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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SWISS DEVCO, a California corporation,  
Plaintiff,  
v.  
U.S TOOL GRINDING, INC., a Missouri  
corporation, and DOES 1-10,  
Defendants.

Case No.: 20cv1310 JM(RBB)

**ORDER ON MOTION TO DISMISS**

Presently before the court is a motion to dismiss filed by Defendant U.S. Tool Grinding, Inc., (“U.S. Tool”) pursuant to Federal Rules of Civil Procedure 12(b)(6). (Doc. No. 16.) The motion has been fully briefed and the court finds it suitable for submission on the papers and without oral argument in accordance with Civil Local Rule 7.1(d)(1). For the reasons set forth below, U.S. Tool’s motion is **denied**.

**I. BACKGROUND**

On May 29, 2020, Plaintiff Swiss Devco (“Swiss”) filed this lawsuit in San Diego County Superior Court asserting a claim for breach of contract. (Doc. No. 1-2 at 2-11.<sup>1</sup>) On July 10, 2020, U.S. Tool removed the action to this court pursuant to diversity jurisdiction. (Doc. No. 1.)

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<sup>1</sup> Document numbers and page references are to those assigned by CM/ECF for the docket entry.

1 On July 31, 2020, U.S. Tool filed a motion to dismiss (Doc. No. 6) that was granted  
2 with leave to amend (Doc. No. 11).

3 On December 21, 2020, Swiss filed the First Amended Complaint for breach of  
4 contract. (Doc. No. 11, “FAC”). The factual allegations, accepted as true, are as follows.

5 Swiss and U.S. Tool do business directly with a third party, The Boeing Company  
6 (“Boeing”) and are Boeing vendors. (*Id.* ¶ 8). Boeing assigns ratings to its vendors and  
7 uses a sliding price scale which penalizes vendors with a lower rating. (*Id.*) Boeing will  
8 reduce a vendor’s rating if the vendor fails to timely complete orders. (*Id.*)

9 Swiss maintains that prior to entering the contract at issue, it had a Boeing rating of  
10 “silver.” (*Id.* ¶ 9.) Any vendor competing with Swiss for a Boeing contract that was rated  
11 below silver, for example a “yellow” rated company, would have been required to bid up  
12 to 10% less than Swiss for the contract. (*Id.*)

13 As a vendor of Boeing’s since 2004, U.S. Tool, is “very familiar with Boeing’s rating  
14 system and its effect on vendors’ abilities to bid on contracts with Boeing.” (*Id.* at ¶ 10.)

15 On or about October 18, 2018, Swiss requested a written quote for delivery of parts  
16 from U.S. Tool within six weeks of Swiss’s acceptance of the quote by U.S. Tool. (*Id.* ¶  
17 11.) Swiss’s “representative specifically informed Defendant’s representative that  
18 Plaintiff’s request for a quote was in support of Boeing Government Contract # CF-10-  
19 0130 & FA8634-17-D-269 and, [because it was a Boeing contract], time was a very  
20 important aspect of any agreement.” (*Id.*) U.S. Tool was aware that the six-week time  
21 period quoted was a material term to the agreement and that it would receive a reduced  
22 rating from Boeing if the six-week time frame could not be met. (*Id.* ¶ 12)

23 On November 16, 2018, Swiss accepted U.S. Tool’s quote and provided U.S. Tool  
24 with the purchase order reflecting a delivery date of January 15, 2019. (*Id.* ¶ 15.) The  
25 purchase order stated:

26 **Special Instructions:** Please ensure that the seller/manufacturer COC is  
27 included with the shipment. This has a due date of 1/15/2019, although early  
28 shipment is O.K. Please advise ASAP if this date will not be met. Thank you!

1 Doc. No. 12-2 at 4. U.S. Tool was aware that if it failed to deliver the purchase order by  
2 January 15, 2019, Swiss would be penalized by Boeing, and would lose substantial  
3 business with Boeing. (FAC ¶ 16.) Further, U.S. Tool was “aware of this based on direct  
4 conversations with Plaintiff and based upon Defendant’s own status as a vendor with  
5 Boeing.” (*Id.*)

6 Prior to U.S. Tool’s acceptance of the purchase order, Swiss expressed the need for  
7 U.S. Tool to promptly notify it if the products were going to be delayed in any manner so  
8 that Swiss could mitigate any potential problems with Boeing. (*Id.* ¶ 17.) U.S. Tool agreed  
9 to do so. (*Id.*)

10 U.S. Tool failed to deliver the products on January 15, 2019 as expressly agreed.  
11 (*Id.* ¶ 18.) Immediately thereafter, Swiss contacted U.S. Tool to inquire about the delivery  
12 of the products. (*Id.* ¶ 19.) On January 22, 2019, Swiss was informed by a U.S. Tool  
13 representative that the purchase order was “shipping complete today.” (*Id.*)

14 By early February, Swiss had still not received all of the parts from the purchase  
15 order and had only received a partial shipment. (*Id.* ¶ 20.) Representatives of Swiss  
16 regularly contacted U.S. Tool throughout February. (*Id.*) Swiss informed U.S. Tool: “We  
17 are really stressing over this order and really need some help getting it delivered!”; “They  
18 need to make it to our customers by [the promised dates]”; and “This order has hurt our  
19 company in a huge way!” (*Id.*)

20 On February 26, 2019, U.S. Tool revised its shipping date to March 5, 2019. (*Id.*  
21 ¶ 21.) Swiss informed Boeing of the revised date. (*Id.*)

22 By March 19, 2019, Swiss still had not received the missing products. (*Id.* ¶ 22.)  
23 Swiss again contacted U.S. Tool stating, “We still have not received them! Now these  
24 lines are again late after we gave our customer the new dates we were provided.” (*Id.*) The  
25 full order of parts was delivered on March 28, 2019. (*Id.*)

26 As a result of U.S. Tool’s breach of the Purchase Order and failure to timely deliver  
27 the parts, Swiss maintains that it was excused from making final payment. (*Id.* at 23.)  
28 Further, Swiss complains that “[a]s a direct and proximate result of U.S. Tool’s failure to

1 timely deliver the ordered parts within the agreed upon period, Plaintiff was unable to  
2 timely comply with its contract with Boeing, and Plaintiff's rating with Boeing dropped  
3 from 'Silver' to 'Yellow.' ... so Plaintiff has lost substantial contract opportunities with  
4 Boeing as a result of Plaintiff's lower rating." (*Id.* at ¶ 25.) Swiss maintains that it has  
5 suffered foreseeable consequential damages of lost revenue in excess of \$1,300,000, from  
6 contracts it would otherwise have received from Boeing, plus additional future revenue.  
7 (*Id.* ¶¶ 27, 28.)

8 On January 14, 2021, U.S Tool filed its motion to dismiss.<sup>2</sup> (Doc. No. 16.) Plaintiff  
9 filed its opposition, (Doc. No. 17) and Defendant filed a reply, (Doc. No. 18).

## 10 II. LEGAL STANDARD

11 Under Federal Rule of Civil Procedure 12(b)(6), a party may bring a motion to  
12 dismiss based on the failure to state a claim upon which relief may be granted. A Rule  
13 12(b)(6) motion challenges the sufficiency of a complaint as failing to allege "enough facts  
14 to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.  
15 544, 570 (2007). Ordinarily, for purposes of ruling on a Rule 12(b)(6) motion, the court  
16 "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the  
17 light most favorable to the non-moving party." *Manzarek v. St. Paul Fire & Marine Ins.*  
18 *Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But, even under the liberal pleading standard  
19 of Rule 8(a)(2), which requires only that a party make "a short and plain statement of the  
20 claim showing that the pleader is entitled to relief," a "pleading that offers 'labels and  
21 conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).  
22 "Determining whether a complaint states a plausible claim for relief ... [is] a context-  
23 specific task that requires the reviewing court to draw on its judicial experience and  
24 common sense." *Id.* at 679.

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28 <sup>2</sup> On December 28, 2020, the court granted U.S. Tool's *Ex-Parte* Application for Extension  
of Time to File Response to First Amended Complaint. (*See* Doc. Nos. 13, 14, 15.)

1           **III. DISCUSSION**

2           The parties take opposing positions on whether the FAC meets the necessary  
3 pleading standards to state a claim for breach of contract.

4           In California, to successfully bring a breach of contract claim “a plaintiff must show:  
5 (1) the existence of a contract, (2) plaintiff’s performance or excuse for nonperformance,  
6 (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty,*  
7 *LLC v. Goldman*, 51 Cal. 4th 811, 821 (2001). The determination as to whether a contract  
8 is or is not ambiguous is a question of law for the court. *Han v. Mobil Oil Corp.*, 73 F.3d  
9 872, 877 (9th Cir. 1995). “A contract or a provision of a contract is ambiguous if it is  
10 reasonably susceptible of more than one construction or interpretation.” *Castenada v.*  
11 *Dura-Vent Corp*, 648 F.2d 612, 619 (9th Cir. 1981).

12           **A. Consequential Damages**

13           U.S Tool’s primary arguments for dismissal are based around the damages prong of  
14 Swiss’s breach of contract claim. First, U.S. Tool contends Swiss has failed to plead  
15 sufficient facts to support its claim for damages. (Doc. No. 16-1 at 12-14.) Second, it  
16 claims that the consequential damages sought by Swiss were not contemplated by the  
17 parties at the time they entered into the contract. (*Id.* at 14-16.) In opposition, Swiss  
18 maintains that the FAC meets the necessary pleading standards and adequately alleges  
19 damages. (Doc. No. 17 at 11-14, 16.)

20           As the court explained previously, Federal Rule of Civil Procedure 9(g) requires that  
21 “if an item of special damage is claimed, it must be specifically stated.” Fed. R. Civ. P.  
22 9(g).

23           In a contract case, ‘while both special and general damages must be the natural  
24 and proximate cause of the breach of the agreement, general damages are such  
25 as inevitably follow, while special damages are such as may, or may not  
26 follow...The distinction between general and special damages for breach of  
27 contract is that the former are such damages as the law implies and presumes  
28 from the breach complained of, while the latter are such as have proximately  
resulted but do not always immediately result from the breach and will,  
therefore, not be implied by law.’

1 *City & Cnty. of S.F. v. Tutor-Saliba Corp.*, No. C 02-5286 CW, 2005 WL 645389, at \*17  
2 (N.D. Cal. Mar. 17, 2005) (quoting *Henry Pratt Co. v. Stoodly Co.*, 16 F.R.D. 175, 177  
3 (S.D. Cal. 1954). “[S]pecial, or consequential, damages are not usually recoverable in an  
4 action for breach of contract.” *Contempo Metal Furniture Co. of Cal. v. E. Tex. Motor*  
5 *Freight Lines, Inc.*, 661 F.2d 761, 765 (9th Cir. 1981).<sup>3</sup> Thus, in order to recover special  
6 damages a plaintiff “must show that the carrier had notice of the special circumstances  
7 from which the damages would flow.” *Id.* (citations omitted).

8 Here, the question is whether Swiss has set forth sufficient facts to establish that  
9 prior to entering the agreement with it, U.S. Tool was aware that Swiss would suffer  
10 consequential damages in the form of having its rating reduced which, in turn, would result  
11 in substantial lost contract opportunities with Boeing. As alleged, U.S. Tool and Swiss  
12 were both long-term vendors of Boeing and familiar with the rating system Boeing  
13 employed, and that Boeing penalized vendors for failing to deliver parts on time. (*See*  
14 *FAC* ¶¶ 8-10.) It is also alleged that U.S. Tool was made aware that the ordered parts were  
15 for a Boeing contract. (*Id.* ¶ 11.) Further, as alleged, Swiss informed U.S. Tool of the  
16 time-sensitive nature of the contract, expressing that the six-week time frame was a  
17 material term and that it would be penalized by Boeing by way of a reduced rating, “which  
18 would cause Plaintiff to lose substantial business with Boeing.” (*Id.* at ¶¶ 12, 14, 16.)  
19 Additionally, the purchase order reflected the six-week time frame, provided that U.S. Tool  
20 was to notify Swiss “ASAP” if there were any issues regarding the delivery timeframe and,  
21 once U.S. Tool missed the January 15, 2019 deadline, it is alleged that U.S. Tool needed to  
22 inform Swiss of any delays so it could mitigate its damages with Boeing. (*Id.* at ¶¶ 15, 17;  
23 *see also* Doc. No. 12-2 at 4.) It is also alleged that U.S. Tool expressly acknowledged the  
24 time requirements and that U.S. Tool’s knowledge of the consequences to Swiss was based  
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27 <sup>3</sup> Defining special damages as “those that the carrier did not have reason to foresee as  
28 ordinary, natural consequences of a breach when the contract was made.” *Contempo Metal*  
*Furniture Co.*, 661 F.2d at 765.

1 upon direct conversations between the companies. (FAC ¶¶ 15, 17.) Moreover, U.S.  
2 Tool’s own experience with Boeing, made it aware of the potential consequences Swiss  
3 was facing. (*Id.* ¶ 14.) Taking these allegations as true, these facts are sufficient to support  
4 a finding that Swiss’s losses were the natural and proximate consequence of U.S. Tool’s  
5 conduct.

6 Furthermore, the court is not persuaded by U.S. Tool’s contention that further  
7 itemization of the special damages is required. Swiss has alleged that as a result of the  
8 delayed shipment: (1) its rating was downgraded from silver to yellow; (2) the lower rating  
9 meant it would have to bid as much as 10% lower for the same contracts; and (3) the new  
10 bid prices were more than its profit margin on most contracts with Boeing. (*Id.* ¶ 25.) The  
11 net effect being that Swiss’s relationship with Boeing suffered losses to the tune of \$1.3  
12 million. (*Id.* ¶27.) The FAC only alleges one claim, for breach of contract, and does not  
13 attribute the lost business and profit to any other claim. *See, e.g., First Advantage*  
14 *Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 938 (N.D. Cal. 2008)  
15 (concluding specific damages allegations were inadequate for a claim based on trade libel  
16 when no dollar amount was provided because Private Eyes simply relied on the total  
17 damages calculation for all of its claims, therefore, it was “impossible to determine what,  
18 if any, damage to its relationship with CCE Private Eyes claims to have suffered just as a  
19 result of the libelous statements.”). The \$1.3 million is clearly identified solely as loss of  
20 business and profits, (*see* FAC ¶ 27 Swiss “lost at least 1.3. million dollars from contracts  
21 [it] would otherwise [have] received from Boeing”), and not as loss of good will, etc. *See*  
22 *Henry Pratt, Co.* 16 F.R.D. at 178 (a simple itemization of the \$185,000 alleged as damages  
23 to its ‘good will, business, and profits,’ allocating \$100,000 was damage to good will, and  
24 \$85,000 was loss of business and profits was found to be sufficient at the pleadings stage  
25 for special damages). Any “further itemization is evidentiary and can be secured by  
26 discovery proceedings under the Federal Rules of Civil Procedure.” *Id.* In other words,  
27 the court is able to determine on the face of the FAC that special damages are being sought  
28 as a result of the breach of contact claim. *See Ores v. Willow W. Condo. Ass’n*, No. 94 C

1 4717, 1996 WL 111894, \* 6 (N.D. Ill. 1996) (“Rule 9(g) does not require that the plaintiff  
2 set forth his or her entire legal theory underlying asserted special damages. Instead, it  
3 requires that the plaintiff plead facts that adequately reveal the nature of the claimed  
4 damages to permit the defendant to respond in his answer and further delineate the claim  
5 during pretrial discovery.”).<sup>4</sup>

6 For the reasons set forth above, the court concludes that Swiss has adequately pled  
7 specific damages and denies U.S. Tool’s motion to dismiss on this ground.

### 8 **B. Excuse from Performance**

9 Secondly, U.S. Tool contends that dismissal is appropriate because Swiss has  
10 failed to specifically plead excuse of its own performance. (Doc. No. 16-1 at 16-18.) Swiss  
11 contends that it has “properly alleged partial payment and that it was excused from any  
12 further payment due to U.S. Tool’s material breach of the parties’ contract.” (Doc. No. 17  
13 at 15.) Swiss also maintains that under California law it was excused from performing its  
14 contractual obligations because U.S. Tool failed to timely deliver the ordered parts and that  
15 this failure constituted a material breach of the contract. (*Id.* at 14.)

16 “[I]t is elementary that one party to a contract cannot compel another to perform  
17 while he himself is in default.” *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367  
18 (2010) (citation omitted). “While a plaintiff may plead its performance of a contract in  
19 general terms, ‘excuses must be pleaded specifically.’” *New Box Solutions, LLC v. Davis*,  
20 CV 18-5324-RSWL-KSw, 2018 WL 4562764, at \* 5 (C.D. Cal. Sept. 18, 2018) (quoting  
21 *Durell*, 183 Cal.App.4th 1368). “When a party's failure to perform a contractual obligation  
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24 <sup>4</sup> See *cf. City & Cnty. of S.F. v. Tutor-Saliba Corp.*, No. C 02-5286 CW, 2005 WL 645389,  
25 \*18 (N.D. Cal. Mar. 17, 2005) (“At this stage in the proceeding, the Court cannot determine  
26 whether the damages sought in each claim would inevitably follow from the alleged  
27 wrongful conduct. Therefore, the Tutor Defendants' motion to dismiss the contract claim  
28 based on a failure to allege special damages is DENIED. If, at the summary judgment or  
trial stage of the proceedings, it is determined that Plaintiffs are seeking special damages,  
special damages may be denied”).



1 constitutes a material breach of the contract, the other party may be discharged from its  
2 duty to perform under the contract.” *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011)  
3 (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 813, 814, p. 906  
4 (Witkin) (“*Material* failure of consideration discharges the other party's duty.”)) (collecting  
5 cases). “However, if reasonable minds cannot differ on the issue of materiality, the issue  
6 may be resolved as a matter of law.” *Ins. Underwriters Clearing House, Inc. v. Natomas*  
7 *Co.*, 184 Cal. App. 3d 1520, 1527 (1986).

8 Here, Swiss has alleged that timely delivery of the parts from U.S. Tool was a  
9 material term of the parties’ agreement (*see* FAC at ¶¶ 14, 23, 24). Swiss contends that it  
10 performed its obligations under the contract by making partial payment to U.S. Tool. (*Id.*  
11 ¶ 23.) It maintains it was excused from full payment of the contract price because the  
12 additional two months it took U.S. Tool to deliver the parts constituted a material breach  
13 of the parties’ contract (*see id* at ¶¶ 22, 23). Swiss has also alleged that U.S. Tool was  
14 informed that time was a material term of the contract prior to its execution. (*Id.* at ¶ 12.)  
15 Further, it is alleged that “[p]ayment was to be made after a timely delivery.” (*Id.* at ¶ 23.)

16 For purposes of the motion to dismiss, the court accepts as true the factual allegations  
17 of the FAC. Whether the breach was so material as to constitute cause for Swiss to  
18 terminate a contract is properly a question for the trier of fact, and not for determination at  
19 this time. *See Brown*, 192 Cal. App. 4th at 277 (“Whether a breach is so material as to  
20 constitute cause for the injured party to terminate a contract is ordinarily a question for the  
21 trier of fact.”). Consequently, the court denies U.S. Tool’s motion to dismiss on this  
22 ground.

#### 23 IV. CONCLUSION

24 In accordance with the foregoing, Defendant’s motion to dismiss the FAC is  
25 **DENIED**. (Doc. No. 16.) Defendant shall file its answer to the FAC in accordance with

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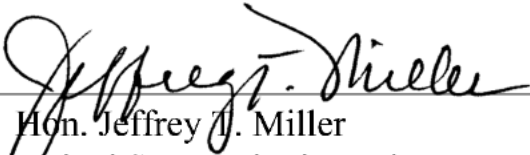
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1 the Federal Rules of Procedure.

2 IT IS SO ORDERED.

3 Dated: April 29, 2021

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5 Hon. Jeffrey J. Miller  
6 United States District Judge  
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