’s counsel, David
20 Mannion, asked Kazemi to read portions of the Euler Hermes insurance documents
21 (Tr. Ex. 71-1), bearing small, blurry text, Kazemi demonstrated little difficulty
22 deciphering and reading aloud the particular text. However, when asked to read small,
23 sharp text pertaining to attorneys’ fees and interest on the Invoices, Kazemi shifted
24 around in his seat, adjusted and readjusted his reading glasses on the bridge of his
25 nose, and testified that he could not read a single word of the provision at issue.
26 Kazemi’s change in demeanor, and exaggerated facial- and body expression when
27 asked to read the attorneys’ fees and interest provision as compared to his demeanor
28 and expressions when reading blurrier, similarly small text in Trial Exhibit 71-1 leads

1 the Court to conclude that Kazemi’s purported inability to decipher or read the
2 attorneys’ fees/interest provision on the Guillemot Invoices is not credible. In
3 addition, Kazemi is the sole owner of E.S.E. Thus, Kazemi has a significant, personal
4 interest in the outcome of this litigation.

5 98. In the Ninth Circuit, a factfinder may choose to believe “everything a
6 witness says, or part of it, or none of it.” Ninth Cir. Model Jury Instr. 1.14 (Civil)
7 (2007, updated July 2017). Based upon Kazemi’s repeated, admittedly false
8 testimony pertaining to central issues (notably, each false statement supports E.S.E.’s
9 purported defenses to liability) during his depositions and in his declaration, Kazemi’s
10 personal interest in the outcome of this Action, and Kazemi’s demeanor on the witness
11 stand, the Court finds only very limited portions of Kazemi’s testimony throughout
12 this litigation credible.

13 99. The Court finds the testimony of Jonathan Tanner and Maher Chammas to
14 be *credible*. The Court observed their demeanor and found them to be forthright,
15 credible witnesses. Each of these witnesses testified in a straightforward manner and
16 no evidence or testimony was adduced at trial that would indicate that either of these
17 witnesses personally stood to gain from the Action’s outcome. Their testimony was
18 largely uncontradicted by past statements and corroborated by documentary evidence.
19 Accordingly, the Court deems their testimony to be credible.

20 100. With respect to Mark Crane and Myra Urmaneta⁶, the Court finds their
21 testimony to be *credible*. The Court observed the demeanor of the witnesses, and
22 found them to be believable. In addition, their testimony is consistent with the
23 documents and with each other. The witnesses responded to questions in a
24

25
26 ⁶ Ms. Urmaneta’s testimony on the second day where she testified inconsistently with her
27 testimony on the first day regarding why she did not respond to Guillermot’s emails was adequately
28 clarified. Accordingly, the Court believes Ms. Umaneta’s testimony that the reason she did respond
to Guillermot’s emails is because it slipped her mind.

1 straightforward and forthright manner. They presented as unbiased witnesses who
2 simply answered the questions. Accordingly, the Court believes their testimony.

3 III.

4 CONCLUSIONS OF LAW

5 101. “In bench trials, Fed.R.Civ.P. 52(a) requires a court to ‘find the facts
6 specially and state separately its conclusions of law thereon.’ ” *Vance v. American*
7 *Hawaii Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir.1986) (quoting Fed. R. Civ. P.
8 52(a)). “One purpose behind Rule 52(a) is to aid the appellate court's understanding of
9 the basis of the trial court's decision. This purpose is achieved if the district court's
10 findings are sufficient to indicate the factual basis for its ultimate conclusions.” *Id.*
11 (citations omitted). Furthermore, the court “is not required to base its findings on each
12 and every fact presented at trial.” *Id.* at 792; *see generally Kurth v. Hartford Life &*
13 *Acc. Ins. Co.*, 845 F. Supp. 2d 1087, 1091 (C.D. Cal. 2012). In a bench trial, the court
14 may enter judgment against a party on a claim that, under the controlling law, can be
15 maintained only with a favorable finding on that issue. Fed. R. Civ. P. 52(c). Under
16 Rule 52(c), the court has express authority to resolve disputed issues of fact. *Ritchie*
17 *v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). The Court may make findings
18 in accordance with its own view of the evidence and is not required to draw any
19 inferences in favor of the non-moving party. *Id.* Pursuant to Rule 52, the Court
20 makes the following conclusions of law.

21 A. Interpretation of Contracts

22 102. Under California law,⁷ a contract is to be interpreted so as “to give effect
23 to the mutual intention of the parties as it existed at the time of contracting.” Cal. Civ.
24

25 ⁷ Under California choice-of-law rules, California state law applies, unless the parties object. *See,*
26 *e.g., Hurtado v. Superior Court*, 11 Cal. 3d 574, 580 (Cal. 1974). Here, Defendant belatedly raised,
27 and subsequently withdrew, its intent to invoke Québec law. (*See* PTCO Motion at 12; PTCO Reply
28 at 5.) As the Court explained in its Summary Judgment Order, absent timely objection by the
parties, the Court applies California law. (*See* Summary Judgment Order at 7 n.3)

1 Code § 1636; see *Founding Members of the Newport Beach Country Club v. Newport*
2 *Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 955 (Cal. Ct. App. 2003). The
3 mutual intent of the parties is to be determined from the language of a contract, “if the
4 language is clear and explicit, and does not involve an absurdity.” See *id.* § 1638. “It
5 is the objective intent, as evidenced by the words of the contract, rather than the
6 subjective intent of one of the parties, that controls interpretation.” *Titan Group, Inc.*
7 *v. Sonoma Valley Cty. Sanitation Dist.*, 164 Cal. App. 3d 1122, 1127 (Cal. Ct. App.
8 1985). A party’s subjective and undisclosed intent is simply irrelevant to contract
9 interpretation. *Newport Beach Country Club*, 109 Cal. App. 4th at 956.

10 103. When discerning the parties’ mutual intent, a court must take care not to
11 substitute one party’s view of what the contract should have said for the terms that are
12 actually contained within the document. See *Ben-Zvi v. Edmar Co.*, 40 Cal. App. 4th
13 468, 473 (Cal. Ct. App. 1995). In other words, “the courts do not make contracts for
14 the parties.” 5 Margaret N. Kniffin, *Corbin On Contracts* § 24.19 (rev. ed. 1998); see
15 also *Bookstein v. Bookstein*, 7 Cal. App. 3d 219, 223 (Cal. Ct. App. 1970) (“It is not
16 the province of a court to add the provisions of a stipulation, to insert a term not found
17 therein, or to make a new stipulation for the parties.”).

18 104. But where the parties disagree about the meaning of the contract, a court
19 must construe it applying a two-step approach. *Wolf v. Superior Court*, 114 Cal. App.
20 4th 1343, 1351 (2004). First, the court must determine as a matter of law whether the
21 contract is ambiguous. *Id.* In making this determination, the court considers whether
22 the contract’s language is reasonably susceptible to the interpretation urged by a party,
23 and may properly consider any extrinsic evidence that would be relevant to this end.
24 See *id.* If an ambiguity exists, the court moves to the second step in the analysis, and
25 admits any extrinsic or parol evidence to assist in interpreting the contract. *Id.*; *F.B.T.*
26 *Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010) (“Parol evidence
27 is properly admitted to construe a contract only when its language is ambiguous.”). If
28 the parties do not present any parol evidence, or if the parol evidence is not in conflict,

1 the court may resolve any ambiguities as a matter of law. *Wolf v. Walt Disney*
2 *Pictures & Television*, 162 Cal. App. 4th 1107, 1126 (Cal. App. Ct. 2008), as
3 *modified on denial of reh'g* (June 4, 2008). If there is a conflict in the extrinsic
4 evidence, then the factfinder must resolve the factual conflict. *See City of Hope Nat.*
5 *Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (Cal. 2008); *Wolf*, 114 Cal. App.
6 4th at 1351.

7 105. Here, the parties disagree about the contract's meaning; accordingly the
8 Court proceeds by *Wolf's* two-step approach. The documentary evidence of the
9 contracting parties' agreement is incomplete and disjointed; the parties engaged in
10 undocumented oral negotiations, Kazemi sent an email requesting confirmation on
11 November 20, 2014, Guillemot sent Invoices bearing certain terms, and the
12 contracting parties exchanged numerous other emails. No single document can
13 reasonably be considered as the single, final manifestation of the contracting parties'
14 agreement, and the collection of incomplete documents lends itself to multiple
15 interpretations. Because the documentary manifestation of the contracting parties'
16 agreement lends itself to multiple reasonable interpretations, the Court finds that
17 admitting parol evidence to aid in the interpretation of the parties' mutual intent in
18 contracting is necessary and appropriate in this instance.

19 **B. Consignment Contract vs. Contract-for-Sale**

20 106. The parties dispute whether their agreement pertaining to the TX Wheels
21 was one for consignment or sale. (Compare PBR at 1–5 with DBR at 3–4.) Whether
22 the parties agreed to a consignment is determined under the law of the state where the
23 transaction occurred. *Kemp-Booth Co., Ltd., v. Calvin*, 84 F.2d 377, 380 (9th Cir.
24 1936). Under California law, “[a] consignment sale is one in which the merchant
25 takes possession of goods and holds them for sale with the obligation to pay the owner
26 for the goods from the proceeds of a sale by the merchant.” *Bank of Cal. v. Thorton-*
27 *Blue Pacific, Inc.*, 53 Cal. App. 4th 841, 847 (Cal. Ct. App. 1960). A consignment of
28 goods for the purpose of sale ordinarily constitutes a bailment. *N. Ctys. Bank v. Earl*

1 *Himovitz & Sons Livestock Co.*, 216 Cal. App. 2d 849, 859 (Cal. Ct. App. 1963)
2 (citing *Perera v. Panama-Pacific Int. Exp. Co.*, 179 Cal. 63, 64 (Cal. 1918); 7 Cal.
3 Jur. 2d, Bailments, sec. 4; 8 Am. Jur. 2d Bailments, sec. 34; 8 C.J.S. Bailments § 3; 4
4 Williston on Contracts (rev. ed.) sec. 1035).

5 107. If, however, the transacting parties intend passage of title, the transaction
6 may be regarded as a contract of sale rather than a bailment. In determining which
7 event occurred, bailment or contract of sale, the intent of the parties is controlling.
8 *Himovitz*, 216 Cal. App. 2d at 859 (citing 8 Am. Jur. 2d, Bailments, sec. 35; 8 C.J.S.
9 Bailments § 3.) The bailor may sell or otherwise transfer the subject matter of the
10 bailment and confer on the transferee an immediate and valid title without the
11 necessity of formal delivery. *Id.* (citing 8 Am. Jur. 2d, Bailments, sec. 84; 8 C.J.S.
12 Bailments § 32).

13 108. The entire contract as well as the action of the parties thereunder must be
14 considered to determine whether a contract was for a sale or consignment. *Consol.*
15 *Accessories Corp. v. Franchise Tax Bd.*, 161 Cal. App. 3d 1036, 1040–41 (Cal. Ct.
16 App. 1984). Significant factors include (1) suggestion and contemplation of
17 consignment in the memorandum of the agreement between the parties; (2) lack of
18 obligation on the part of the “consignee” to pay for unsold goods; (3) obligation of the
19 consignee to pay for goods when sold by him; (4) prompt remittance to consignor for
20 goods sold, whether for cash or credit; (5) visits to consignee to inquire into sales and
21 urge prompt remittance of collections to consignor; (6) keeping by a representative of
22 the consignor of an account or inventory of goods consigned and sold; and,
23 (7) provision for return of merchandise upon termination of the agreement. *Id.* (citing
24 *Hervey v. AMF Beaird, Inc.* 464 S.W.2d 557, 562 (Ark. 1971)).

25 109. A consignment agreement may also take the form of a *security*
26 consignment, which is a contract for sale, rather than a *true* consignment. *See In re*
27 *Ide Jewelry Co., Inc.*, 75 B.R. 969, 973 (Bankr. S.D.N.Y. 1987) (“[W]here a
28 consignment is intended as security and the goods are delivered to the consignee

1 primarily for resale, the transaction will actually be a sale or return[.]”); *Martini E*
2 *Ricci Iamino S.P.A.—Consortile Societa Agricola v. Trinity Fruit Sales Co., Inc.*, 30
3 F. Supp. 3d 954 (E.D. Cal. 2014) (“[T]he Ninth Circuit has cited with approval *In re*
4 *Ide Jewelry’s* discussion of, and distinction between, ‘true consignments’ and ‘security
5 interests.’”). In *Martini*, district court in this Circuit explained that a consignment “is
6 nothing more than a bailment for care or sale, wherein there is no obligation of
7 purchase in the consignee.” 30 F. Supp. 3d at 966 (quoting *In re D.I.A. Sales Corp.*,
8 339 F.2d 175, 178 (6th Cir. 1964)). “A true consignment creates an agency pursuant
9 to which goods are delivered to a dealer for the purpose of resale; the consignor
10 usually requires the consignee to charge a certain price for the goods.” *Id.* (quoting
11 *Glenshaw Glass Co. v. Ontario Grape Growers’ Mktg. Bd.*, 67 F.3d 470, 475 (3d Cir.
12 1995)).

13 110. A key distinction between a security consignment agreement and a true
14 consignment agreement is whether the consignor (i.e. Guillemot) retains title over the
15 underlying goods, or instead retains merely a security interest in the underlying goods.
16 As set forth in *In re Ide Jewelry Co., Inc.*, 75 B.R. 969, 978 (Bankr. S.D.N.Y. 1987),⁸
17 “[f]acts which support the notion that a consignment was intended as security include:
18 (i) setting of price by the consignee, (ii) billing consignee upon shipment, (iii)
19 commingling of proceeds and failure to keep proper accounts by the consignee, (iv)
20 mixing consigned goods with goods owned, and (v) consignor purporting to retain
21 title to goods until paid[.]” *Ide Jewelry*, 75 B.R. at 978. By contrast, in a true
22 consignment, “[t]he consignor, as principal retains the ownership, may recall the
23 goods, and sets the sale price.” *Consol. Accessories Corp. v. Franchise Tax Bd.*, 161
24 Cal. App. 3d 1036, 1040 (Cal. Ct. App. 1984). “The consignee (agent) receives a
25 commission and not the profits of the sale.” *Id.*

26
27 ⁸ *Martini E Ricci Iamino S.P.A.— Consortile Societa Agricola v. Trinity Fruit Sales Co., Inc.*, 30 F.
28 Supp. 3d 954, 966, n.8 (E.D. Cal. 2014) (“[T]he Ninth Circuit has cited with approval *In re Ide*
Jewelry’s discussion of, and distinction between, ‘true consignments’ and ‘security interests.’”).

1 111. Here, the Court concludes that the parties intended to (and did) form a
2 contract for sale. In reaching this conclusion, the Court evaluates the abovementioned
3 factors to ascertain the parties mutual intent. First, with respect to suggestion and
4 contemplation of consignment, Kazemi mentioned a consignment in his November
5 20, 2014 email to Guillemot. Kazemi also noted that he wished to be able to return
6 any unsold goods. But Crane and Tanner credibly testified that, although Kazemi had
7 raised consignment in preliminary negotiations, neither Crane nor Tanner agreed to a
8 deal of that structure. Crane credibly testified that he advised Kazemi that Crane was
9 not authorized to agree to consignment deals on Guillemot’s behalf. Notably,
10 Kazemi’s November 20, 2014 email ends with a request that Guillmot “please
11 confirm” the terms he had suggested in the email. No evidence before the Court
12 shows that Guillemot ever confirmed Kazemi’s November 20, 2014 email terms.
13 Furthermore, Kazemi sent the email, the only documentary indication of any intent for
14 consignment, at 4:24 p.m. PST,⁹ after Guillemot’s distributor, Petra Industries, had
15 already shipped the Goods at issue to E.S.E.; the Bills of Lading reflect signatures
16 dated November 19 and 20, 2014. (*See* Bills of Lading.) Maher Chammas credibly
17 testified on cross examination that in his experience in this industry, the truck driver
18 signs a bill of lading at the time the driver actually picks up the goods and leaves the
19 warehouse.

20 112. The extrinsic evidence adduced at trial shows that E.S.E. received
21 invoices bearing a payment due date of January 24, 2015. (*See* Tr. Ex. 15.) In
22 deposition, Kazemi explained E.S.E.’s record-keeping for contracts for sale versus for
23 consignment. (*See also* Tr. Ex. 62.) Notably, E.S.E.’s record-keeping differed based
24 upon a given contract’s nature as one for consignment or one for sale. At the time of
25 contracting, Kazemi kept the Schedule of Payments for the Guillemot TX Wheels
26

27 ⁹ Chammas credibly explained that the Petra facility, which is located in Oklahoma), would have
28 already been closed by 4:24 p.m. PST (i.e. 6:24 p.m. CST).

1 transactions according to the manner he developed for contracts for sale. In particular,
2 the “Aging” column reflects an entry of “144 days.” (*See id.*; *see also* Tr. Ex. 62.)
3 Kazemi’s Schedule of Payments to Guillemot does not reflect Kazemi’s self-
4 described, usual manner of recordkeeping for consignment contracts. These facts
5 weigh in favor of the parties’ mutual intent to contract for sale of goods.

6 113. Like Guillemot’s Invoices, E.S.E.’s Schedule of Payments also reflects a
7 payment due date of January 24, 2015 for the TX Wheels. (*Compare* Tr. Ex. 62 *with*
8 Tr. Ex. 15.) The fact that Kazemi noted a particular due date for payment owed to
9 Guillemot corroborates Kazemi’s intent to form a contract for sale because it
10 demonstrates that Kazemi did not necessarily pay Guillemot only when E.S.E. had
11 sold TX Wheels to a third party. And the pattern of E.S.E.’s initial payments
12 demonstrates that E.S.E. did not pay only when it had resold TX Wheels. Instead, as
13 Kazemi testified at trial, E.S.E. began paying Guillemot in amounts exceeding the
14 value of TX Wheels actually sold to any third party. The fact that E.S.E. paid for
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1 units before it actually resold the units to a third party corroborates the contracting
2 parties' mutual intent to form a contract for sale, rather than a consignment contract.
3 E.S.E.'s recordkeeping and initial payments weigh in favor of the parties' intent to
4 contract for a sale of goods, rather than a true consignment of goods.¹⁰

5 C. Action for the Price

6 114. An action for the price, is codified at California Commercial Code¹¹
7 Sections 2709(1) and 2607(1). A seller must satisfy four elements to prove a claim
8 under Uniform Commercial Code Section 2-709 for trade contract price (adopted by
9 California as Commercial Code Section 2709): "(1) the acceptance of the goods by the
10 buyer, (2) the price of the goods accepted, (3) the past due date of the price, and
11 (4) the failure of the buyer to pay." *Zhongshan Hengfu Furniture Co., Ltd. v. Home*
12 *Accents All., Inc.*, No. ED-CV-14-00038-VAP-DTBX, 2014 WL 12561625, at *4
13 (C.D. Cal. Oct. 20, 2014).

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15
16 ¹⁰ Furthermore, even assuming the Guillemot and E.S.E.'s intended to form a consignment
17 agreement, the transaction bears more markers of a security consignment rather than of a true
18 consignment. Kazemi testified that E.S.E. did not keep accounting records of its income from
19 selling TX Wheels. And according to Kazemi, the TX Wheels at issue were warehoused together
20 with other goods, such that Kazemi would not be able to indicate which TX Wheels were on
21 consignment versus bought in an outright sale. Guillemot sent the TX Wheels Invoices to E.S.E.
22 shortly after shipping the TX Wheels to E.S.E. (*See Invoices.*) Guillemot did not control the price at
23 which E.S.E. resold the TX Wheels, nor to whom E.S.E. resold the TX Wheels. And the parties did
24 not agree that E.S.E. would receive a commission for its sales of the TX Wheels; rather, E.S.E. was
25 to retain the profits from its resales. In sum, the Court concludes that the parol evidence of the
26 parties' negotiations prior to shipment, as well as the parol evidence demonstrating E.S.E.'s and
27 Guillemot's respective understanding of their obligations at the time of contracting evince the
28 contracting parties' mutual intent to form a contract for sale, rather than one for true consignment of
goods. Accordingly, the California Commercial Code applies to the contracting parties' agreement.

¹¹ California courts "generally afford great deference to the decisions of [their] sister jurisdictions
interpreting [the Uniform Commercial Code's] provisions. *Oswald Mach. & Equip., Inc. v. Yip*, 10
Cal. App. 4th 1238, 1247 (Cal. Ct. App. 1992), *reh'g denied and opinion modified* (Dec. 4, 1992);
Needle v. Lasco Industries, Inc., 10 Cal. App. 3d 1105, 1108 (Cal. Ct. App. 1970) ("Since one of the
purposes of the Commercial Code is to 'make uniform the law among the various
jurisdictions' . . . the cited cases are compelling authority which we accept.").

1 115. Plaintiff met its burden to show, through the evidence and testimony that
2 between November 17, 2014 and November 24, 2014, E.S.E. received a total of 2,469
3 units of the Thrustmaster TX Ferrari 458 Italia Edition Racing Wheel' from
4 Guillemot. E.S.E. resold those TX Wheels to Wintec and Bright Light. E.S.E.'s
5 receipt of the TX Wheels (absent seasonable return), and resale of those TX Wheels to
6 third parties establishes that E.S.E.'s accepted the TX Wheels at issue.

7 116. The parties admit that the price per unit was \$202.49. Plaintiff met its
8 burden of establishing the price of the goods accepted.

9 117. Guillemot's Invoices, (Tr. Ex. 15), Mr. Chammas's credible trial
10 testimony, and E.S.E.'s Schedule of Payments, (Tr. Ex. 62), documenting the
11 transaction between Guillemot and E.S.E. reflect that E.S.E.'s payments to Guillemot
12 for the TX Wheels were due over two years ago, on January 24, 2015. EDC met its
13 burden of establishing by a preponderance of the evidence the past due date of the
14 price.

15 118. As the Court found above, E.S.E. admits it has not paid for 1,119 units of
16 the Goods. EDC met its burden of showing, by a preponderance of the evidence, that
17 E.S.E. failed to pay for the 1, 119 TX Wheels at issue.

18 **D. Interest and Attorneys' Fees Provisions**

19 **1. Whether Parol Evidence Exists to Support the Proposition that** 20 **Guillemot's Invoices Were Intended as a Confirmation of the** 21 **Contracting Parties' Agreement**

22 119. "The prevailing rule is that an invoice, standing alone, is not a contract,
23 and a buyer is ordinarily not bound by statements thereon which are not a part of the
24 original agreement." *Starbucks Corp. v. Amcor Packaging Distrib., a corp.*, No. CV
25 2:13-1754 WBS CKD, 2016 WL 3543371, at *6 (E.D. Cal. June 24, 2016) (quoting
26 *Hebberd-Kulow Enters., Inc. v. Kelomar, Inc.*, 218 Cal. App. 4th 272, 279 (Cal. Ct.
27 App. 2013)) (citation omitted). However, where parol evidence exists to support the
28 proposition that an invoice was intended as a confirmation of the parties' agreement,

1 an invoice may state agreed-upon terms. *Hebberd-Kulow*, 218 Cal. App. 4th at 283
2 (“[T]o find the interest provision an agreed upon term under section 2207, the court
3 had to rely on more evidence than the invoices.”).

4 120. Here, parol evidence supports the proposition that Guillemot’s Invoice(s)
5 were intended as a confirmation of the contracting parties agreement. Specifically,
6 both parties introduced evidence regarding Kazemi’s November 20, 2014 email to
7 Guillemot, requesting confirmation of the contracting parties’ agreement. On
8 November 24, 2014, Tanner replied to Kazemi’s November 20, 2014 email stating,
9 “David [Kazemi], [w]e are putting together a spreadsheet that will detail everything.
10 Stay tuned.” (Tr. Ex. 5.) In light of the contracting parties’ contemplation of a
11 confirmation of their oral negotiations, the Court concludes that the Invoices at issue
12 may state agreed-upon terms. *Hebberd-Kulow*, 218 Cal. App. 4th at 283.

13 **2. Whether the Interest and Attorneys’ Fees Provision Was**
14 **Incorporated Into the Contracting Parties’ Agreement**

15 121. The parties dispute whether the interest and attorneys’ fees provision in
16 particular was incorporated into the contracting parties agreement, because Kazemi’s
17 November 20, 2014 email did not mention attorneys’ fees or interest. Incorporation of
18 additional terms during contract-for-sale negotiation is governed by California
19 Commercial Code Section 2207. *See Channell Com. Corp. v. Wilmington Mach. Inc.*,
20 No. ED-CV-14-2240-DMG-DTBx, 2016 WL 7638180, at *5 (C.D. Cal. June 17,
21 2016) (quoting *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 926 (9th
22 Cir. 1979)) (“Section 2-207 rejects the common law’s ‘mirror-image’ rule for
23 transactions, by ‘convert[ing] a common law counteroffer into an acceptance even
24 though it states additional or different terms.”).

25 122. “One intended application of section 2-207 is to commercial transactions
26 in which the parties exchange printed purchase order and acknowledgment
27 forms.” *Channell*, 2016 WL 7638180, at *5 (quoting *Diamond Fruit Growers, Inc. v.*
28 *Krack Corp.*, 794 F.2d 1440, 1442–43 (9th Cir. 1986) (finding that section 2-207

1 applied to a case in which the parties exchanged purchase order and acknowledgment
2 forms that contained different or additional terms)). “The drafters of the U.C.C.
3 recognized that ‘because the purchase order and acknowledgement forms are oriented
4 to the thinking of the respective drafting parties, the terms contained in them often do
5 not correspond.’” *Id.* (quoting *Diamond Fruit Growers*, 794 F.2d at 1442–43; U.C.C.
6 § 2-207, Cmt. 1.4).

7 123. California Commercial Code § 2207 “is [also] intended to deal with” the
8 situation “where an agreement has been reached either orally or by informal
9 correspondence . . . and is followed by one or both of the parties sending formal
10 memoranda embodying the terms so far as agreed upon and adding terms not
11 discussed.” Cal. Com. Code § 2207, Off. Cmt. 1. “Under [California Commercial
12 Code] § 2207(1), an acceptance will operate to create a contract even if additional or
13 different terms are stated *unless* the acceptance is expressly conditioned on assent to
14 the new terms. If a contract is created under § 2207(1), then § 2207(2) defines the
15 terms of the contract.” *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 787
16 (9th Cir. 2001) (citing *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90, 101 (Cal. 1977)).
17 “[S]ubsections (a), (b), and (c) of section 2207, subdivision (2), operate in the
18 alternative. If any one of the three subsections applies, the variant terms of an
19 acceptance do not become part of an agreement.” *Steiner v. Mobil Oil Corp.*, 20 Cal.
20 3d 90, at 103 (Cal. 1977).

21 124. Applied to the circumstances of this case, the attorneys’ fees/interest
22 provisions may have been incorporated into the parties’ Agreement, if EDC proves
23 that: (1) Kazemi’s purchase orders and November 20, 2014 email did not expressly
24 limit acceptance to their terms; (2) Guillemot’s invoice terms did not materially alter
25 the parties’ agreement; and, (3) ESE did not object to the interest or attorneys’ fees
26 provisions on Guillemot’s invoices. *See Steiner*, 20 Cal. 3d at 93–94.

27 //

1 **a. Express Limitation of Acceptance**

2 125. Based upon the evidence adduced at trial, the Court concludes that
3 Kazemi failed to expressly limit acceptance to the terms of his November 20, 2014
4 email, or other prior oral negotiations with Guillemot. Crane credibly testified that,
5 while Kazemi had requested to take TX Wheels on consignment, Crane informed
6 Kazemi that he was not authorized to enter into contracts for consignment with E.S.E.
7 Additionally, as the Court found above, E.S.E. admits that its purchase orders did not
8 expressly limit acceptance to their terms. The Court concludes, by a preponderance of
9 the evidence, that E.S.E. did not expressly limit acceptance to the terms of the
10 November 20, 2014 email or any other, prior, oral negotiation between the parties.

11 **b. Material Change**

12 126. “A clause that would materially alter the contract is one which result[s] in
13 surprise or hardship if incorporated without express awareness by the other party.” *C9*
14 *Ventures v. SVC-W., L.P.*, 202 Cal. App. 4th 1483, 1506 (Cal. Ct. App. 2012) (internal
15 quotation marks omitted). “Examples of clauses which involve no element of
16 unreasonable surprise and which therefore are to be incorporated in the contract unless
17 notice of objection is seasonably given are . . . a clause providing for interest on
18 overdue invoices . . . where they are within the range of trade practice[.]” *See* Cal.
19 Com. Code § 2207, Off. Cmt. 5 (emphasis added); *cf.*, *S.W. Concrete Products v.*
20 *Gosh Constr. Corp.*, 798 P.2d 1247, 1252 (Cal. 1990) (affirming judgment that
21 invoice term for late charges of 1.5% per month¹² became part of contract under
22 § 2207 where invoices accompanied goods.); *Kawasho Internat., U.S.A. Inc. v.*
23 *Lakewood Pipe Serv., Inc.*, 152 Cal. App. 3d 785, 792 (Cal. Ct. App. 1983) (affirming
24 trial court’s judgment that interest provision was incorporated into agreement under
25 Section 2207); *O’Connor v. Televideo Sys., Inc.*, 218 Cal. App. 3d 709, 718–19 (Cal.
26 Ct. App. 1990) (“The fact that the parties agreed to the 1 ½ percent monthly charge is

27 _____
28 ¹² Guillemot’s invoices all provided for default interest of 1.5% per month. (*See* Tr. Exs. 13, 15.)

1 also established by Commercial Code section 2207 which provides that additional
2 terms become part of the contract between merchants unless the person receiving them
3 objects.”); *United States v. A.E. Lopez Enters., Ltd.*, 74 F.3d 972, 976 (9th Cir. 1996)
4 (finding that interest terms on concrete supplier’s invoice created an enforceable
5 contract).

6 127. California courts have also ruled that attorneys’ fee provisions are terms
7 that may bind a buyer if not objected to under § 2207. *Cf. Boyd v. Oscar Fisher Co.*,
8 210 Cal. App. 3d 368, 379 (Cal. Ct. App. 1989) (holding that where nothing in the
9 parties’ original agreement precluded a supplemental agreement on attorneys’ fees,
10 invoices added attorneys’ fee provision under § 2207); *Progressive Produce Corp. v.*
11 *Wild W. Produce, LLC*, No. CV 13-00665 RSWL, 2013 WL 1935921, at *3 (C.D.
12 Cal. May 9, 2013) (“[T]he attorney’s fee provision became a part of the Parties’
13 contract pursuant to California Commercial Code § 2207(2) and created a contractual
14 right to attorney’s fees.”); *South Bay Transp. Co. v. Gordon Sand Co.*, 206 Cal. App.
15 3d 650, 660 (Cal. Ct. App. 1988) (attorney fee provision added to carrier’s contract by
16 signed bills of lading); *Henry Avocado Corp. v. Polo’s Produce, Inc.*, No. 1:10-CV-
17 01298 AWI, 2010 WL 4569136, at *5 (E.D. Cal. Nov. 3, 2010) (finding “that neither
18 the interest nor attorneys [sic] fees terms materially alter the contract”); *JC Produce,*
19 *Inc. v. Paragon Steakhouse Rests., Inc.*, 70 F. Supp. 2d 1119, 1123 (E.D. Cal.1999)
20 (holding that the plaintiff’s invoices expressly reserved PACA trust rights over
21 interest and reasonable attorney's fees); *but see C9 Ventures v. SVC-W., L.P.*, 202 Cal.
22 App. 4th 1483, 1507 (Cal. Ct. App. 2012) (“Because the indemnification provision
23 would have materially altered the terms of the oral contract between SVC and C9, the
24 provision did not become part of their contract under section 2207.”); *Food Team*
25 *Int'l, Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 421–22 (E.D. Pa. 2012) (finding that
26 attorneys’ fees provision first included on invoice was material change to parties’
27 agreement).

1 128. Here, the Court concludes that, in accordance with California law, the
2 interest and attorneys’ fees provision at issue is not one that would “result in surprise
3 or hardship if incorporated without express awareness by the other party.” The
4 possibility of legal expenses and interest based upon a buyer’s failure to pay a
5 monetary obligation is not so unusual as to cause surprise to the buyer, E.S.E. The
6 concepts of legal action in pursuit of unpaid debts, as well as interest upon past-due
7 amounts are common in business transactions and professional parlance. And the
8 provision at issue would not cause undue hardship to E.S.E. if incorporated without
9 E.S.E.’s express awareness. The interest rate is within the range of rates that have
10 repeatedly been held to be insufficieint to constitute undue hardship. And the
11 attorneys’ fees for which E.S.E. could be liable under that provision would also be
12 within E.S.E.’s direct control (in theory, E.S.E. could pay its amounts-owing at any
13 time to stem accrual of excessive legal fees). For that reason, the Court holds that the
14 additional interest and attorneys’ fees provision on the Guillemot Invoices to E.S.E.
15 does not constitute a material change to the contracting parties’ agreement.

16 **c. Notification of Objection**

17 129. “If no answer is received within a reasonable time after additional terms
18 are proposed, it is both fair and commercially sound to assume that their inclusion has
19 been assented to.” *See* Cal. Com. Code § 2207, Off. Cmt. 6. “[I]n California, an
20 offeree, regardless of apparent manifestation of his consent, is not bound by
21 inconspicuous contractual provisions of which he is unaware, contained in a document
22 whose contractual nature is not obvious.” *Lima v. Gateway, Inc.*, 886 F. Supp. 2d
23 1170, 1179 (C.D. Cal. 2012) (internal quotation marks omitted) (citing *Specht v.*
24 *Netscape Commc'ns Corp.*, 306 F.3d 17, 32–35 (2d Cir. 2002); *Windsor Mills, Inc. v.*
25 *Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (Cal. Ct. App. 1972)).

26 130. However, “it is a general and well established principle of contract law
27 that ‘one who is ignorant of the language in which a document is written, or who is
28 illiterate,’ may be bound to a contract by negligently failing to learn its contents.”

1 *Randas v. YMCA of Metro. L.A.*, 17 Cal. App. 4th 158, 163 (Cal. Ct. App. 1993)
2 (citation omitted); *see also* Restatement (Second) of Contracts § 157 cmt. b (1981)
3 (“Generally, one who assents to a writing is presumed to know its contents and cannot
4 escape being bound by its terms merely by contending that he did not read them; his
5 assent is deemed to cover unknown as well as known terms.”).

6 140. As explained above, the Court finds that E.S.E. never objected to the
7 interest or attorneys’ fee provisions on any invoices it received from Guillemot. Ms.
8 Urmaneta testified that E.S.E. did not respond because there was no need to respond
9 because there was no dispute. The Court rejects Mr. Kazemi’s testimony that he could
10 not read the text on the invoice. E.S.E.’s failure to object to the interest and attorneys’
11 fees provision stands in contrast to E.S.E.’s objection to the incorrect price term
12 contained in the same Invoice.

13 141. As explained in greater detail above, the Court finds Kazemi’s assertion
14 that he could not (and cannot) read the Invoice terms to be not credible. Even
15 assuming Kazemi could not read the terms, his failure to learn the contents of the
16 interest and attorneys’ fees provision does not permit E.S.E. to escape being bound by
17 these terms. *See Randas*, 17 Cal. App. 4th at 163. Myra Urmeneta, Kazemi’s
18 personal assistant, credibly testified that E.S.E. did not object to the interest/attorneys’
19 fees terms because “normally we don’t really pay attention to that.” Moreover, the
20 Court received Myra Urmeneta’s deposition testimony, (Urmeneta Dep. 193:24–
21 194:4), as an admission by E.S.E.. Ms. Urmaneta testified that E.S.E. failed to object
22 to the attorneys’ fees/interest provision because there was no reason to object as
23 there was no dispute at the time E.S.E. received the invoice. Alternatively, she
24 testified that it slipped her mind. Accordingly, the Court concludes that EDC has met
25 its burden of establishing, by a preponderance of the evidence, that E.S.E. failed to
26 notify Guillemot of any objection to the interest and attorneys’ fees provision on Trial
27 Exhibits 13 and 15.

1 142. Because (1) E.S.E. did not expressly limit acceptance to its terms, (2) the
2 additional interest and attorneys’ fees provision on the Guillemot Invoices did not
3 materially change the contracting parties’ agreement, and, (3) E.S.E. failed to object to
4 the interest/attorneys’ fees provision, the Court concludes that the interest/attorneys’
5 fees provision was incorporated into the contracting parties’ contract for sale of goods.
6 Thus, E.S.E., as buyer, may be held “liable for all expenses incurred to recover the
7 payment of [the invoiced] amount including all legal fees” and any past-due accounts
8 are subject to 1.5% monthly interest.

9 **E. Affirmative Defenses**

10 143. In its Answer, ESE raised a number of defenses to EDC’s claims. In its
11 trial brief and at trial in this matter, ESE raised defenses only as to the 193 allegedly
12 Defective Units. (*See* DBR at 8–11.) The Court discusses E.S.E.’s defenses in turn.

13 **1. Revocation of Acceptance**

14 144. Defendant claims that “[u]nder CA Commercial Code §2608, E.S.E. is not
15 liable for the cost of the 193 Defective TX Wheels, since E.S.E.’s RMA requests for
16 Defective TX Wheels was a revocation and rejection of the Defective TX Wheels.”
17 (DBR at 7.) “[A] buyer may revoke acceptance [only] if: (1) there is a substantial
18 nonconformity in the goods; (2) the nonconformity is difficult to discover; (3) the
19 revocation occurs within a reasonable time; and (4) the revocation occurs ‘before any
20 substantial change in condition of goods which is not caused by their own defects.’”
21 *Alco Stand. Corp. v. Beauwood California, Inc.*, 84-CV-4430, 1986 WL 8884, at *4
22 (C.D. Cal. Apr. 30, 1986) (citing Cal. Com. Code § 2608).

23 145. As explained in Official Comment 2 to § 2607, “acceptance of goods
24 precludes their subsequent rejection. Any return of the goods thereafter must be by
25 way of revocation of acceptance, under [§ 2608].” *Cf. Rawls v. Associated Materials,*
26 *LLC*, 10-CV-01272, 2012 WL 3852875, *5 (S.D. W. Va. Sept. 5, 2012) (“[R]ejection
27 of goods occurs, if at all, before acceptance of goods, and revocation of acceptance of
28 goods occurs, if at all after acceptance of goods.”).

1 146. Importantly, “[a] buyer has the burden to prove that revocation of
2 acceptance was . . . justified, including proof that the defects or nonconformity caused
3 a substantial impairment in the value of the goods.” *Zeta Consumer Prods. Corp. v.*
4 *Equistar Chem. L.P.*, 291 B.R. 336, 355 (Bankr. D.N.J. 2003); *Sherwin-Williams Co.*
5 *v. Mark Charcoal Co.*, No. 80 C 4541, 1985 WL 3932, at *4 (N.D. Ill. Nov. 15, 1985)
6 (“The party asserting revocation of acceptance has the burden of establishing that it
7 was proper and justified, and that the seller’s breach substantially impaired the value
8 of the goods to the buyer.”). “In ‘cases between merchants . . . the essential content of
9 the notice must set forth ‘the nonconformity in the goods materially impairing their
10 value to the buyer.’ The content must also inform the seller that the buyer does not
11 wish to keep the goods.” *China Nat. Metal Prod. Imp./Exp. Co. v. Apex Digital, Inc.*,
12 141 F. Supp. 2d 1013, 1026 (C.D. Cal.), *order set aside on other grounds*, 155 F.
13 Supp. 2d 1174 (C.D. Cal. 2001).

14 **a. Substantial Nonconformity**

15 147. Here, E.S.E. has failed to discharge its burden of establishing that 193
16 units of TX Wheels were defective. Mr. Kazemi testified that he does not know what
17 defects, if any, exist in the 193 allegedly defective units in E.S.E.’s possession. E.S.E.
18 also admits it never notified Guillemot what defects, if any, exist in the 193 allegedly
19 defective units in its possession. Because E.S.E. has failed to establish that the 193
20 units at issue had a substantial nonconformity, E.S.E.’s revocation of acceptance
21 defense fails with respect to the 193 allegedly defective units.

22 **b. Revocation Within Reasonable Time**

23 148. Section 2608 also provides that, “[r]evocation of acceptance must occur
24 within a reasonable time after the buyer discovers or should have discovered the
25 ground for it[.]” § 2608(2) (emphasis added); *cf. In re G. Paoletti, Inc.*, 205 B.R. 251,
26 261 (Bankr. N.D. Cal. 1997) (“if acceptance is revoked, the buyer must return the
27 goods to the seller.”). “A buyer who abandons the return process and keeps the goods
28 therefore cannot recover the purchase price.” *Genesis Health Clubs, Inc. v. LED*

1 *Solar & Light Co.*, 639 F. App'x. 550, 556 (10th Cir. 2016) (finding buyer “did not
2 effectively reject or revoke acceptance of the lights because it never relinquished
3 dominion over them.”); *Barry & Sewall Indus. Supply Co. v. Metal-Prep of Houston,*
4 *Inc.*, 912 F.2d 252, 257 (8th Cir. 1990) (buyer must unequivocally and timely revoke
5 and “not indulge in any action which would indicate that he has reaccepted the
6 goods”); *White v. Holiday Kamper & Boats*, 06-CV-2362, 2008 WL 4155663, at *3
7 (D.S.C. Sept. 9, 2008) (“Revocation of acceptance . . . requires return of goods[.]”)
8 (citation omitted); *Sherwin-Williams*, 1985 WL 3932, at *4 (“a buyer may lose his
9 right to revoke acceptance before or after its attempted revocation by the exercise of
10 ownership over the goods.”) (*citing*, 4 Anderson, Uniform Commercial Code,
11 § 2:608–43–44 at 204 (3d Ed. 1983)); *C.A.I., Inc. v. Vitex Packaging Group, Inc.*, 115
12 F. Supp. 3d 168, 174, n. 2 (D. Mass. 2015) (“Vitex has cited no provision of the
13 Uniform Commercial Code that both permits revocation of acceptance by a merchant-
14 buyer . . . *and* permits the merchant-buyer to retain the good for ongoing future use by
15 refusing to return it without any payment whatsoever.”).

16 149. In addition to its failure to prove a substantial nonconformity in the 193
17 allegedly defective units, E.S.E.’s revocation defense also fails because the evidence
18 before the Court shows that E.S.E. abandoned the return process and retains
19 possession of the allegedly defective units to this day. Although E.S.E. argued that
20 Guillemot refused to issue RMAs, the documentary evidence before the Court shows
21 that Guillemot repeatedly emailed E.S.E. and offered RMAs, but E.S.E. failed to
22 respond in writing to those emails. Mr. Chammas testified that he sent repeated
23 emails to E.S.E. regarding the RMAs, but received no response. (*See, e.g.*, Tr. Ex.
24 87.) Myra Urmeneta testified that, after receiving Guillemot’s emails regarding
25 Guillemot’s desire to issue an RMA for all remaining inventory, (Tr. Ex. 10), she
26 discussed the emails with Kazemi, who stated that he would speak to Tanner, such
27 that Urmeneta did not need to reply to the email. Contrary to E.S.E.’s claim that
28 Guillemot refused to provide RMAs, the Court concludes that E.S.E.’s failure to

1 (1) respond to Guillemot’s emails concerning the RMA process, and, (2) clarify that
2 E.S.E. was seeking an RMA for defective units only, rather than all units, caused the
3 return process to falter. Moreover, E.S.E. has retained possession over the 193
4 allegedly defective units to this day. For these reasons, the Court concludes that
5 E.S.E. failed to effectively revoke its acceptance of the 193 allegedly defective units.

6 **2. Adequate Assurances/Cooperation**

7 150. Defendant also asserts that it was entitled to “delay and suspend
8 performance of payment to Guillemot, and did not breach the agreement between
9 Guillemot and EDC for the TX Wheels, pending adjudication of the parties [sic]
10 rights, in light of Guillemot’s refusal and failure to honor E.S.E.’s RMA requests for
11 Defective TX Wheels.” (DBR at 8.) Defendant invokes California Commercial Code
12 §§ 2609 and 2311.¹³

13 151. Like E.S.E.’s revocation of acceptance defense, E.S.E.’s adequate
14 assurances/cooperation defense fails in light of the evidence presented at trial. The
15 evidence before the Court shows that Guillemot repeatedly contacted E.S.E. between
16 July 30, 2015 and October 22, 2015, (*see* Tr. Exs. 10, 11, 86, 87), and even prepared
17 an RMA, (Tr. Ex. 69), though Guillemot ultimately did not send the RMA to E.S.E.
18 E.S.E. failed to respond to Guillemot’s emails, or communicate in any way, regarding
19 the RMA and return process. E.S.E.’s also failed to clarify its insecurity allegedly
20 caused by Guillemot’s request that E.S.E. return all the TX Wheels in its possession.
21 For these reasons, the Court concludes that E.S.E.’s adequate assurances defense is
22 meritless.

23
24
25
26 ¹³ Defendant appears to contend that the parties’ agreement lacked specifications regarding the
27 RMA return process, and thus, Defendant was entitled to make a good faith specification regarding
28 return. And according to Defendant, Guillemot’s cooperation was necessary for Defendant to effect
the return. On that basis, Defendant claims it was entitled to delay and suspend performance of
payment to Guillemot “pending adjudication of the parties [sic] rights.”

3. Unclean Hands

152. The unclean hands defense arises from the maxim, “[h]e who comes into equity must come with clean hands.” *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 241 (1933). “[T]he Supreme Court explained that unclean hands applies only where the ‘unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.’” *Gilead Scis., Inc. v. Merck & Co, Inc.*, No. 13-CV-04057-BLF, 2016 WL 3143943, at *24 (N.D. Cal. June 6, 2016) (citing *Keystone Driller*, 290 U.S. at 245). “The misconduct must ‘affect the equitable relations between the parties in respect of something brought before the court for adjudication.’” *Id.* (quoting *Keystone Driller*, 290 U.S. at 245.)

153. “To establish unclean hands, a defendant must demonstrate (1) inequitable conduct by the plaintiff; (2) that the plaintiff’s conduct directly relates to the claim which it has asserted against the defendant; and[,] (3) plaintiff’s conduct injured the defendant.” *Metro-Goldwyn-Mayer Studios*, 518 F. Supp. 2d at 1222–23 (quoting *Survivor Prods. LLC v. Fox Broadcasting Co.*, 2001 WL 35829270, at *3 (C.D. Cal. June 12, 2001)) (citing *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987) (“[T]he defendant must demonstrate that the plaintiff’s conduct is inequitable and that the conduct relates to the subject matter of its claims.”)).

154. Additionally, the unclean hands “defense will not apply if the defendant merely establishes harm to the public interest.” *McCormick v. Cohn*, 1992 WL 687291, at *4 (S.D. Cal. July 31, 1992); *see also Broderbund*, 648 F. Supp. at 1138 (N.D. Cal. 1986) (“[A] defense of unclean hands may be asserted in a copyright infringement action only where the defendant can show that he has personally been injured by the plaintiff’s conduct.”) (citing *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979)).

155. Notably, unclean hands, “does not stand as a defense that may be properly considered independent of the merits of the plaintiff’s claim—such as the defenses of

1 the statute of limitations or the statute of frauds.” *Republic Molding Corp. v. B. W.*
2 *Photo Utilities*, 319 F.2d 347, 350 (9th Cir. 1963). Irrespective of the defense, the
3 Court must ascertain the soundness of the plaintiff’s claim. *Id.* This means that,
4 the court should not automatically condone the defendant’s infractions
5 because the plaintiff is also blameworthy, thereby leaving two wrongs
6 unremedied and increasing the injury to the public. Rather the court must
7 weigh the substance of the right asserted by plaintiff against the
8 transgression which, it is contended, serves to foreclose that right. The
9 relative extent of each party’s wrong upon the other and upon the public
10 should be taken into account, and an equitable balance struck.

11 *Id.* (citing *Alfred Bell & Co., Ltd. v. Catalda Fine Arts*, 191 F.2d 99, 106(2nd Cir.
12 1951); *Stein v. Mazer*, 204 F.2d 472, 480 (4th Cir. 1953)). Furthermore, “[t]he
13 doctrine of unclean hands does not deny relief to a plaintiff guilty of any past
14 misconduct; only misconduct directly related to the matter in which he seeks relief
15 triggers the defense.” *Cal-Agrex, Inc. v. Tassell*, 258 F.R.D. 340, 351 (N.D. Cal.
16 2009), *aff’d*, 408 F. App’x 58 (9th Cir. 2011)(citing *Kendall–Jackson Winery, Ltd. v.*
17 *Super. Ct.*, 76 Cal. App. 4th 970, 974 (Cal. Ct. App. 2000)).

18 157. E.S.E. asserts that EDC is not entitled to the contract value of the TX
19 Wheels as a result of assignor Guillemot’s unclean hands. Defendants’ Fourth
20 Affirmative Defense states in relevant part that, “Plaintiff herein, and each and every
21 cause of action contained in the First Amended Complaint, is barred by reason of acts,
22 omissions, representations, and courses of conduct by non-party Guillemot”
23 (Answer at 10.) And in its trial brief, Defendant explains that,

24 Guillemot’s refusal to honor E.S.E.’s RMA requests for Defective TX
25 Wheels, as well as Guillemot’s conduct in demanding full payment or
26 return of all of the TX Wheels in early 2015, without legal grounds, and
27 Guillemot’s disruption of E.S.E.’s business relationship with Wintec,
28 support E.S.E.’s Second Affirmative Defense for Estoppel and Unclean
Hands[.]

158. Defendant failed to adduce sufficient evidence to prove its unclean hands
defense. Except for Kazemi’s own testimony, Defendant failed to offer any
documentary evidence or testimony to support this defense. And even Kazemi’s
testimony demonstrates that Kazemi can only speculate that Tanner’s call to Wintec

1 precipitated the termination of Wintec and E.S.E.'s business relationship. Kazemi
2 testified at trial that Ray Huang, of Wintec, never actually told Kazemi that Wintec
3 stopped buying from E.S.E. because of Guillemot. Furthermore, Tanner credibly
4 testified that he contacted Wintec to ascertain the source of Wintec's TX Wheels. In
5 light of the entirety of the evidence, the Court concludes that Defendant has failed to
6 establish any inequitable conduct by Guillemot.

7 159. Defendant also failed to meet its burden with respect to demonstrating
8 that any alleged wrongdoing on Guillemot's part was directly related to the claims
9 EDC now brings as Guillemot's assignee. In fact, Kazemi himself agreed with EDC's
10 counsel's question at trial that whether Guillemot interfered in E.S.E.'s relationship
11 with Wintec has nothing to do with E.S.E.'s obligation to pay for the TX Wheels
12 E.S.E. resold. Kazemi also testified that he did not express to Guillemot that E.S.E.
13 would not pay Guillemot due to Guillemot interfering with E.S.E. and Wintec's
14 relationship. And E.S.E. offered no evidence (beyond Kazemi's self-interested
15 testimony) that E.S.E. suffered any damages as a result of Guillemot's alleged
16 wrongdoing. The Court rejects Mr. Kazemi's testimony on this point as not credible.
17 In sum, the Court concludes that Defendant has failed to prove the merits of its
18 unclean hands defense.

19 4. Estoppel

20 160. Four elements are essential to raise an equitable estoppel defense: (1) the
21 party to be estopped must be apprised of the facts; (2) it must intend that its conduct
22 be acted upon, or must so act that the party asserting the estoppel had a right to believe
23 it was so intended; (3) the party asserting the estoppel must be ignorant of the true
24 state of facts; and (4) the party asserting the estoppel must rely upon the conduct to its
25 injury. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197,
26 1225 (C.D. Cal. 2007) (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100,
27 105 (9th Cir. 1960)); see also *Granco Steel, Inc. v. Workmen's Comp. Appeal Bd.*, 68
28 Cal. 2d 191, 203, (Cal. 1968).

1 Defendant contends that,

2 Guillemot's refusal to honor E.S.E.'s RMA requests for Defective TX
3 Wheels, as well as Guillemot's conduct in demanding full payment or
4 return of all of the TX Wheels in early 2015, without legal grounds, and
5 Guillemot's disruption of E.S.E.'s business relationship with Wintec,
6 support E.S.E.'s Second Affirmative Defense for Estoppel and Unclean
7 Hands, Third Affirmative Defense for Waiver, and Fourth Affirmative
8 Defense for Estoppel with respect to attorneys fees and interest that EDC
9 seeks.

10 (DBR at 9.)

11 161. As explained above, the Court concludes that E.S.E.'s own failure to
12 communicate with respect to the RMA precipitated the breakdown of the return
13 process. And Defendant has not met its burden with respect to its unclean hands
14 defense. In view of the totality of the evidence, the Court finds no bad faith on
15 Guillemot's part. Accordingly, E.S.E. has failed to prove any of its purported bases
16 for its estoppel defense. Thus, Defendant's estoppel defense fails.

17 5. Waiver

18 163. "Waiver is the intentional relinquishment of a known right with
19 knowledge of its existence and the intent to relinquish it." *Metro-Goldwyn-Mayer*
20 *Studios.*, 518 F. Supp. 2d at 1224 (citing *United States v. King Features Entm't, Inc.*,
21 843 F.2d 394, 399 (9th Cir. 1988)). Defendants' Third Affirmative Defense states in
22 relevant part that:

23 by reason of conduct by non-party Guillemot which constitutes a waiver
24 of Plaintiff's rights, these answering Defendants are excused from the
25 performance of the obligation alleged in the First Amended Complaint,
26 since Plaintiff's claims against Defendants in the First Amended
27 Complaint are brought by Plaintiff on behalf of Guillemot, as
28 Guillemot's assignee.

(Answer at 9.) Defendant also explains that "Guillemot's refusal to honor E.S.E.'s
RMA requests for Defective TX Wheels, as well as Guillemot's conduct in
demanding full payment or return of all of the TX Wheels in early 2015, . . . and

1 Guillemot’s disruption of E.S.E.’s business relationship with Wintec, support
2 E.S.E.’s . . . Third Affirmative Defense for Waiver” (DBR at 9.)

3 164. Like Defendant’s estoppel defense, the waiver defense is similarly
4 misplaced and meritless. Little to no evidence supports Defendant’s theory of
5 Plaintiff’s waiver of rights in this case. Furthermore, the evidence demonstrates that
6 Guillemot repeatedly demanded that E.S.E. return all units, demanded payment for all
7 units, and offered an RMA for all units. Guillemot’s actions do not demonstrate any
8 intentional relinquishment of rights associated with the TX Wheels transaction.
9 Accordingly, the Court concludes that Defendant fails to meet its burden of
10 establishing this defense.

11 **6. Failure to Mitigate**

12 165. “California law is clear that a ‘plaintiff who suffers damage as a result of
13 either a breach of contract or a tort has a duty to take reasonable steps to mitigate
14 those damages and will not be able to recover for any losses which could have been
15 thus avoided.’” *Cent. Coast Pipe Lining, Inc. v. Pipe Shield USA, Inc.*, No. 2:13-CV-
16 00639-ODW, 2013 WL 6442603, at *7 (C.D. Cal. Dec. 9, 2013) (quoting *Shaffer v.*
17 *Debbas*, 17 Cal.App.4th 33, 41 (Cal. Ct. App. 1993)); *see also Ins. Co. of the State of*
18 *Pennsylvania v. Citizens of Humanity LLC*, No. SA-CV-13-01564-JVS-DFMX, 2014
19 WL 12689271, at *5 (C.D. Cal. Feb. 24, 2014).

20 166. Defendant’s Fifth Affirmative Defense reads in relevant part, “by reason
21 of non-party Guillemot’s failure to mitigate its damages, Plaintiff has assumed
22 comparative fault through non-party Guillemot’s failure to fully perform its
23 obligations to Defendants, since Plaintiff’s claims against Defendants in the First
24 Amended Complaint are brought by Plaintiff on behalf of Guillemot, as Guillemot’s
25 assignee.” (Answer at 10.)

26 167. Defendant adduced no evidence at trial relating to Defendant’s failure to
27 mitigate defense. And Defendant fails to address this defense in its trial brief. (*See*
28

1 DBR.) Accordingly, the Court concludes that Defendant has failed to meet its burden
2 to establish the failure to mitigate defense.

3 **F. Plaintiff's Claims for Restitution and Constructive Trust**

4 168. In light of the foregoing discussion, the Court concludes that it need not
5 exercise its equity jurisdiction over Plaintiff's claims for restitution and constructive
6 trust. "This conclusion follows from the general principle of equity that equitable
7 relief (such as restitution) will not be given when the plaintiff's remedies at law are
8 adequate." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 260 (Cal. Ct. App.
9 2011), *as modified* (Dec. 28, 2011) (citing *Ramona Manor Convalescent Hospital v.*
10 *Care Enterprises*, 177 Cal. App. 3d 1120, 1140 (Cal. Ct. App. 1986); 1 Witkin,
11 Summary of Cal. Law (10th ed. 2005) Contracts, §§ 1040–1041, pp. 1130–32; *Falk v.*
12 *Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007)); *see also Mort v.*
13 *United States*, 86 F.3d 890, 892 (9th Cir. 1996) (citing *Morales v. Trans World*
14 *Airlines, Inc.*, 504 U.S. 374, 381 (1992)) ("It is a basic doctrine of equity
15 jurisprudence that courts of equity should not act . . . when the moving party has an
16 adequate remedy at law. . . .").

17 **G. Conversion/Punitive Damages**

18 169. EDC did not plead a conversion/negligence claim in its FAC. (*See* Dkt.
19 No. 18.) Accordingly, the Court need not address Plaintiff's arguments pertaining to
20 conversion or punitive damages.

21
22 **IV.**

23 **CONCLUSION**

24 The Court concludes that EDC has shown, by a preponderance of the evidence,
25 that: (1) Guillemot and E.S.E. intended to form a contract for sale; (2) the additional
26 attorneys' fees and interest provision were incorporated into the underlying
27 agreement; and, (3) EDC is entitled to judgment with respect to its action for the price
28 claim. The Court further concludes that E.S.E. has failed to meet its burden of


1 establishing any of its affirmative defenses.

2 Because EDC has met its burden of proving all applicable elements and E.S.E.
3 failed to prove its affirmative defenses, the Court hereby holds that, in addition to the
4 contract value of 926 units non-defective TX Wheels, (*see* MSJ2 Order at 38), EDC is
5 also entitled to recover from Defendant E.S.E.: (1) the contract value of the 193
6 allegedly defective TX Wheels units ; (2) one and a half percent (1.5 %) monthly
7 interest on the contract value of 1,119 TX Wheels units, from the payment due date of
8 January 24, 2015 through the date of judgment; (3) attorneys' fees as provided for
9 under the contracting parties' agreement.

10 JUDGMENT is for Plaintiff Export Development Canada in the amount of
11 \$226,586.31 plus the interest described above and attorneys' fees. Plaintiff is hereby
12 ORDERED to file a Proposed Judgment by September 18, 2017 by 4 :00 p.m.

13
14 IT IS SO ORDERED.
15 DATED: September 5, 2017

16
17 By:



Honorable Beverly R. O'Connell
United States District Court Judge