UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

STARBUCKS CORPORATION, a corporation, Plaintiff, v. AMCOR PACKAGING DISTRIBUTION, a corporation; AMCOR PACKAGING (USA), INC., a corporation; and PALLETS UNLIMITED, LLC, a limited liability company, Defendants.	Civ. No. 2:13-1754 WBS CKD MEMORANDUM AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

----oo0oo----

Plaintiff Starbucks Corporation ("Starbucks") filed this action against defendants Amcor Packaging Distribution, Amcor Packaging (USA), Inc. (collectively, "Amcor"), and Pallets Unlimited, LLC ("Pallets Unlimited"), alleging that defendants supplied it with defective wooden pallets that caused mold to develop on its unroasted ("green") coffee and resulted in losses of approximately $5.3 million. (Compl. ¶¶ 9-11 (Docket Nos. 1,

6, 7).) The matter is now before the court, pursuant to Federal Rule of Civil Procedure 56, on (1) Starbucks' motion for partial summary judgment against Amcor on certain purportedly invalid provisions of the contract between Starbucks and Amcor, (Docket No. 119); and (2) Amcor's cross-motion for summary judgment on all of Starbucks' claims, (Docket No. 111).

I. Factual and Procedural Background

Starbucks is an international company that distributes coffee products. Starbucks operates a coffee bean roasting facility in Minden, Nevada called the Carson Valley Roasting Plant ("CVRP"). Ozburn-Hessey Logistics, LLC ("OHL") owned and operated a warehouse in Sparks, Nevada ("OHL Warehouse") where Starbucks' green coffee was stored on wooden pallets before being transported to CVRP for roasting. (Compl. ¶¶ 8-11.)[1] Between December 14, 2011 and February 17, 2012, Starbucks contracted with Amcor, a manufacturer and distributor of packaging materials, to purchase 9,480 wooden pallets for storing its green coffee at the OHL Warehouse. Starbucks provided Amcor with a specification sheet stating that the wooden pallets must consist of lumber that was kiln-dried to a moisture content of less than 19% ("Specification Sheet"). (Id. Ex. B.) Amcor subcontracted with Pallets Unlimited to manufacture the wooden pallets and deliver them to the OHL Warehouse. (Id. ¶¶ 7-11.)

[1] Pallets Unlimited filed a third-party claim for equitable indemnity against OHL, (Docket No. 46), and OHL subsequently moved for summary judgment on that claim, (Docket Nos. 104-107). On June 13, 2016, OHL and Pallets Unlimited filed a notice of settlement and request to take OHL's summary judgment motion off the calendar. (Docket No. 128.)

Upon delivery, OHL, acting on behalf of Starbucks, visually inspected the wooden pallets for damage, but did not measure the pallets for moisture content. Except for one shipment of wooden pallets that were found to be wet and returned to Pallets Unlimited, OHL accepted all of the pallet deliveries on behalf of Starbucks. Following the deliveries, Amcor issued invoices to Starbucks for the sale of the wooden pallets ("Invoices"). Each Invoice included a provision at the bottom as follows:

> The following is made in lieu of all warranties, express or implied: seller's only obligation shall be to replace such quantity of the product proved to be defective. Seller shall not be liable for any injury, loss or damage, direct or consequential, arising out of the use or inability to use the product. Before using, user shall determine the suitability of the product for his intended use and the user assumes all risk and liability whatsoever in connection therewith. The foregoing may not be changed except by agreement signed by an officer of seller.

(the "Disclaimers"). (Id. ¶ 8, Ex. A.)

Starbucks paid these Invoices and loaded 68,000 bags of green coffee on the wooden pallets it purchased from Amcor for storage at the OHL Warehouse and subsequent transportation to CVRP for roasting. (Id. ¶ 9.) On February 9, 2012, OHL personnel discovered mold growing on some of the wooden pallets in the OHL Warehouse. Shortly thereafter, Starbucks discovered mold on green coffee, coffee bags, and wooden pallets that were delivered to CVRP from the OHL Warehouse. (Id.)

Starbucks retained independent surveyors to conduct an investigation into the source of the mold. The surveyors determined that many of the wooden pallets Starbucks purchased from Amcor did not meet specifications because they were

constructed with lumber whose moisture content was considerably above the 19% requirement. (Parikh Decl. Exs. 14-15, 19 (Docket Nos. 111-5 to -27).) The surveyors concluded that the "formation of mold on the affected Bags [and] Green Coffee Beans was apparently due to the release of moisture from the lumber materials used in construction of the Pallets, principally due to excessive moisture contained within the lumber." (Id. Ex. 19 at 5.)

Upon Starbucks' request, Amcor picked up all of the wooden pallets it had sold to Starbucks from the OHL Warehouse and sent them back to Pallets Unlimited. (Coons Decl. ¶¶ 11-12, Ex. 25 (Docket Nos. 111-28 to -32).) Starbucks demanded that Amcor reimburse it for the damage to its coffee beans caused by the mold. Amcor disputed its liability for any damage to Starbucks' coffee as precluded under the Disclaimers contained in the Invoices it issued Starbucks for the wooden pallets. (Id. ¶ 16; Compl. ¶ 12.)

Starbucks filed this action on August 23, 2013, alleging claims against Amcor for (1) breach of contract, and (2) breach of the express warranty that the wooden pallets would meet Starbucks' moisture content specifications. (Compl. ¶¶ 26-34.) Starbucks additionally asserted claims against Amcor and Pallets Unlimited for (3) breach of the implied warranty of merchantability, (4) breach of the implied warranty of fitness for a particular purpose, (5) strict products liability, and (6) negligence. (Id. ¶¶ 13-25, 35-38.)

Starbucks moves for partial summary judgment against Amcor that the Disclaimers in the Invoices are unenforceable and

invalid as a matter of law because Starbucks neither bargained for nor assented to them. (Docket No. 119.) Starbucks seeks a ruling that Amcor is precluded from invoking the Disclaimers as a defense against Starbucks' claims. Starbucks also seeks to strike Amcor's thirteenth and forty-ninth affirmative defenses, which are premised on the Disclaimers.

Amcor's thirteenth affirmative defense states that Amcor "disclaimed, negated and excluded each and every warranty of the type and character alleged in the complaint so as to bar recovery based on any such warranty." (Amcor's Ans. at 9 (Docket No. 14).) Amcor's forty-ninth affirmative defense states that "the warranties, disclaimers and any other exclusions in the invoices or contract between plaintiff and [Amcor] is valid and enforceable." (Id. at 13.) Amcor has filed a cross-motion for summary judgment on all of Starbucks' claims. (Docket No. 111.)

II. Legal Standard

A party may move for summary judgment on a "claim or defense." Fed. R. Civ. P. 56(a). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). A material fact is one that could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue exists if the evidence produced would allow a reasonable trier of fact to reach a verdict in favor of the non-moving party. Id.

The moving party bears the initial burden of establishing that no genuine issue of material fact exists as to

the particular claim or defense. Id. at 256. Where the moving party seeks summary judgment on a claim or defense for which it bears the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find for the non-moving party on that claim or defense. Soremekun v. Thrifty Payless Inc., 509 F.3d 978, 994 (9th Cir. 2007). If summary judgment is sought on a claim or defense for which the non-moving party bears the burden of proof at trial, the moving party must either (1) produce evidence negating an essential element of the non-moving party's claim or defense, or (2) show that the non-moving party cannot produce evidence to support an essential element of its claim or defense. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Once the moving party has met its initial burden, the burden shifts to the non-moving party to produce concrete, specific evidence establishing a genuine issue of material fact. Id. at 324; Anderson, 477 U.S. at 256. To carry this burden, the non-moving may not rely "solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, it must produce sufficient evidence beyond the pleadings that would allow a reasonable trier of fact to find in its favor. Anderson, 477 U.S. at 256. If it does so, then "there is a genuine issue of fact that requires a trial." Id. at 257.

In ruling on a motion for summary judgment, the court may not weigh the evidence, make credibility determinations, or determine the truth of the matters asserted, and it must view all inferences drawn from the factual record in the light most

favorable to the non-moving party. Id. at 249, 255; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party" unless that evidence is "uncontradicted and unimpeached" and "comes from disinterested witnesses." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000) (citation omitted).

Where parties submit cross-motions for summary judgment, the court must consider each motion separately to determine whether either party has met its burden, "giving the nonmoving party in each instance the benefit of all reasonable inferences." ACLU of Nevada v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003).

III. Discussion

A. Starbucks' Motion for Summary Judgment

"[F]ederal courts sitting in diversity apply state substantive law and federal procedural law." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996). The court will thus apply California substantive law here. The interpretation of a contract is a question of law. United States v. King Features Entm't, Inc., 843 F.2d 394, 398 (9th Cir. 1988). The California Uniform Commercial Code (the "Code") applies to all "transactions in goods." Cal. Com. Code § 2102.[2] Goods are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract

[2] All statutory references are to the California Uniform Commercial Code unless otherwise specified.

for sale." Id. § 2105(1). It is undisputed that the wooden pallets Amcor sold to Starbucks are "goods" within the meaning of the Code. The Code thus governs the parties' contract here.

Starbucks argues that the Disclaimers are not part of the parties' contract, are unconscionable, and are invalid because they materially alter the parties' contract. Amcor, on the other hand, contends that the Disclaimers are part of the parties' contract because Starbucks had assented to them during the parties' prior course of dealing; thus, Starbucks' remedy for breach of contract here is limited to the exclusive remedy provided in the Disclaimers.

Amcor argues that Starbucks is precluded from challenging the validity of the Disclaimers because Starbucks judicially admitted in its Complaint that Amcor's Invoices were part of the parties' contract for the wooden pallets. (Amcor's Mem. at 14-15 (Docket No. 111-1).) "Factual assertions in pleadings . . . are considered judicial admissions conclusively binding on the party who made them." Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). Starbucks alleges in its Complaint that the Specification Sheet and 26 Invoices Amcor issued to Starbucks for the wooden pallets "comprise the contract for the provision and sale of pallets from [Amcor] to plaintiff." (Compl. ¶ 8.) Starbucks does not allege, however, that the Disclaimers in the 26 Invoices are valid and enforceable. Starbucks expressly alleges the "invoices contain fine print with purported disclaimer language, but the disclaimer[s] [are] invalid and ineffective." (Id.) Amcor's argument that Starbucks' judicial admissions preclude it from

challenging the validity of the Disclaimers is thus unpersuasive.[3]

1. Contract Formation

To determine whether the Disclaimers are a part of the parties' contract for the sale of the wooden pallets, the court must evaluate the manner in which the parties formed the contract. "[T]he rules of contract formation under the [Code] do not include the principle that the parties must agree to all essential terms in order to form a contract." Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 105 (1977) (en banc). Section 2204 provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Cal. Com. Code § 2204(3). "[T]he omission of even an important term does not prevent the finding under [§ 2204(3)] that the parties intended to make a contract." Steiner, 20 Cal. 3d at 105 (alterations and citation omitted).

To find an enforceable contract, the parties' conduct

---

[3] Amcor's objections to Starbucks' reliance on cases interpreting the UCC and commercial codes of other states is also unavailing. "Case law from other jurisdictions applying California's Commercial Code, the Uniform Commercial Code (UCC), or the uniform code of other states, are considered good authority in litigation arising under the California [Code]." Israel Aerospace Indus., Ltd. v. Airweld, Inc., Civ. No. 2:11-887 WBS CKD, 2012 WL 4834184, at *2 n.3 (E.D. Cal. Oct. 10, 2012) (quoting Fariba v. Dealer Servs. Corp., 178 Cal. App. 4th 156, 166 n.3 (4th Dist. 2009)); see also U.S. Roofing, Inc. v. Credit Alliance Corp., 228 Cal. App. 3d 1431, 1443-44 (3d Dist. 1991) (looking to decisions from other jurisdictions interpreting the UCC to interpret California's Code).

must indicate a consummated process of offer and acceptance--and thus, an intent to contract--rather than inconclusive negotiations. Id. at 104. Any terms not agreed upon at the time of the contract's formation are filled in by the Code's gap-filling provisions. Id.; e.g., Cal. Com. Code § 2305 (open price terms), § 2307 (open delivery terms). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Id. § 2204(1). An offer to make a contract may be accepted "in any manner and by any medium reasonable in the circumstances." Id. § 2206(1)(a). A buyer's order or offer to buy goods for prompt or current shipment is accepted by the seller's "prompt promise to ship or by the [seller's] prompt or current shipment of conforming or nonconforming goods." Id. § 2206(1)(b).

It is undisputed that, on December 14, 2011, Kerri Hardy, Starbucks' CVRP distribution supervisor, called Rachel Carranza[4] of Amcor and placed an order for wooden pallets to be supplied in accordance with a Specification Sheet that Hardy emailed to Carranza. (Hardy Decl. ¶ 5 (Docket Nos. 119-20 to -22); Kirsch Decl., May 6, 2016 ("Kirsch I Decl."), Ex. A ("Carranza Dep.") at 42:11-20 (Docket Nos. 119-23 to -39).) This constituted an offer by Starbucks "to buy goods for prompt or current shipment." Cal. Com. Code § 2206(1)(b). Carranza

[4] Amcor provides evidence that Carranza had the authority to negotiate on Amcor's behalf regarding any contract between Amcor and Starbucks for the sale of the wooden pallets. (Carranza Decl. ¶ 34.) Some of the evidence submitted refers to Carranza by her former name, Rachel Kennedy.

acknowledges that, during her conversation with Hardy, Hardy "requested [that Amcor] build the pallets per the specification sheet" that she later emailed to Carranza. (Carranza Dep. at 51:1-17.) The terms of Starbucks' offer therefore included the requirement that the wooden pallets conform to the Specification Sheet.

Although Hardy and Carranza did not specifically discuss the 19% kiln-dry requirement that was contained in the Specification Sheet, it is undisputed that Carranza orally represented to Hardy that Amcor would supply the wooden pallets to Starbucks in accordance with the Specification Sheet. (Hardy Decl. ¶¶ 5-6; Carranza Dep. at 51:1-17.) Carranza's prompt promise to ship the pallets thus constituted an acceptance of Starbucks' offer and created an enforceable contract between the parties. See Cal. Com. Code § 2206(1)(b).

Between December 2011 and February 2012, Starbucks placed additional orders for wooden pallets pursuant to the Specification Sheet. (Carranza Decl. ¶ 25 (Docket Nos. 111-33 to -37); e.g., Parikh Decl. Ex. 11 (email dated January 18, 2012 from Hardy to Carranza requesting confirmation that Starbucks' first three orders were for 2,000, 3,800, and 1,000 pallets respectively, for a total of 6,800 pallets, and stating that Starbucks "will need to order more pallets").) It is undisputed that Amcor agreed here that all of the pallet orders during that time would conform to the Specification Sheet. (Hardy Decl. ¶¶ 5-6.)[5]

[5] Carranza also testified that she forwarded the

Amcor, through Pallets Unlimited, delivered the first shipment of pallets to the OHL Warehouse on December 21, 2011--one week after Hardy placed the initial order for pallets--and continued to deliver the remaining wooden pallets until February 17, 2012. (McCullough Decl. ¶ 6 (Docket No. 119-17 to -19)); Parikh Decl. Ex. 10.) Because the parties' conduct indicates a consummated process of offer and acceptance, Starbucks and Amcor entered into an enforceable contract here for the sale of 9,480 wooden pallets made from lumber that was kiln-dried to a moisture content of less than 19%. See Steiner, 20 Cal. 3d at 104.

Both parties refer to the sale of all 9,480 wooden pallets as a single contract, and the court will treat their transaction as such here. The Code treats an installment contract "which requires or authorizes the delivery of goods in separate lots to be separately accepted" as a single contract. Cal. Com. Code § 2612(1); see also id. § 2612(3) ("Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole."). Between December 23, 2011 and February 17, 2012, Amcor issued 26 Invoices to Starbucks totaling $400,740. (Compl. Ex. A.) It is undisputed that Starbucks

---

Specification Sheet to Pallets Unlimited and informed Pallets Unlimited that the pallets were to be manufactured in accordance with the Specification Sheet. (Carranza Dep. at 41:13-24, 52:12-20.) Though Pallets Unlimited disputes whether Amcor did in fact provide it with the Specification Sheet, (Anderson Dep. at 158:14-159:23, 350:21-370:20), Amcor does not dispute that it expected Pallets Unlimited to manufacture the pallets in accordance with the Specification Sheet, (e.g., Carranza Dep. at 56:18-58:3; Docket No. 119-38 ¶ 7; Docket No. 119-39 ¶ 11).

approved and paid the Invoices in full. (McCullough Decl. ¶¶ 6-7; Coons Decl. ¶ 22.)

2. Section 2207

It is undisputed that the parties never discussed the Disclaimers contained in the Invoices and that Starbucks never expressly assented to them. (McCullough Decl. ¶ 7; Hardy Decl. ¶ 6.) Starbucks argues that the Disclaimers are invalid because they materially alter the parties' contract of sale pursuant to § 2207(2)(b). Amcor issued the first Invoice to Starbucks on December 23, 2011, after the first shipment of wooden pallets was delivered on December 21, 2011. By that time, an enforceable contract for the sale of the pallets already existed between the parties. See Cal. Com. Code § 2206(1)(b) (seller's prompt promise to ship or prompt shipment of goods is an acceptance creating an enforceable contract for their sale). The Invoices thus did not constitute letters accepting Starbucks' offer to purchase the wooden pallets. Since the Invoices were not part of the parties' offer and acceptance establishing the contract of sale, the Disclaimers contained in them constitute additional terms governed by § 2207. See Steiner, 20 Cal. 3d at 99.

California courts treat the application of § 2207 to undisputed facts as an issue of law. Frank M. Booth, Inc. v. Reynolds Metals Co., 754 F. Supp. 1441, 1446 (E.D. Cal. 1991) (Levi, J.) (collecting cases). Under § 2207(1), a seller's "definite and seasonable expression of acceptance" or "written confirmation which is sent within a reasonable time" operates as an acceptance of an offer to purchase goods, even if it "states terms additional to or different from those offered or agreed

upon." Id. § 2207(1). If both parties to the transaction are merchants, the additional terms in the seller's acceptance or confirmation automatically become part of the contract unless (a) the offer expressly limits acceptance to the terms of the offer, (b) the additional terms materially alter the contract, or (c) the other party has objected to the additional terms or objects to them within a reasonable time after receiving the acceptance or confirmation. Id. § 2207(2). It is undisputed that Starbucks and Amcor are merchants here. See id. § 2104(1).

Subsections 2207(1) and (2) do not apply, however, when "[c]onduct by both parties . . . recognizes the existence of a contract . . . [but] the writings of the parties do not otherwise establish a contract." Id. § 2207(3). In such a case, § 2207(3) applies. Id. Under § 2207(3), the terms of the parties' contract are those upon which the parties have expressly agreed and any supplemental terms incorporated under any other provisions of the Code. Transwestern Pipeline Co. v. Monsanto Co., 46 Cal. App. 4th 502, 515 (2d Dist. 1996); Textile Unlimited, Inc. v. A. BMH & Co., 240 F.3d 781, 788 (9th Cir. 2001).

Subsections 2207(1) and (2) do not apply here. The 26 Invoices did not constitute "definite and seasonable expression[s] of acceptance" under § 2207(1) because Amcor's acceptance occurred when it promised to ship the wooden pallets to Starbucks. The Invoices were also not written confirmations "intended by the parties as a final expression of their agreement." Cal. Com. Code § 2202; see Enpro Sys., Ltd. v. Namasco Corp., 382 F. Supp. 2d 874, 884 (S.D. Tex. 2005)

("Certainly, not every written communication after an oral agreement need be characterized as a confirmation. Were it otherwise, it would be impossible to determine where the process of confirming ended." (citation omitted)). "The prevailing rule is that an invoice, standing alone, is not a contract, and a buyer is ordinarily not bound by statements thereon which are not a part of the original agreement." Hebberd-Kulow Enters., Inc. v. Kelomar, Inc., 218 Cal. App. 4th 272, 279 (4th Dist. 2013) (citation omitted).

In addition, the parties here agreed that the wooden pallets would conform to the Specification Sheet. The Invoices did not mention any of the requirements contained in the Specification Sheet besides indicating that they were for "54x72" pallets. (See Compl. Ex. A). Because the parties' contract was formed by their conduct and "the writings of the parties do not otherwise establish a contract," § 2207(3) applies to delineate the terms of the contract here. Cal. Com. Code § 2207(3).[6]

This conclusion is supported by the official commentary to UCC § 2-207(3), which addresses the precise situation here: "In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. . . . The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule." U.C.C. § 2-207, cmt. 7 (1966); see also Transwestern, 46 Cal. App. 4th at 513 n.1 (noting that California

[6] As a result, the court need not address Starbucks' argument that the Disclaimers materially altered the terms of the contract pursuant to § 2207(2)(b).

adopted Uniform Commercial Code ("UCC") § 2-207 without change).

3. The Parties' Course of Dealing

The terms of a contract formed pursuant to § 2207(3) are those terms upon which the parties expressly agreed and any supplemental terms incorporated under any other provisions of the Code. Transwestern, 46 Cal. App. 4th at 515. Any terms that do not fall under either of these categories "drop out of the contract." Reynolds Metals Co., 754 F. Supp. at 1448; see also Textile Unlimited, 240 F.3d at 788 ("Under § 2207(3), the disputed additional items on which the parties do not agree simply 'drop out' and are trimmed from the contract.").

Although it is undisputed that Starbucks did not expressly assent to the Disclaimers, Amcor contends that Starbucks' assent can be implied from the parties' course of dealing. It argues that all of the invoices Amcor had issued to Starbucks since the companies started doing business in 2008 contained the same disclaimer language at issue here and that Starbucks never raised any objections to those disclaimers. (Amcor's Mem. at 24-25, 32; Carranza Decl. ¶¶ 7-10; Coons Decl. ¶¶ 5, 8.) Amcor argues that Starbucks' failure to object constituted its assent to the Disclaimers here.

California courts have recognized that "the 'supplementary terms' referred to in section 2207(3) may include terms incorporated as a result of the parties' course of dealing." Transwestern, 46 Cal. App. 4th at 516. The Code defines an agreement as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of

trade as provided in Section 1303." Cal. Com. Code § 1201(3). Section 1301, in turn, provides that a "course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement . . . and may supplement or qualify the terms of the agreement." Id. § 1303(d).[7]

"A 'course of dealing' is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Id. § 1303(b). "An inference of the parties' common knowledge or understanding that is based upon a prior course of dealing is a question of fact." In re CFLC, Inc., 166 F.3d 1012, 1017 (9th Cir. 1999). A genuine dispute surrounding the parties' course of dealing may therefore preclude summary judgment. See United States v. Sacramento Mun. Util. Dist., 652 F.2d 1341, 1344 (9th Cir. 1981) ("differing views of the intent of parties [may] raise genuine issues of material fact").

Amcor argues that the parties "had a three year prior course of dealing [since 2008], which imputed notice to plaintiff of the limited remedy and the limitation of liability provision." (Amcor's Mem. at 32.) Amcor contends that, between 2008 and

---

[7] "Course of dealing" consists of the parties' relations prior to forming the contract at issue, whereas "course of performance" consists of the parties' actions in carrying out the contract at issue. Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 794 (9th Cir. 1981).

2012, it issued approximately 250 invoices to Starbucks for the sale of various products, including wooden pallets, and that all of those invoice contained the same disclaimers as those contained in the 26 Invoices here. Amcor has not provided copies of any of the invoices it purportedly issued to Starbucks prior to the transaction at issue in this case. Instead, Amcor submits two spreadsheets that list the approximately 250 invoices Amcor purportedly issued since 2008. (See Carranza Decl. ¶ 7, Ex. 28.)

Amcor also states that it had sold wooden pallets to Starbucks once before in July and August 2009. In that transaction, as here, Starbucks ordered pallets pursuant to a specification sheet it provided that included a 19% kiln-dry requirement, and Amcor subcontracted with Pallets Unlimited to manufacture and deliver the pallets to Starbucks. (Carranza Decl. ¶¶ 11-13, 17; Kirsch Decl., May 27, 2016 ("Kirsch II Decl."), Ex. C at 97:1-25, Ex. O (Docket Nos. 122-4 to -19).)[8] Amcor argues that Starbucks' failure to object to the disclaimers in the hundreds of invoices it received from Amcor since 2008 constituted Starbucks' implied assent to the Disclaimers in the 26 Invoices here. (Amcor's Mem. at 32.)

California courts have consistently held that "the repeated sending of a writing which contains certain standard terms, without any action with respect to the issues addressed by those terms, cannot constitute a course of dealing which would incorporate a term of the writing otherwise excluded under

[8] Starbucks states that the 2009 order involved only 357 pallets and amounted to less than 4% of the 9,480 pallets in the 2011 and 2012 transaction at issue. (See id. Ex. O.)

[§ 2207]." Transwestern, 46 Cal. App. 4th at 517 (citation omitted). "[T]he mere exchange of forms containing inconsistent terms, for however long a period, cannot establish a common understanding between the parties as to which set of conflicting terms is part of their contract." Id. at 516; see also Textile Unlimited, 240 F.3d at 788 ("[M]odern commercial transactions conducted under the U.C.C. are not a game of tag or musical chairs.").

In Transwestern, the seller added a limitation of liability clause to invoices that it issued to the buyer over a twelve-year period. The court found that § 2-207(3) applied and considered whether the clause became part of the parties' contracts for sale as a result of their twelve-year course of dealing. The court rejected the seller's argument that "the exchange of forms containing inconsistent provisions as to liability and remedies, over a long period of time, can 'fairly be regarded as establishing a common basis of understanding' between the parties as to their respective liability and remedies." Transwestern, 46 Cal. App. 4th at 517. Additionally, the longer such an exchange continues, "the more obvious it is the parties have not reached an agreement over the terms in dispute." Id.

Amcor attempts to distinguish Transwestern on the ground that the seller "stated in its invoices its acceptance was conditioned on assent to its liability limiters." Id. Section 2-207 of the UCC, like Code § 2207, provides that a "definite and seasonable expression of acceptance" containing additional terms operates as an acceptance, unless it is expressly conditioned on

the buyer's assent to the additional terms. U.C.C. § 2-207(1). Amcor's argument is unavailing because the seller's conditioning of acceptance in Transwestern merely led to the conclusion that, as here, the parties did not form a contract under § 2-207(1), but instead, under § 2-207(3). See Transwestern, 46 Cal. App. 4th at 515.

In In re CFLC, Inc., 166 F.3d 1012 (9th Cir. 1999), the Ninth Circuit held that, under the UCC, an invoice does not add terms to a contract because "[c]ourse of dealing analysis is not proper in an instance where the only action taken has been the repeated delivery of a particular form by one of the parties" and the parties had not taken any action with respect to the matters addressed by the disputed terms. Id. at 1017. The Ninth Circuit reasoned that, because a seller in multiple transactions will typically have every opportunity to negotiate the precise terms it seeks, its failure "or inability to obtain a negotiated agreement reflecting its desired terms strongly suggests that those terms are not a part of the parties' commercial bargain." Id.

"[P]ayment on an invoice in accordance with an existing oral contract does not in itself establish assent to the addition of terms to the contract. For a party's performance to establish assent to a modification or addition of terms, the performance must be related to the proposed modification or addition and differ from the performance already required of the party by the existing contract." C9 Ventures v. SVC-W., L.P., 202 Cal. App. 4th 1483, 1502 (4th Dist. 2012); see also Hebberd-Kulow, 218 Cal. App. 4th at 283 (holding that, absent additional evidence, 33

invoices containing a disputed term did not by themselves establish that the term was part of the parties' contract).

It cannot be said here that Starbucks' payment of Amcor's prior invoices without objection constituted a course of dealing establishing a common basis of understanding between the parties as to their respective liabilities and remedies. There is no evidence that, by paying the prior invoices, Starbucks manifested its affirmative assent to the disclaimers in the Amcor's prior invoices. Rather, Starbucks was merely performing its obligation to pay Amcor for the goods that it purchased, including the wooden pallets that were delivered in 2009. The payment of those invoices, without more, thus does not constitute Starbucks' assent to the Disclaimers in the 26 Invoices here. See Transwestern, 46 Cal. App. 4th at 517; see also Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444-45 (9th Cir. 1986) (holding that to treat the buyer's acceptance and receipt of the goods as assent to the seller's additional terms would be inconsistent with UCC § 2-207 and reinstate the "last shot rule" that § 2-207 intended to abolish).[9]

To support its argument, Amcor relies on two inapposite cases, neither of which involves the use of a course of dealing to supplement the terms of the parties' contract under § 2207(3). In Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., 200 Cal.

---

[9] Nor did the Disclaimers here modify the parties' contract. Although the Code does not require consideration to modify a contract, Cal. Com. Code § 2209(1), "a valid modification still requires proof of the other elements essential to the validity of a contract, including mutual assent." PMC, Inc. v. Porthole Yachts, Ltd., 65 Cal. App. 4th 882, 887 (4th Dist. 1998).

App. 3d 1518 (5th Dist. 1988), the court analyzed whether a party can limit its damages for a statutory violation. Id. at 1523 (analyzing a violation of California Food and Agriculture Code § 52482). In Agricola Baja Best, S. De. R.L. de C.V. v. Harris Moran Seed Co., 44 F. Supp. 3d 974 (S.D. Cal. 2014), a seed company attached a booklet that contained warranty disclaimers and a limitation of liability to seed packets that the company sold to a consumer. See 44 F. Supp. 3d at 980. The court there held that the warranty disclaimers were unenforceable against the consumer. Id. at 989.

However, the court held that the limitation of liability was enforceable because it was provided in conspicuous large font, capital letters, and bold print. Id. at 990-91. The court also observed that "the exterior of the booklet alerted the user it contained important information and directed the user to read the contents before use." Id. at 991. Moreover, each order "specifically allowed [the consumer] to return the unopened seed within 30 days for a full refund if it did not agree to the terms." Id. at 990.

Unlike Agricola, the Disclaimers here are not conspicuous because they are located at the bottom of the Invoices and are provided in small print. (See Compl. Ex. A); Cal. Com. Code § 1201(10) ("Whether a term is 'conspicuous' or not is a decision for the court."). And, unlike Agricola, Starbucks did not have the right to return the wooden pallets for a full refund if it did not agree with the terms of the Disclaimers. The cited cases are also inapposite because they involve seed sales. "Seed sales are unique because seed is a

unique chattel." Nunes Turfgrass, 200 Cal. App. 3d at 1533 (citation omitted). "[T]he custom of nonwarranty or limiting the buyer's recovery to the purchase price of the seed has prevailed in the seed industry for many years." Id. Though Amcor contends that it included the Disclaimers in its Invoices because it did not manufacture the wooden pallets, Amcor offers no evidence that doing so is the custom in its industry or trade.

Amcor also contends that, when Starbucks and Amcor first started doing business in 2008, the parties attempted to negotiate the terms of a standard supplier contract to govern Starbucks' purchase of goods from Amcor. (Parikh Decl. Exs. 4-5.) On March 10, 2008, Christopher Silkworth, a Starbucks employee, emailed a proposed contract to Amcor for review. (Id. Ex. 4 at 004135-36.) On March 19, 2008, Amcor sent back its proposed revisions, which included the addition of a limitation of liability clause stating: "Neither party will be responsible for any special, incidental or consequential damages arising out of this Agreement." (Id.; Coons Decl. ¶ 3, Ex. 24.)

On March 24, 2008, Silkworth responded that, with the exception of an arbitration clause that Amcor had added, Amcor's changes were "acceptable." (Parikh Decl. Ex. 4 at 004151.) Silkworth requested that Amcor make certain additional changes and resubmit their revised contract to Starbucks. (Id.) It is undisputed that Silkworth never received those revisions, that there were no further communications between Starbucks and Amcor regarding the proposed supplier contract, and that the parties' negotiations ended without them executing an agreement. (Coons Decl. ¶ 4; Silkworth Dep. at 50:22-51:2.)

Amcor argues that Silkworth's March 24, 2008 email accepting Amcor's revisions indicates Starbucks' assent to the Disclaimers in the Invoices here. When asked at his deposition whether he had the authority to execute supplier contracts on behalf of Starbucks, however, Silkworth responded that he "had the authorization to administer the flow of agreements between suppliers and Starbucks," but "never had authorization to sign on Starbucks' behalf any agreements or documents that related to a supplier, any supplier." (Silkworth Dep. at 21:10-22:6.)

As to the proposed revisions that Amcor sent back on March 19, 2008, Silkworth testified that he would not have had the authority to respond to Amcor regarding those changes without first taking them to the proper officials at Starbucks for review and approval. (Id. at 44:7-25.) Starbucks also provides evidence that the supplier contract over which the parties were negotiating in 2008 was product-specific and involved "industrial packaging & janitorial supplies," not wooden pallets. (Id. at 54:12-18, Ex. 252.)

Contrary to Amcor's assertions, the parties' March 2008 negotiation is immaterial because, as Amcor itself acknowledges, no agreement was reached. The very nature of a negotiation allows a party to change its position regarding a specific term numerous times before the parties finally reach an agreement. Since the parties failed to reach an agreement in 2008, the emails do not evince Starbucks' intent to assent to the Disclaimers at issue here. In addition, the proposed clause in 2008 is different from the Disclaimers at issue because it limits both parties' liability for damages. The Disclaimers here, by

contrast, limit only Amcor's liability for damages. And, unlike the 2008 clause, the Disclaimers here exclude all express and implied warranties, limit the remedy for any defective pallets to the replacement of those pallets, and provide that Starbucks assumes the risk of any loss that arises from the defective pallets.

Furthermore, "[u]nder well-established precedent, a single prior transaction cannot constitute a course of dealing." Trans-Tec Asia v. M/V HARMONY CONTAINER, 435 F. Supp. 2d 1015, 1028-29 (C.D. Cal. 2005) (collecting cases), aff'd, 518 F.3d 1120 (9th Cir. 2008). This is because the Code defines a course of dealing as "a sequence of conduct concerning previous transactions between the parties." Cal. Com. Code § 1303(b) (emphasis added); see also id. § 1303(b), U.C.C. cmt. 2 (stating that course of dealing "is restricted, literally, to a sequence of conduct between the parties previous to the agreement" at issue (emphasis added)). Courts applying the UCC's definition of "course of dealing" have also emphasized the requirement that there be a "sequence" of previous transactions.

For instance, in Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380, 1385 (9th Cir. 1986), the Ninth Circuit held that the "negotiation of a single prior contract" did not constitute a course of dealing. Id. at 1385. Numerous other courts have echoed this view. See Trans-Tec Asia, 435 F. Supp. 2d at 1029 & n.18 (collecting cases); see also id. at 1029 ("Thus, Trans-Tec's course of dealing evidence, even if admissible, fails to raise a triable issue of fact regarding Kien Hung's surprise or lack thereof.").

Because the parties did not have a course of dealing from which Starbucks' assent to the Disclaimers may be inferred, there are thus no genuine issues of material fact regarding the absence of Starbucks' assent to the Disclaimers here. As a matter of law, therefore, the Disclaimers are not part of the parties' contract for the sale of the wooden pallets. Accordingly, the court must grant Starbucks' motion for summary judgment regarding the unenforceability of the Disclaimers and strike Amcor's thirteenth and forty-ninth affirmative defenses. Amcor is thus excluded from raising the Disclaimers as a defense to Starbucks' claims.

B. Amcor's Motion for Summary Judgment

1. Strict Products Liability and Negligence

Starbucks does not oppose Amcor's motion for summary judgment on its strict products liability and negligence claims against Amcor. (Pl.'s Opp'n at 2 (Docket No. 122).) The court will thus grant Amcor's motion for summary judgment on those claims.[10]

2. Breach of Contract

Amcor seeks judgment as a matter of law that Starbucks is precluded from recovering damages on its breach of contract claim and is limited to the exclusive remedy provided in the Disclaimers.[11] As discussed above, the Disclaimers are not part

[10] This does not affect Starbucks' strict products liability and negligence claims against Pallets Unlimited.

[11] Amcor acknowledges that "[t]here is a genuine dispute of material fact as to whether the failure to comply with the moisture content in the specifications provided by Starbucks caused the resultant mold, as well as a dispute as to whether the moisture content of the pallets was the cause of the mold."

of the parties' contract as a matter of law. Accordingly, the court must deny Amcor's motion for summary judgment on Starbucks' breach of contract claim.

3. Breach of Express Warranty

Amcor does not dispute that the "disclaimer in the invoices is ineffective as to the implied warranty of merchantability and any express warranties." (Amcor's Opp'n at 5.) Amcor argues, rather, that Starbucks' claim for breach of express warranty fails because no express warranty exists here.

Section 2313 of the Code provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Cal. Com. Code § 2313(1)(a). "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Id. § 2313(1)(b). "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty." Id. § 2313(2).

Starbucks contends that "Amcor expressly warranted that the pallets would be 19% kiln dried when it accepted the order for pallets." (Pl.'s Mot. at 7.) The Specification Sheet contained the requirement that the wooden pallets be constructed with lumber that was kiln-dried to a moisture content of less than 19%. (Compl. Ex. B.) It is undisputed that Starbucks

---

(Amcor's Opp'n at 1 n.1.)

provided Amcor with the Specification Sheet and that Carranza, on behalf of Amcor, orally agreed to provide Starbucks with wooden pallets in accordance with the Specification Sheet. (Hardy Decl. ¶¶ 5-6; Carranza Dep. at 51:1-17.)

Amcor's promise that the pallets will conform to the Specification Sheet thus created an express warranty that the pallets would be 19% kiln dried. See Reynolds Metals, 754 F. Supp. at 1448 (the terms of a contract include express warranties of conformity with standard specifications). Accordingly, the court must deny Amcor's motion for summary judgment on Starbucks' claim for breach of express warranty.

4. Breach of Implied Warranty of Fitness for a Particular Purpose

Amcor argues that Starbucks' claim for breach of the implied warranty of fitness for a particular purpose fails because no such warranty exists here. "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose." Cal. Com. Code § 2315. Amcor argues that Starbucks has failed to establish that Amcor knew Starbucks was relying on its skill or judgment in furnishing the pallets in accordance with the Specification Sheet.

This argument is without merit. It is undisputed that Amcor was aware of the particular purpose for which Starbucks would use the wooden pallets. Carranza states that she "knew that the wooden pallets would be used to store green coffee

beans" and that "the ordinary use of wooden pallets was to hold goods for storage, moving, and/or shipping." (Carranza Decl. ¶¶ 28-29.) It is also undisputed that Amcor knew Starbucks was relying on Amcor to furnish the pallets in accordance with the Specification Sheet. Carranza testified that Hardy "requested [that Amcor] build the pallets per the specification sheet," and that Amcor represented to Starbucks it would furnish the pallets in accordance with the Specification Sheet. (Carranza Dep. at 51:1-17.)

Amcor's own undisputed evidence also establishes that Amcor expected Pallets Unlimited to manufacture the pallets in accordance with the Specification Sheet. (E.g., id. at 56:18-58:3; Amcor's Resp. to Pl.'s Interrog. No. 7 ("[Amcor] expected that the specifications and quality of the Starbucks pallets would meet the . . . Specification Sheet requirements.") (Docket No. 119-38); Amcor's Resp. to Pl.'s RFAs, Set Two, No. 11 ("[Amcor] expected the pallet manufacturer to manufacture the pallets as per the specification sheet it had provided.") (Docket No. 119-39).) Because a reasonable factfinder could find that Amcor knew the particular purpose for the wooden pallets and that Starbucks relied on Amcor to furnish the pallets in accordance with the Specification Sheet, the court must deny Amcor's motion for summary judgment on Starbucks' claim for breach of the implied warranty of fitness for a particular purpose.

5. Breach of Implied Warranty of Merchantability

Amcor argues that Starbucks' claim for breach of the implied warranty of merchantability fails because there was no breach of that warranty. The Code implies a warranty of

merchantability that goods are "fit for the ordinary purposes for which such goods are used." Cal. Com. Code § 2314(2)(c). The implied warranty provides for a "minimum level of quality." Birdsong v. Apple, Inc., 590 F.3d 955, 958 (9th Cir. 2009) (citation omitted). "Crucial to the inquiry is whether the product conformed to the standard performance of like products used in the trade." Pisano v. Am. Leasing, 146 Cal. App. 3d 194, 198 (2d Dist. 1983). This is a factual determination that "may depend on testimony of persons familiar with the industry standards and local practices and is a question of fact." Id.

A plaintiff claiming breach of the implied warranty of merchantability must show that the product "did not possess even the most basic degree of fitness for ordinary use." Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406 (4th Dist. 2003). "Such fitness is shown if the product is in safe condition and substantially free of defects." Mexia v. Rinker Boat Co., 174 Cal. App. 4th 1297, 1303 (4th Dist. 2009) (internal quotation marks and citation omitted).

Starbucks provides evidence here that the mold discovered on the pallets could pose a health hazard to humans working with them and a quality hazard to any products stored on them. (Kirsch II Decl. Ex. I at 177:17-179:17.) Amcor argues that the wooden pallets Starbucks returned to Amcor several weeks or months after they were delivered to the OHL Warehouse were not moldy. However, the evidence submitted indicates that the pallets' moisture content decreased over time as a result of natural air drying. (Anderson Dep. at 169:21-171:12; Kirsch II Decl. Ex. N.) This would support a reasonable inference that the

pallets may not have been able to support mold growth at the time Amcor took them back.

Amcor also disputes whether the particular mold that was found on the pallets was dangerous to human health and to products because "some types of mold are not hazardous to humans and would not impact products not meant for consumption." (Amcor's Reply at 5.) Amcor acknowledges, however, that the cause of the mold may need to be resolved before the court may determine if the implied warranty of merchantability was breached. It also acknowledges that the cause of the mold "is a disputed fact and cannot be resolved without weighing the evidence and credibility of the parties' witnesses and experts." (Id.)

Because genuine issues of material fact exist as to whether the wooden pallets here posed a health and quality hazard and because the determination of this issue may require the resolution of the causation issue, the court must deny Amcor's motion for summary judgment on Starbucks' claim for breach of the implied warranty of merchantability.

IT IS THEREFORE ORDERED that:

(1) Starbucks' motion for partial summary judgment on the unenforceability of the Disclaimers in Amcor's 26 Invoices, (Docket No. 119), be, and the same hereby is, GRANTED;

(2) Amcor's thirteenth and forty-ninth affirmative defenses, (Docket No. 14), be, and same hereby are, STRICKEN and that Amcor be excluded from raising the Disclaimers in the 26 Invoices as a defense to Starbucks' remaining claims for breach of contract, breach of express warranty, breach of the implied

warranty of merchantability, and breach of the implied warranty of fitness for a particular purpose;

(3) Amcor's motion for summary judgment on Starbucks' strict products liability and negligence claims, (Docket No. 111), be, and the same hereby is, GRANTED; and

(4) Amcor's motion for summary judgment on Starbucks' claims for breach of contract, breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness for a particular purpose, (Docket No. 111), be, and the same hereby is, DENIED.

Dated: June 23, 2016

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE