

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES FOR THE USE
AND BENEFIT OF CK ONE
CONSULTING SERVICES, INC.,

Plaintiffs,

v.

A.W. SCHELL ELECTRIC
SERVICES, INC. et al.,

Defendants.

CASE NO. C13-408 RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on the motion for summary judgment filed by defendants A.W. Schell Electrical Services, Inc. (“Schell”), Andy Schell, Jane Doe Schell, and Hanover Insurance Company (“Hanover”) (Dkt. # 18), and plaintiff CK One Consulting Services dba Atlas Power Corp.’s (“Atlas”) motion for partial summary judgment against Hanover (Dkt. # 22). The court has considered all of the evidence presented together since many of the issues overlap. Plaintiff alleges eight causes of action: (1) Breach of Contract, (2) Quantum Meruit, (3) Conversion, (4) Fraudulent Misrepresentation, (5) Unjust Enrichment, (6) Negligent Misrepresentation, (7) Miller Act Payment Bond, and (8) Trade Libel. The first, second, fifth, and seventh claims arise

1 out of Schell’s alleged failure to pay for labor, services and materials provided by Atlas.
2 Dkt. # 1 (Compl.) ¶¶ 3.3, 3.9, 3.20, 3.26.

3 Neither party requested oral argument, and the court finds that this matter may be
4 decided on the materials submitted. Having reviewed the memoranda, exhibits, and the
5 record herein, the court GRANTS defendants’ summary judgment motion, and DENIES
6 plaintiff’s motion for partial summary judgment.

7 **II. BACKGROUND**

8 In January 2012, Schell was awarded a government contract with the U.S. Army
9 Corp of Engineers to provide labor and materials for the Chief Joseph Dam in Douglas
10 County, Washington. Dkt. # 19 (Schell Decl.) ¶ 2. In order to complete the labor and
11 materials for the project, Schell entered into a subcontract (“Subcontract”) with Atlas.¹
12 *Id.* ¶ 3. In July 2012, Schell informed Atlas that all submittals had been provided to the
13 Army Corp with all documentation needed to begin work on the project. Dkt # 22-1 at 5
14 (Ex. A to Pl.’s Mot., 1st Kuhnert Decl.). When Mr. Kuhnert went to the site, Schell
15 representatives asked Mr. Kuhnert to assist them with their submittals and other work,
16 which was not part of the subcontract. *Id.* Mr. Kuhnert assisted Schell in performing the
17 submittals and other work.² *Id.*

18 On November 1, 2012, Atlas sent Schell a letter that stated, among other things,
19 that its “invoices, present and future, have been assigned to, and are now payable only to
20 Avalon Funding Corporation” and that the “instruction will remain in effect until revoked
21 by Avalon in written notification.” Dkt. # 19 at 31 (Ex. B to 1st Schell Decl.). On the
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23 ¹ The parties dispute whether the subcontract is valid because of an email in which Mr.
24 Schell stated that the subcontract “was never signed by an authorized person at [Schell]” and that
25 the “signing power is held only by officers in this corporation, which is myself.” Dkt. # 27-1 at 7
26 (Ex. C to Plf.’s Opp’n). Mr. Schell now states that he directed Dan Baker, the project manager,
to sign the subcontract. Dkt. # 19 (Schell Decl.) ¶ 3. The court has addressed the admissibility
of this document below.

27 ² The parties dispute whether the submittals had been submitted and whether the
additional work was outside the scope of the subcontract.

1 same day, Atlas issued two invoices to Schell for \$254,116.83 (No. CJD102212) and
2 \$361,068.88 (No. cjd102212-1), respectively. *Id.* at 33-34 (Ex. C to 1st Schell Decl.).

3 In December 2012 and January 2013, Atlas delivered labor and materials to
4 Schell. Dkt. # 30 at 2-3 (Taylor Decl.); Dkt. # 34 at 2-3 (Eurick Decl.). Atlas claims that
5 delays in delivery were caused by Schell, weather, and the freight company (*Id.*), and
6 Schell claims that the items delivered and the labor performed did not comply with the
7 Subcontract (Dkt. # 26 (2d Schell Decl.) ¶¶ 9-12)). On February 27, 2013, Schell sent
8 Atlas a letter in response to recent correspondence it had with Avalon and Atlas's
9 demands for payment of the two invoices issued on November 1, 2012. *Id.* at 7-13 (Ex.
10 A to 2d Schell Decl.). In that letter, Schell stated that it intended to withhold payment
11 based on "numerous material defaults under the Subcontract." *Id.* Atlas did not respond
12 to this letter. *Id.* at 4 ¶ 9. On March 7, 2013, Atlas filed its complaint against defendants.
13 Dkt. # 1. On March 27, 2013, Schell "terminated Atlas'[s] contract for Atlas'[s] failure
14 to cure material defaults." Dkt. # 19 (1st Schell Decl.) ¶ 6. On May 19, 2013, Avalon
15 sent Atlas a notice of default and demand for payment pursuant to the Purchase and
16 Security Agreement. Dkt. # 29-1 at 2-3 (Ex. A to Plf.'s Reply). On May 22, 2013,
17 Schell, Avalon and Atlas (by Avalon as power of attorney for Atlas)³ entered into a
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20 ³ On January 29, 2010, Atlas executed a Special Power of Attorney ("Power of
21 Attorney") that appointed Avalon Funding Corporation ("Avalon") as its "attorney in fact to act
22 in [Atlas's] place" to, among other things, compromise, prosecute, or defend any action, claim,
23 proceeding or dispute relating to any accounts receivable, sold and/or assigned to Avalon under
24 the Accounts Receivable Purchase and Security Agreement ("Purchase and Security
25 Agreement") entered into between Atlas and Avalon. Dkt. # 24-2 at 2 (Ex. B to Avalon Decl.);
26 Dkt. # 27-1 at 2 (Ex. A to Plf.'s Opp'n). The Power of Attorney remained in effect until all of
27 Atlas's obligations to Avalon under the Purchase and Security Agreement had been satisfied. *Id.*
On the same day, Atlas also executed a separate assignment ("Assignment") that "assign[ed] all
of its right, title and interest in all of its commercial Accounts Receivable to" Avalon. Dkt. # 24-
1 at 2 (Ex. A to Avalon Decl.). The Purchase and Security Agreement governs the accounts
receivable purchased by Avalon, and requires, among other things, Atlas to notify each account
debtor that all payments must be made to Avalon. Dkt. # 28 at 12 (Ex B to 2d Kuhnert Decl., §
2.1); Dkt. # 33 at 5 (Ex. A to Supp. Avalon Decl., signature page).

1 settlement agreement (“Settlement Agreement”), by which they released all claims
2 against each other related to the accounts receivable that Atlas assigned to Avalon.⁴ Dkt.
3 # 19 at 38-45 (Ex. E to 1st Schell Decl.). Pursuant to the Settlement Agreement, Schell
4 paid Avalon \$495,000. *Id.* at 3 ¶ 7.

5 On June 13, 2013, Atlas issued a third invoice (No. M021113), which repeated
6 entries from the prior two invoices, but also included new entries for shipping,
7 consulting, interest, storage, collection fees, and sales tax, totaling an additional
8 \$263,292. Dkt. # 20 at 25-26 (Ex. C to Godwin Decl.).

9 III. ANALYSIS

10 Summary judgment is appropriate if there is no genuine dispute as to any material
11 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
12 56(a). The moving party bears the initial burden of demonstrating the absence of a
13 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
14 Where the moving party will have the burden of proof at trial, it must affirmatively
15 demonstrate that no reasonable trier of fact could find other than for the moving party.
16 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where
17 the nonmoving party will bear the burden of proof at trial, the moving party can prevail
18 merely by pointing out to the district court that there is an absence of evidence to support
19 the non-moving party’s case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets
20 the initial burden, the opposing party must set forth specific facts showing that there is a
21 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*
22 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most
23 favorable to the nonmoving party and draw all reasonable inferences in that party’s favor.
24 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

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27 ⁴ Atlas did not sign the Settlement Agreement in its own right, and challenges Avalon’s
authority to sign on its behalf.

1 **A. Motions to Strike**

2 As a preliminary matter, defendants make a number of motions to strike
3 inadmissible evidence, to which plaintiff provides no substantive response. Far from
4 “sophistical argumentation and cheap legal maneuverings” or “smoke and mirrors, and
5 other juridical wizardry,” as plaintiff contends, defendants’ motions are rooted firmly in
6 the Federal Rules of Evidence and binding precedent.

7 In resolving a motion for summary judgment, the court may only consider
8 admissible evidence. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).
9 However, at the summary judgment stage, a court focuses on the admissibility of the
10 evidence’s content, not on the admissibility of the evidence’s form. *Fraser v. Goodale*,
11 342 F.3d 1032, 1036 (9th Cir. 2003).

12 Defendants move to strike various statements that appear in plaintiff’s briefing
13 that, purportedly, are not supported by admissible facts. Dkt. # 25 at 3-4. The court has
14 only considered admissible evidence. To the extent that plaintiff makes assertions that
15 are not supported by the record, the court has disregarded them.

16 Defendants also move to strike various statements in the declarations of Mr.
17 Kuhnert based on lack of personal knowledge and hearsay. Dkt. # 25 at 4-5; # 31 at 3-4.
18 Rather than limit his declarations to statements of fact of which he has personal
19 knowledge, the vast majority of Mr. Kuhnert’s declarations consists of argument, analysis
20 and interpretation of other evidence, improper opinion testimony, speculation, hearsay,
21 and legal conclusions. Fed. R. Evid. 602, 701, 702, 801. The court has only considered
22 statements of fact that appear to be within Mr. Kuhnert’s personal knowledge and that are
23 not hearsay.

24 Defendants move to strike a number of unauthenticated documents that lack
25 appropriate foundation by a person with personal knowledge. Dkt. # 31 at 2 (moving to
26 strike Exs. B, C, and D to Plf.’s Opp’n at Dkt. # 27-1); Dkt. # 36 at 2 (moving to strike
27 Ex. C to Plf.’s Reply at Dkt. # 29-1). The court agrees that these documents are not

1 properly authenticated and lack appropriate foundation by a person with personal
2 knowledge. However, with respect to Exhibit C to Dkt. # 27-1, it appears that Mr.
3 Kuhnert received a copy of the email. Accordingly, the court believes that Mr. Kuhnert
4 could authenticate the document and provide proper foundation for its admissibility.
5 With respect to Exhibit C to Dkt. # 29-1, it also appears that Mr. Kuhnert could lay the
6 proper foundation for its admissibility where it appears that he requested a certified copy
7 of all financing statements and non-UCC liens for Schell that had been filed with the
8 Washington State Department of Licensing. Accordingly, the court focuses on the
9 admissibility of the evidence's content with respect to these two exhibits, not their form.

10 Defendants also argue that Exhibit C to Dkt. # 29-1 is hearsay offered to prove the
11 truth of the matter therein—that Atlas filed a financing statement to perfect a security
12 interest on Schell. Dkt. # 36 at 3. Defendants are mistaken. Plaintiff has provided this
13 exhibit to demonstrate the notice to and effect of the UCC financing statement on Schell.
14 Dkt. # 29 at 6. Accordingly, this Exhibit is not offered for the truth of the matter
15 asserted.

16 Accordingly, the court GRANTS defendants' motions to strike Exhibits B and D
17 to Dkt. # 27-1, and DENIES the motions with respect to Exhibits C to Dkt. ## 27-1 and
18 29-1.

19 Plaintiff moves to strike Avalon's declaration based on lack of foundation, legal
20 conclusions and improper opinion testimony because "this declaration is being provided
21 to establish that the 'Special Power of Attorney' that Plaintiff signed with Avalon is
22 valid." Dkt. # 27 at 11. Plaintiff has not identified any legal conclusion or improper
23 opinion testimony that Mr. Haldeman purportedly makes on Avalon's behalf. Contrary
24 to plaintiff's interpretation of the declaration, Mr. Haldeman does not state that the Power
25 of Attorney is valid. Rather, Mr. Haldeman states that "Avalon did not revoke the
26 Special Power of Attorney" and that "Avalon did not waive its rights under the Special
27 Power of Attorney." Mr. Haldeman does not state, as defendants contend, that Avalon

1 “did not make any statement or conduct any act that waives or revokes the Special Power
2 of Attorney.” Dkt. # 31 at 9. Rather, Mr. Haldeman took the next step and provided the
3 legal conclusion that Avalon did not revoke or waive its rights under the Power of
4 Attorney. Accordingly, the court has disregarded these legal conclusions in Mr.
5 Haldeman’s declaration on behalf of Avalon.

6 **B. The Miller Act**

7 The Miller Act requires a general contractor on a federal construction project to
8 furnish a payment bond for the protection of all persons supplying labor and material in
9 carrying out the work provided for in the contract. 40 U.S.C. § 3131⁵; *Mai Steel Serv.*
10 *Inc. v. Blake Constr. Co.*, 981 F.2d 414, 416 (9th Cir. 1992). The Miller Act represents a
11 congressional effort to protect persons supplying labor and material for the construction
12 of federal public buildings in lieu of the protection they might receive under state statutes
13 with respect to the construction of nonfederal buildings. *Mai Steel*, 981 F.2d at 416-17.
14 “Because the Act is ‘highly remedial in nature,’ it must be liberally construed to
15 effectuate Congress’s intent.” *Id.* at 417. “Every person that has furnished labor or
16 material in carrying out work provided for in a contract for which a payment bond is
17 furnished under section 3131” may recover against a surety where payment has not been
18 made in full within 90 days of the last day the labor or material was supplied. 40 U.S.C.
19 § 3133(b)(1); *Mai Steel*, 981 F.2d at 417. This includes any subcontractor who deals
20 directly with the prime contractor as well as any sub-subcontractor who has supplied
21 labor or materials to a subcontractor. *Mai Steel*, 981 F.2d at 417. Additionally, when a
22 subcontractor’s claim falls within the Miller Act, the subcontractor may recover from the
23 general contractor’s Miller Act surety all of its increased labor and material costs
24 resulting from construction delays for which it is not responsible, even if those delays are
25 caused by someone other than the general contractor. *Id.* at 420.

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27 ⁵ This section was formerly cited as 40 U.S.C. 270a.

1 “The Miller Act provides a federal cause of action, and the scope of the remedy as
2 well as the substance of the rights created thereby is a matter of federal not state law.”

3 *F.D. Rich Co. v. U.S. ex rel. Indus. Lumber Co., Inc.*, 417 U.S. 116, 127 (1974).

4 However, state law controls the interpretation of Miller Act subcontracts to which the
5 United States is not a party. *U.S. ex rel. Reed v. Callahan*, 884 F.2d 1180, 1185 (9th Cir.
6 1989). Plaintiff does not dispute that Washington State law applies to the interpretation
7 of the Power of Attorney, Purchase and Security Agreement, Assignment, Settlement
8 Agreement, and Subcontract. *See Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96
9 Wash. 2d 692, 696, 635 P.2d 441 (Wash. 1981) (“In determining the appropriate choice
10 of law, this court has rejected the *lex loci delicti* choice-of-law rule and has adopted the
11 most significant relationship rule for contracts and tort choice-of-law problems.”).

12 Additionally, the Supreme Court and other federal courts have indicated that the Miller
13 Act does not alter the generally accepted principles of law governing the assignment of
14 claims. *See United States ex rel Sherman v. Carter*, 353 U.S. 210, 219 (1957) (noting
15 that there is nothing in the language, legislative history, or related decisions that indicated
16 that Congress intended to overturn cases that allowed assignees of the claims of persons
17 furnishing labor or material to bring a civil action under the Heard Act, which was
18 replaced with broader and more liberal provisions of the Miller Act); *Nickell v. United*
19 *States ex rel. D.W. Falls, Inc.*, 355 F.2d 73, 76 (10th Cir. 1966) (“It is not shown,
20 however, that the Miller Act in any way varies the generally accepted principles of law
21 governing the assignment of claims including the rule that the assignee takes the rights of
22 the assignor, and the assignment neither improves nor diminishes the value or validity of
23 those rights.”).

24 Much of the disputes between the parties centers on the scope and interpretation of
25 various contracts, including the Power of Attorney, Purchase and Security Agreement,
26 Assignment, Settlement Agreement, and Subcontract. Washington follows the objective
27 manifestation theory of contracts. *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154

1 Wash. 2d 490, 503, 115 P.3d 262 (2005). In determining the parties' intent, the court
2 focuses on the objective manifestations of the agreement, rather than on the unexpressed
3 subjective intent of the parties. *Id.* The court imputes an intention corresponding to the
4 reasonable meaning of the words used. *Id.* Thus, the subjective intent of the parties is
5 generally irrelevant if the intent can be determined from the actual words used. *Id.* at
6 504. Words in a contract are given their ordinary, usual, and popular meaning unless the
7 entirety of the agreement clearly demonstrates a contrary intent. *Id.* The court must also
8 view the contract as a whole and the parties' conduct in determining intent. *King v. Rice*,
9 146 Wn. App. 662, 670, 191 P.3d 946 (2008).

10 On January 29, 2010, Atlas executed the Power of Attorney that appointed Avalon
11 as its "attorney in fact to act in [Atlas's] place" for four specific purposes:

12 1. To endorse its name to checks, drafts, or other instruments payable to it,
13 to receive cash therefore, and/or to deposit to Avalon's account or to any
14 other account which Avalon may designate;

15 2. To contact account debtor(s) on behalf of the undersigned, orally or in
16 writing, to verify account(s) receivable, documents related thereto, to
17 specify and confirm mode of payment and otherwise take such action to
18 ensure payment on account(s) receivable and protection of collateral related
19 thereto;

20 3. To compromise, prosecute, or defend any action, claim, proceeding or
21 dispute relating to any account(s) receivable, sold and/or assigned to
22 Avalon under that certain "Accounts Receivable Purchase and Security
23 Agreement" entered into between the undersigned and Avalon.

24 4. To receive, open and dispose of all mail, delivered by private carrier or
25 the U.S. postal Service, sent to the undersigned and/or Avalon.

26 Dkt. # 27-1 at 2 (Ex. A to Plf.'s Opp'n). The Power of Attorney also provides that Atlas
27 "further grants to its attorney in fact full authority to act in any manner both proper and
28 necessary to the exercise of the foregoing powers, and hereby ratifies every act that
29 Avalon may lawfully perform in exercising those powers." *Id.* Finally, the Power of

1 Attorney became effective on January 29, 2010, and “remain[ed] in full force and effect
2 until all obligations of [Atlas] to Avalon under that certain Accounts Receivable Purchase
3 and Security Agreement entered into between [Atlas] and Avalon have been satisfied in
4 full.” *Id.*

5 Plaintiff also executed a separate Assignment consistent with the Purchase and
6 Security Agreement and the Power of Attorney that “assign[ed] all of its right, title and
7 interest in all of its commercial Accounts Receivable to” Avalon. Dkt. # 24-1 at 2 (Ex. A
8 to Avalon Decl.). The Assignment also provides that “Avalon has purchased said
9 receivables, acting for its own account and has advanced the necessary funds to purchase
10 said accounts, pursuant to the Avalon Schedule of Accounts, which has been entered into
11 concurrently with this Assignment.” *Id.* The Assignment also provides that Atlas “shall
12 and does assign, sell and transfer all of its rights, title and interest in all of the Accounts
13 Receivable sold and assigned to [Avalon]” *Id.*

14 The intent of the parties is clear and unambiguous from the actual words used.⁶
15 The Power of Attorney was intended to grant fairly broad authority on Avalon to “act in
16 any manner proper and necessary to” accomplish the four purposes, including the ability
17 of Avalon to “compromise, prosecute, or defend any action, claim, proceeding or
18 dispute” relating to the purchased accounts receivable, which have been assigned to
19 Avalon. Additionally, the Power of Attorney does not terminate until the obligations
20 under the Purchase and Security Agreement have been satisfied in full.

21 The Purchase and Security Agreement, entered into between Avalon and Atlas on
22 January 29, 2010, governs the accounts receivable purchased by Avalon, and requires
23 Atlas to notify each account debtor that all payments must be made to Avalon. Dkt. # 28
24 at 12 (Ex B to 2d Kuhnert Decl., § 2.1); Dkt. # 33 at 5 (Ex. A to Supp. Avalon Decl.,
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27 ⁶ Thus, plaintiff’s subjective intent is irrelevant.

1 signature page).⁷ On November 1, 2012, Atlas provided this required notice to Schell,
2 the account debtor, and informed Schell that its “invoices, present and future, have been
3 assigned to, and are now payable only to Avalon Funding Corporation” and that the
4 “instruction will remain in effect until revoked by Avalon in written notification.” Dkt. #
5 19 at 31 (Ex. B to 1st Schell Decl.). On the same day, Atlas issued two invoices to
6 Schell for \$254,116.83 (No. CJD102212) and \$361,068.88 (No. cjd102212-1),
7 respectively. *Id.* at 33-34 (Ex. C to 1st Schell Decl.). On June 13, 2013, three months
8 after this case was filed, Atlas issued a third invoice (No. M021113), which largely
9 repeats entries from the prior two invoices.⁸ Dkt. # 20 at 25-26 (Ex. C to Godwin Decl.).
10 However, it also includes seven new entries for shipping, consulting, interest, storage,
11 collection fees and sales tax, totaling an additional \$263,292. *Id.*

12 The court finds that all three invoices are “commercial Accounts Receivable”
13 subject to the Assignment, Power of Attorney, and Purchase and Security Agreement.
14 *Compare* Dkt. # 19 at 40, 45 (Ex. E to 1st Schell Decl., May 2013 Settlement Agreement)
15 (agreeing to \$495,000 payment by Schell to Avalon to settle claims related to assigned
16 accounts receivable) *with* Dkt. # 20 at 26 (Ex. C to Godwin Decl., June 2013 Invoice No.

18 ⁷ Atlas does not dispute that it signed the Purchase and Security Agreement in January
19 2010.

20 ⁸ Although Atlas contends in its interrogatories that the third invoice “cancels” the first
21 two, Atlas has not provided the court with any legal or factual authority to support such a
22 conclusion. *See* Dkt. # 20 at 15-16 (Ex. B to Godwin Decl., Interrog. 7). Nor has Atlas provided
23 the factual basis for its conclusion that Schell had notice of the “master invoice M021113” at any
24 time prior to June 2013. *Id.* Atlas contends that this master invoice was created in February
25 2011. *Id.* However, there is no other evidence that supports a February 2011 date for the master
26 invoice. The earliest date the court has received on the actual invoice bears a June 2013 date. *Id.*
27 at 25-26 (Ex. C to Godwin Decl.); *see also* Dkt. # 22-3 at 6 (Ex. C to Plf.’s Mot., 11/1/2013
date). On a March 7, 2013 communication from Atlas to Schell regarding “Aging Report
Amounts Owned [sic],” Atlas only identified the first two invoices, not the master invoice. Dkt.
29-1 at 19 (Ex. B to Plf.’s Reply). Had the master invoice been issued prior to March 7, 2013,
Atlas would have included it in its Aging Report Amounts Owed letter. Atlas cannot create a
disputed fact with conflicting evidence that it provides. The court has used the June 2013 date
for the third invoice.

1 M021113) (applying payment credit of \$495,000 to account balance of the master
2 invoice).

3 The Purchase and Security Agreement also provides that “[e]ach purchase by
4 Avalon shall be a true purchase with transfer of all legal and equitable title and shall not
5 be deemed to be a loan agreement or secured transaction. [Atlas] shall thereafter have no
6 right, title, or interest in or to Purchased Accounts or payments thereof.” Dkt. # 28 at 13
7 (Ex. B to 2d Kuhnert Decl., § 2.2). The Purchase and Security Agreement also contains a
8 power of attorney section that “irrevocably” appoints Avalon as Atlas’s “true and lawful
9 attorney in fact, with respect to Purchased Receivables and authorizes [Avalon],
10 regardless of whether there has been an Event of Default,” among other things “to
11 demand, collect, receive, sue, and give releases to any Account Debtor for the monies due
12 or which may become due upon or with respect to the Purchased Receivables and to
13 compromise, prosecute, or defend any action, claim, case or proceeding relating to the
14 Purchased Receivables . . .” and “to prepare, file and sign [Atlas]’s name on any notice,
15 claim, assignment, demand, draft or notice of or satisfaction of lien or mechanic’s lien or
16 similar document[.]” *Id.* at 15 (§ 5). Additionally, upon an Event of Default, Avalon
17 may “declare all Obligations immediately due and payable[,] . . . exercise all rights under
18 the power of attorney set forth in Section 5 above with respect to all Collateral and all
19 remedies set forth herein[, and] settle, compromise, adjust or litigate Receivables on such
20 terms as [Avalon] deems necessary to protect its rights . . .” *Id.* at 17-18 (§ 10). Finally,
21 “any termination of [the] Agreement shall not affect [Avalon’s] security interest in the
22 Collateral and [Avalon’s] ownership of the Purchased Receivables, and this Agreement
23 shall continue to be effective, and [Avalon]’s rights and remedies hereunder shall survive
24 such termination, until all transactions entered into and Obligations incurred hereunder or
25 in connection herewith have been completed and satisfied in full.” *Id.* at 19 (§ 13).

26 The objective intent of the parties regarding the Purchase and Security Agreement
27 is also clear and unambiguous from the actual words used. The parties unambiguously

1 | agreed to allow Avalon the ability “to compromise” any claim relating to the accounts
2 | receivable it purchased from Atlas, or to “settle, compromise, adjust or litigate
3 | Receivables” in the event of a default. There is also no ambiguity that Avalon has all
4 | legal and equitable title to the purchased receivables, and that Atlas has “no right, title, or
5 | interest in or to Purchased Accounts or payments thereof.” Finally, it is clear and
6 | unambiguous that the parties intended Avalon’s ownership of the accounts receivable to
7 | be unaffected by any possible termination of the agreement until all obligations incurred
8 | by Atlas had been satisfied in full.

9 | Atlas seems to argue that Avalon’s “Notice of Default” (Dkt. # 29-1 at 2-3)
10 | somehow changed the parties’ contractual obligations. Dkt. # 29 at 3. Specifically, Atlas
11 | argues that “Avalon seemed to view the relationship between it and Atlas as one where
12 | Atlas was obligated to repurchase the invoices and then collect on them by itself” and
13 | that “[i]t was never Avalon’s position that it had any independent right to settle the matter
14 | with Schell.” *Id.* However, the Purchase and Security Agreement expressly
15 | contemplated Atlas’s repurchase obligations and Avalon’s recourse in the event of non-
16 | payment or default. Specifically, the parties agreed that (1) Atlas would repurchase “the
17 | full face amount, or any unpaid portion of, any Purchased Receivable” that remains
18 | unpaid for the payment period, (2) Avalon could “declare all Obligations immediately
19 | due and payable[,]” (3) Avalon could “exercise all rights under the power of attorney set
20 | forth in Section 5 above with respect to all Collateral and all remedies[,]” and, among
21 | others, (4) Avalon could “settle, compromise, adjust or litigate Receivables on such terms
22 | as Buyer deems necessary to protect its rights in said Receivables[.]” Dkt. # 28 at 15, 17-
23 | 18 (Ex. B to 2d Kuhnert Decl., Purchase and Security Agreement §§ 4.1.1, 5, 10).

24 | Nothing in the Notice of Default altered the obligations or remedies of Atlas or
25 | Avalon, or could be construed to be a revocation of the Power of Attorney by Avalon.
26 | *Id.*; *see also* Dkt. # 28 at 15 (Ex. B to 2d Kuhnert Decl., Purchase and Security
27 | Agreement § 5) (parties “irrevocably” appoint Avalon as Atlas’s attorney in fact with

1 respect to purchased receivables). Rather, the Notice of Default simply provided notice
2 to plaintiff that Avalon intended to use the remedies provided for by contract.

3 Atlas also argues that 40 U.S.C. § 3133 renders the Power of Attorney invalid.
4 Section 3133(c) provides that a “waiver of the right to bring a civil action on a payment
5 bond under this subchapter is void unless the waiver” is (1) in writing, (2) signed by the
6 person whose right is waived, and (3) executed after the person whose right is waived has
7 furnished labor or material for use in the performance of the contract. 40 U.S.C. §
8 3133(c).

9 Both the Power of Attorney and Purchase and Security Agreement provide Avalon
10 with the ability to compromise, prosecute, or defend any action, claim, case or
11 proceeding relating to the purchased receivables. Dkt. # 27-1 at 2 (Ex. A to Pl.’s Opp’n,
12 ¶ 3); Dkt. # 28 at 15 (Ex. B to 2d Kuhnert Decl., § 5). However, these provisions do not
13 constitute an outright waiver of a right to civil action under the Miller Act. Rather, the
14 assignment of Atlas’s rights allows Avalon to step into Atlas’s shoes. *See Estate of*
15 *Jordan v. Hartford Acc. & Indem. Co.*, 120 Wash. 2d 490, 495, 844 P.2d 403 (Wash.
16 1993) (“assignee steps into the shoes of the assignor, and has all of the rights of the
17 assignor”). Under Washington law, an assignment carries with it the rights and liabilities
18 as identified in the assigned contract, as well as all applicable statutory rights and
19 liabilities.⁹ *Puget Sound Nat. Bank v. State Dept. of Rev.*, 123 Wash. 2d 284, 292, 868
20 P.2d 127 (Wash. 1994).

21 Accordingly, the Power of Attorney, section 5 of the Purchase and Security
22 Agreement, and the Assignment created an assignment of Atlas’s rights, rather than a
23 waiver of a cause of action under the Miller Act.

24
25 ⁹ Atlas also argues that the Subcontract prohibited assignment of any funds due under the
26 Subcontract without Schell’s written consent. Dkt. # 27 at 10. However, under Washington law,
27 such terms restricting assignment in an agreement between an account debtor (Schell) and an
assignor (Atlas) are ineffective. RCW 62A.9A-406(d)(1).

1 Atlas also argues that Avalon did not have authority to execute the settlement
2 agreement on its behalf to waive its Miller Act claim under section 3133(c). Federal
3 courts have been uniform in their insistence that a waiver under section 3133(c) be clear
4 and explicit. *United States ex rel. Walton Tech., Inc.*, 290 F.3d 1199, 1208 (9th Cir.
5 2002).

6 In May 2013, two months after this case was filed, Schell, Avalon, and Atlas (by
7 Avalon as Atlas's power of attorney) executed the Settlement Agreement, pursuant to
8 which, Schell paid Avalon \$495,000 to settle claims related to the purchased accounts
9 receivables. Dkt. # 19 at 44-45 (Ex. E to Schell Decl.). The parties agreed to

10 mutually release one another from all past, present, and future demands,
11 causes of action, and claims for relief (including, but not limited to, any and
12 all claims against a payment bond pursuant to 40 U.S.C. § 3133 and all
13 expenses, costs, and attorney fees for damages of every kind) whether in
14 contract, tort or otherwise, known as well as unknown, anticipated or
15 unanticipated arising out of or in any way related to the Transaction,^[10] the
16 Letter, and CK One Invoice Nos. CJD102212 and cjd102212-1 as
17 originally issued and reissued. It is expressly understood by the Settling
18 Parties that this Release is intended to cover and does cover not only all
19 known losses and damages, but also further losses and damages and
20 personal injury not now known or anticipated, but which may later develop
21 or be discovered, including all of the effects and consequences thereof.
22 This Release forever bars any further or additional claims of any kind
23 against one another arising out of and/or relating to the Transaction, the
24 Letter, and CK One Invoice Nos. CJD102212 and cjd102212-1 as
25 originally issued and reissued, including any claim with respect to
26 equipment specified in the Letter and CK One Invoice Nos. CJD102212
27 and cjd102212-1, as originally issued and reissued, which have not been
delivered as of the date hereof.

Id. at 41 (Settlement Agreement § 4.a). With respect to plaintiff's claim under the Miller
Act, the release explicitly and clearly references a section 3133 claim. The release is in
writing and was executed after Atlas furnished labor and material for use in the

¹⁰ "Transaction" is defined as Atlas's assignment of its accounts receivable to Avalon.

1 performance of the contract. Although Atlas did not execute the release, Avalon, as
2 Atlas's power of attorney, signed the release on Atlas's behalf. The court finds that
3 Avalon was within its scope of authority under the Power of Attorney, Purchase and
4 Security Agreement, and Assignment to settle or compromise any claim related to the
5 purchased accounts receivable, which include plaintiff's Miller Act claim against
6 Schell.¹¹ *See Sherman*, 353 U.S. at 218-19 (indicating that the assignees of persons
7 supplying labor or material may sue under the Miller Act).

8 Although the surety was not a party to the Settlement Agreement, the surety's
9 liability on a Miller Act bond is "at least coextensive with the obligations imposed by the
10 Act if the bond is to have its intended effect." *Walton*, 290 F.3d at 1206. "Thus, the
11 liability of a surety and its principal on a Miller Act payment bond is coextensive with the
12 contractual liability of the principal only to the extent that it is consistent with the rights
13 and obligations created under the Miller Act." *Id.*

14 Nevertheless, the court's analysis above applies equally to the surety because of
15 the assignment. Atlas assigned all of its rights to claims, including the ability to settle
16 claims relating to the three invoices, to Avalon. Plaintiff's Miller Act claim against the
17 surety (and Schell) was to recover the labor and services provided for in those three
18 invoices. Avalon, acting as Atlas's power of attorney, settled all claims relating to any
19 accounts receivables assigned to Avalon, including "all claims against a payment bond
20 pursuant to 40 U.S.C. § 3133," which is plaintiff's Miller Act claim against Hanover.
21 The court understands that Atlas did not view the settlement terms to be favorable to it.
22 However, it cannot escape the legal consequences of signing the Power of Attorney,
23 Assignment, and Purchase and Security Agreement.

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25
26 ¹¹ The court notes that it would appear that the Settlement Agreement would also release
27 Atlas from any claims held by Avalon related to the accounts receivables, or other costs and
expenses related to the accounts receivable.

1 Accordingly, the court DENIES plaintiff's motion for partial summary judgment,
2 and GRANTS defendants' motion for summary judgment as to plaintiff's Miller Act
3 claim.

4 **C. Breach of Contract, Quantum Meruit, and Unjust Enrichment**

5 Plaintiff's first, second, and fifth causes of action for breach of contract, quantum
6 meruit, and unjust enrichment, respectively, rely on the same alleged failure or refusal of
7 Schell to pay Atlas for labor, services and materials that underpin plaintiff's Miller Act
8 claim. Thus, these claims also relate to the accounts receivables that were assigned to
9 Avalon and settled. For the same reasons explained above, the court GRANTS
10 defendants' motion for summary judgment as to these claims.

11 **D. State Law Claims for Conversion, Fraudulent Misrepresentation, Negligent** 12 **Misrepresentation, and Trade Libel**

13 Defendants move the court to dismiss plaintiff's remaining state law claims for
14 conversion, fraudulent misrepresentation, negligent misrepresentation, and trade libel
15 because plaintiff cannot present a prima facie case. Dkt. # 18 at 20-24. Plaintiff has not
16 provided any legal argument in opposition to defendants' motion regarding the state law
17 claims. Dkt. # 27. However, Mr. Kuhnert has provided a declaration addressing the state
18 law claims. Dkt. # 28.

19 "Conversion is the unjustified, willful interference with a chattel which deprives a
20 person entitled to the property of possession." *In re Marriage of Langham*, 153 Wash. 2d
21 553, 564, 106 P.3d 212 (Wash. 2005). Mr. Kuhnert contends that the power of attorney
22 was void and that the assignment of claims was revoked. Dkt. # 28 at 5 (2d Kuhnert
23 Decl.). These are legal conclusions that the court has disregarded. The contracts
24 analyzed above control, and the court has concluded that the Assignment, Purchase and
25 Security Agreement, and Power of Attorney were effective and provided Avalon with the
26 authority to settle claims related to the purchased accounts receivable on Atlas's behalf.
27 Additionally, under Washington law, Schell properly paid Avalon to discharge its

1 obligation. *See* RCW 62A.9A-406(a) (“After receipt of the notification [of assignment],
2 the account debtor may discharge its obligation by paying the assignee and may not
3 discharge the obligation by paying the assignor.”). Accordingly, summary judgment is
4 appropriate as to this claim.

5 Under Washington law, a fraud claim requires proof by clear, cogent, and
6 convincing evidence of: (1) a representation of existing fact, (2) its materiality, (3) its
7 falsity, (4) the speaker’s knowledge of its falsity, (5) the speaker’s intent that it be acted
8 upon by the person to whom it is made, (6) ignorance of its falsity on the part of the
9 person to whom the representation is addressed, (7) the latter’s reliance on the truth of the
10 representation, (8) the right to rely upon it, and (9) consequent damage. *Elcon Const.,*
11 *Inc. v. E. Wash. Univ.*, 174 Wash. 2d 157, 166, 273 P.3d 965 (Wash. 2012).

12 Mr. Kuhnert contends that “Schell admitted in discovery that they did not have
13 money to complete the contract when they made their bid to the Engineers.” Dkt. # 28
14 (2d Kuhnert Decl.) at 5. However, plaintiff has not provided the court with the discovery
15 response as required by Federal Rule of Civil Procedure 56(c)(1). Accordingly, the court
16 has disregarded plaintiff’s interpretation of the purported discovery response. Mr.
17 Kuhnert also asserts that “Schell falsely claimed to have completed their submittals
18 without having even started them.” *Id.* Mr. Kuhnert asserts that plaintiff was justified in
19 relying on this statement because of the “position of trust with [its] contractor on a
20 respectable government project.” Dkt. # 28 at 5. Plaintiff has not provided any legal
21 authority for the conclusion that that a subcontractor is in a position of trust with the
22 prime contractor, and the court has found none. Mr. Kuhnert also asserts that “Schell
23 knew perfectly well that its statements were false, that the bids made to the government
24 were all outright and shameless lies. Schell also knew that it lied and that it had not
25 started its engineering submittals when they came crawling to beg Atlas for merciful
26 help. Schell lied to induce [Atlas] to provide goods and services which it never intended
27 to pay for.” Dkt. # 28 at 5. Mr. Kuhnert does not have personal knowledge of what

1 Schell knew or did not know or what it intended or did not intend to do. Nor has he
2 provided the proper factual foundation to substantiate these speculative and conclusory
3 statements. These assertions are inadmissible. Defendants have met their initial burden
4 on summary judgment, and, when stripped of the inadmissible statements, the court finds
5 that plaintiff has failed to set forth specific facts showing that there is a genuine issue of
6 fact for trial. Accordingly, summary judgment is appropriate for plaintiff's fraud claim.

7 Under Washington law, to prove negligent misrepresentation, a plaintiff must
8 prove by clear, cogent, and convincing evidence that: (1) defendant supplied information
9 for the guidance of others in their business transactions that were false, (2) defendant
10 knew or should have known that the information was supplied to guide plaintiff in
11 business transactions, (3) defendant was negligent in obtaining or communicating false
12 information, (4) plaintiff relied on false information supplied by defendant, (5) plaintiff's
13 reliance on false information supplied by defendant was justified—that is, reliance was
14 reasonable under the surrounding circumstances, and (6) the false information was the
15 proximate cause of damages to plaintiff. *Lawyers Title Ins. Corp. v. Baik*, 147 Wash. 2d
16 536, 545, 55 P.3d 619 (Wash. 2002).

17 Mr. Kuhnert relies on the same assertions for his negligent misrepresentation
18 claim as he does for his fraudulent misrepresentation claim. Accordingly, the court also
19 finds that plaintiff has failed to set forth specific facts showing that there is a genuine
20 issue of material fact for trial, and summary judgment is appropriate.

21 The parties have not cited, and the court is not aware of, any Washington Supreme
22 Court case acknowledging a claim for trade libel, also referred to as product
23 disparagement. However, "a Washington state appellate court, citing the Restatement of
24 Torts, recognized that those whose products are disparaged face a higher burden of proof
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1 than do defamation plaintiffs.”¹² *Auvil v. CBS 60 Minutes*, 67 F.3d 816, 820 (9th Cir.
2 1995) (citing *Waechter v. Carnation Co.*, 5 Wash. App. 121, 485 P.2d 1000, 1003-04
3 (1971)). To establish a claim for trade libel, “a plaintiff must allege that the defendant
4 published a knowingly false statement harmful to the interests of another and intended
5 such publication to harm the plaintiff’s pecuniary interests.” *Id.* (citing Rest. (2d) of
6 Torts § 623A). “Accordingly, for a product disparagement claim to be actionable, the
7 plaintiff must prove, *inter alia*, the falsity of the disparaging statements.” *Id.*

8 The only evidence before the court relating to plaintiff’s trade libel claim is its
9 response to interrogatory 14:

10 Schell made false and defamatory statements to Avalon that Atlas was in
11 breach of duties when in fact Atlas was not. Schell undertook a project and
12 ordered goods and services which it had not the ability to pay for. It further
13 attempted to skirt its obligation to pay Atlas by knowingly and intentionally
14 relying on an invalid power of attorney and paying Avalon amounts
15 rightfully owed to Atlas. Moreover, even if the power of attorney was in
16 any way valid, it did not cover all the equipment and services provided to
17 Schell.

18 Dkt. # 20 at 21 (Ex. B to Godwin, Interrog. 14). The first sentence appears to be the only
19 statement relevant to the requirements for a finding of trade libel. However, such a
20 conclusory statement falls far short to demonstrate an issue of material fact to survive
21 summary judgment. Additionally, plaintiff has not produced any admissible evidence
22 that Schell knew that the statement, that Atlas breached its contract, was false.

23 Accordingly, summary judgment is appropriate on this claim.

24 **E. Attorney’s Fees Request**

25 Schell argues that it is entitled to attorney’s fees and costs pursuant to the
26 subcontract if it prevails on its motion. Dkt. # 18 at 23. However, the Settlement
27

¹² The court assumes, without deciding, that Washington recognizes a claim for trade libel.

1 Agreement also released the parties from “costs, expenses, and attorney fees incurred in
2 pursuing any possible claim or cause of action.” Dkt. # 19 at 39 (Ex. E to Schell Decl.,
3 Settlement Agreement ¶ 2.c). Accordingly, the court DENIES Schell’s request for
4 attorney’s fees.

5 **IV. CONCLUSION**

6 For all the foregoing reasons, the court GRANTS defendants’ motion for summary
7 judgment, and DENIES plaintiff’s motion for partial summary judgment. Although the
8 court did not address individual defendants Andy Schell and Jane Doe Schell
9 individually, the court’s findings apply equally to them as plaintiff has failed to
10 demonstrate any genuine issue of material fact with respect to any of its claims against
11 the individual defendants. The Clerk is DIRECTED to enter judgment against plaintiff
12 and in favor of defendants.

13 Dated this 24th day of April, 2014.

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18 The Honorable Richard A. Jones
19 United States District Judge
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