Time Warner Cable Enters., LLC v Worldwide Supply, LLC
2020 NY Slip Op 33997(U)
November 30, 2020
Supreme Court, New York County
Docket Number: 650304/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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TIME WARNER CABLE ENTERPRISES, LLC,

Plaintiff,

- v -

WORLDWIDE SUPPLY, LLC,

Defendant.

----------X

INDEX NO. 650304/2019

MOTION DATE 07/12/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

WORLDWIDE SUPPLY, LLC,

Plaintiff,

- v -

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

----------X

Third-Party
Index No. 595440/2019

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28

were read on this motion to/for DISMISS.

This action involves alleged breaches of equipment consignment and sales contracts. In motion sequence number 001, plaintiff Time Warner Cable Enterprises, LLC (Time Warner), and third-party defendant Charter Communications Operating, LLC (Charter), move, pursuant to CPLR 3211 (a)(1) and (a)(7), to dismiss the counterclaim and third-party complaint of defendant Worldwide Supply, LLC (Worldwide), and to impose costs and sanctions against Worldwide under NYCRR § 130-1.1 (a), for frivolous conduct in asserting its counterclaim and third-party complaint. Worldwide opposes this motion.

Background

Time Warner is a Delaware limited liability company which maintains its principal place of business in Saint Louis County, Missouri (complaint [NYSCEF Doc No. 1] ¶ 6). Worldwide is a New Jersey limited liability company which maintains its principal place of business in Franklin, New Jersey (complaint ¶ 7; answer [NYSCDF Doc No. 6] ¶ 1). Charter is a Delaware limited liability company which maintains its principal place of business in St. Louis, Missouri (answer ¶ 3).

Worldwide is in the business of selling used data networking and telecommunications equipment (*see* complaint ¶ 8). Over several years, Worldwide sold such equipment on consignment from Time Warner and Charter, under separate agreements. Worldwide also sold such equipment to Charter. On or about April 28, 2014, Worldwide entered a remarketing agreement (the "Remarketing Agreement") with Charter, under which Worldwide agreed to accept "computer, data and telecommunications equipment" on consignment from Charter, to sell it on Charter's behalf, and to return 50 percent of all sales proceeds to Charter (*id.* ¶ 19; *see also* answer exhibit A [Remarketing Agreement] [NYSCEF Doc No. 7] ¶ 14). The Remarketing Agreement is governed by the laws of the state of Missouri (Remarketing Agreement ¶ 18).

On or about July 14, 2015, Worldwide and Charter also entered into a master purchase agreement (answer exhibit B [the "Master Purchase Agreement"] [NYSCEF Doc No. 8]), under which Worldwide agreed to sell certain data network and telecommunication equipment to Charter as Charter may order from time to time, on a "nonexclusive basis" (*id.* § 1 [a]). The Master Purchase Agreement is also governed by the laws of the State of Missouri (*id.* § 21). On or about March 15, 2016, Worldwide and Charter executed an amendment to their Master Purchase Agreement (answer exhibit C [the "MPA Amendment"] [NYSCEF Doc No. 9]). The

MPA Amendment included a "reasonable efforts" clause, obliging Charter to use reasonable efforts to buy equipment from Worldwide, "in the event that such Goods cannot be purchased directly from the OEM or an authorized reseller of the OEM" (*id.* § 8).[1] Section 8 of the MPA Amendment also required Charter to "use reasonable efforts to afford Supplier [i.e., Worldwide] the right of first refusal" on purchase orders, before Charter sought to purchase equipment from vendors "other than directly from the OEM or an authorized reseller of the OEM" (*id.*). Section 8 of the MPA Amendment also provided that:

> Charter's non-compliance with the foregoing does not constitute a breach of this Agreement; however, in the event reasonable efforts were not taken, Charter will assist Supplier [i.e., Worldwide] in explaining the intent of this Agreement to Charter's Network Operations personnel, where appropriate, so that reasonable efforts will be taken when future situations arise to afford Supplier [i.e., Worldwide] with first right of refusal.

(*Id.*)

Worldwide alleges that its relationship with Charter began in or about 2005 and became more formalized in the period between 2014 and 2016, when they entered the Remarketing Agreement, the Master Purchase Agreement, and the MPA Amendment (Counterclaims [NYSCEF Doc. No. 10] ¶¶ 12-13). Worldwide contends that these three agreements were an outgrowth of its strengthening business relationship with Charter and were entered into as part of financial accommodations Worldwide made to help Charter come through bankruptcy and financial restructuring (*id.* ¶ 16). As an example, Worldwide notes that, as part of the Remarketing Agreement, which it describes as the "Advance Arrangement," it borrowed $3.6 million, which it paid up front to Charter in exchange for 300 refurbished UBR-MC3Gx60V cards, to be delivered by Charter to Worldwide for sale on consignment. Worldwide guaranteed

[1] The acronym "OEM" stands for "original equipment manufacturer" (*see*, https://www.merriam-webster.com/dictionary/original%20equipment%20manufacturer).

Charter at least $12,000 per card, depending on the amount Worldwide received for each (*id.* ¶ 17).

Worldwide further alleges that, because of its longstanding business relationship with Charter, and its financial accommodations to Charter, Charter committed itself to increase purchasing from Worldwide by entering into the Master Purchasing Agreement and the MPA Amendment (*id.* ¶¶ 22-23). On or about May 6, 2016, Time Warner and Worldwide entered into a bulk goods purchase and consignment agreement (the "Consignment Agreement") (complaint exhibit 1 [NYSCEF Doc No. 2]), which, among other things, provided that Time Warner may elect to consign used or surplus data networking and telecommunications equipment to Worldwide for sale to third parties. The Consignment Agreement is governed by the laws of the State of New York (*id.* § 16).

In May 2016, as a result of the merger between Time Warner's affiliate, Time Warner Cable, Inc., and Charter's parent, Charter Communications, Inc. (Charter Communications) (complaint ¶ 20), Time Warner became an affiliate of Charter and an indirect subsidiary of Charter Communications (*see* Charter Communications 2019 Annual Report, Form 10-K at 2, at https://ir.charter.com/static-files/b453964b-6b96-4fb8-aebc-91cec0fda968).[2] Worldwide alleges that in or around November 2016, Charter directed Worldwide to remit all payments from the proceeds of Time Warner consignments to Charter, instead of to Time Warner (answer, counterclaim and third-party complaint [NYSCEF Doc No. 10] ¶ 37).[3] Worldwide further

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[2] Charter Communications' principal business, and that of its subsidiaries Time Warner and Charter, is to provide cable and broadband communications services, and to own and operate a high capacity two-way telecommunication network (Form 10-K at 1).

[3] Worldwide set forth its answer, counterclaim and third-party complaint in one document. Transitioning from its answer, it began numbering paragraphs in its counterclaim and third-party claims again at "1." All later references to the counterclaim and third-party complaint portion of the answer are cited in this manner.

alleges that, since that time, it has adhered to Charter's directive and has made no payments to Time Warner, while Charter and Time Warner "have themselves treated the parties' separate agreements as one" (*id.*).

In its complaint, Time Warner seeks to recover damages for Worldwide's alleged breach of the Consignment Agreement. Time Warner alleges that, between March 2017 and September 2018, Worldwide received revenues on Time Warner consignments in excess of $5.1 million, 60 percent of which, or $2,967,023, was due and payable from Worldwide under the terms of the Consignment Agreement. Time Warner alleges that it made a demand for payment of this outstanding balance in the form of a written notice to cure a material breach, which Worldwide neither objected to nor contested. Despite this notice, Worldwide failed to make payment. Based on these allegations, Time Warner asserts causes of action for breach of contract and account stated (*see* complaint ¶¶ 22-40).

In its answer, Worldwide denies Time Warner's claims and alleges that both Time Warner and Charter breached their contractual duties to Worldwide. Worldwide alleges that, beginning in 2018, Charter first reduced, and then stopped, its purchasing of equipment from Worldwide, thereby breaching the MPA Amendment by failing to use reasonable efforts to ensure that Charter bought equipment from Worldwide, and by failing to use reasonable efforts to give Worldwide the right of first refusal to sell Charter such equipment (answer, counterclaim, and third-party complaint ¶¶ 31, 46, 51).

Worldwide asserts a single counterclaim against Time Warner for breach of the implied covenant of good faith and fair dealing. It contends that Time Warner's demand that it be paid for amounts due under the Consignment Agreement, ignoring Charter's 2016 directive to pay all amounts due Time Warner to Charter, is an attempt to avoid the consequences of Charter's

alleged defaults and wrongful conduct (*id.* ¶ 41). Worldwide asserts causes of action against Charter for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and equitable estoppel (*id.* ¶ 43 *et seq.*).

Discussion

Time Warner and Charter (Movants) move to dismiss Worldwide's counterclaim and third-party complaint pursuant to CPLR 3211 (a)(1) (documentary evidence) and (a)(7) (failure to state a cause of action). When a court considers a motion to dismiss under CPLR 3211, it "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]). "However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence" (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]). A motion to dismiss under CPLR 3211 (a)(1) "may be granted if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action" (*Whitebox, supra*, at 63 [internal quotation marks, alteration and citations omitted]).

On a motion to dismiss under CPLR 3211 (a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must "accept the

complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

The Counterclaim Against Time Warner

As noted, Worldwide asserts one counterclaim against Time Warner for breach of the implied duty of good faith and fair dealing. It alleges that Time Warner breached the covenant:

> by attempting to assert a claim for monies under the [Consignment] Agreement notwithstanding that [Time Warner] has directed that all payments due to [Time Warner] be remitted to Charter. In particular, [Time Warner's] attempt to assert that [Worldwide's] payment obligations are owed to [Time Warner] as opposed to Charter are intended to avoid the consequences of the numerous defaults and wrongful acts of Charter detailed herein.

(Answer, counterclaim and third-party complaint ¶ 41). Worldwide alleges that this breach has caused it to suffer damages (*id.* ¶ 42).

As for the covenant of good faith and fair dealing:

> Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.

(*Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22-23 [1st Dept 1996] [citation omitted].)

Movants contend that Worldwide has failed to state a cause of action, inasmuch as it has not identified any of its rights under the Consignment Agreement that Time Warner allegedly breached. Worldwide counters by arguing that Movants have acted in concert and that Charter's

breaches of its agreements with Worldwide damaged Worldwide. Under *Jaffe, supra*, to be actionable, the breach must be of a covenant implied in a particular contract, committed by a party to that same contract. Alleged breaches of contract by Time Warner's affiliate Charter do not create a breach by Time Warner of the implied covenant relative to the Consignment Agreement. This allegation is insufficient to support a cause of action for breach of the implied covenant of good faith and fair dealing under New York law, which law governs this counterclaim, as explicated immediately hereafter.

The Consignment Agreement selects New York law as the "Governing Law" respecting "[t]his Agreement," "without regard to choice of law principles" (NYSCEF Doc. No. 2 § 16). The Appellate Division, First Department has clearly held that a cause of action for breach of the implied covenant of good faith and fair dealing "is a contract claim" (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014] [internal citation omitted]).

This court rejects Worldwide's position that New York law does not apply to its counterclaim foe breach of the covenant. Worldwide has cited *Zurich Ins. Co. v Shearson Lehman Hutton* (84 NY2d 309, 317 [1994]) in arguing that, even though the Consignment Agreement provides that it is governed by New York law, the court must still perform a conflict-of-laws analysis to find the "center of gravity" (*id.*) for Consignment Agreement transactions. Worldwide suggests that there is insufficient information at hand to perform this analysis, and so it would be improper to resolve its counterclaim on this motion to dismiss. This is incorrect.

Under General Obligations Law § 5-1401, "the need for a conflict-of-laws analysis is obviated by the terms of the parties' agreement" (*IRB-Brasil Reeseguros, S.A. v Inepar Investments, S.A.*, 20 NY3d 310, 312 [2012], *cert denied* 569 US 994 [2013]). General Obligations Law § 5-1401 (1) provides, in pertinent part:

> The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection (a) of section 1-301 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code.[4]

"The plain language of General Obligations Law § 5-1401 dictates that New York substantive law applies when parties include an ordinary New York choice-of-law provision, such as appears in . . . their contracts" (*IRB-Brasil Resseguros*, *supra*, at 315). Its goal is "to promote and preserve New York's status as a commercial center and to maintain predictability for the parties" (*id.* at 315-16). "To find here that courts must engage in a conflict-of-laws analysis despite the parties' plainly expressed desire to apply New York law would frustrate the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law" (*id.* at 316). The Consignment Agreement generated over $5 million in revenue to Worldwide, $2,967,023 of which Time Warner alleges remains due and payable by Worldwide (complaint ¶¶ 22-23), and so the counterclaim meets General Obligations Law Section 5-1401's monetary threshold, requiring application of New York law to the Consignment Agreement. Accordingly, the conclusion that

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[4] Subsection (c) of UCC 1-301 lists an exception to this provision under UCC Section 6-103, which relates to bulk transfers and sales. UCC Section 6-103, however, applies only where the seller's principal business is the sale of inventory from stock (UCC § 6-103 [1] [a]). Under the Consignment Agreement, Time Warner was the consignor or seller of used or surplus communications equipment to Worldwide. Time Warner's principal business is not the sale of bulk goods from inventory (*see* note 2, *supra*) and so, the UCC Section 6-103 exception does not apply to the Consignment Agreement.

Worldwide's counterclaim must be dismissed under New York law, as determined hereinabove, is properly grounded in the Consignment Agreement's choice of law provision.

The Third-Party Complaint Against Charter

In its third-party claims against Charter, Worldwide asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and equitable estoppel (answer ¶ 43, *et seq.*). Worldwide concedes that its agreements with Charter are governed by Missouri law but posits that said Missouri choice of law provision should be limited to the breach of contract claim, but not to any other claims that do not sound in breach of contract. To quote Worldwide's counsel:

> The Remarketing Agreement's choice of law provision is narrow, stating only that the "Agreement will be construed and enforced in accordance with the laws of the State of Missouri." Worldwide has not located any Missouri authority that analyzes the breadth of choice of law provisions, but the overwhelming case law distinguishes between "broad" and "narrow" clauses – such as here – applying such a provision only to breach of contract itself.

(NYSCEF Doc No. 26 at 9 n 2.) Worldwide's counsel is contending that a choice-of-law analysis must be performed with respect to its causes of action that do not sound in breach of contreact, to determine whether to apply the laws of Missouri, Charter's principal place of business, or New Jersey, Worldwide's principal place of business.

"Since New York is the forum state, New York choice of law rules are applicable" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643, 650 [Sup Ct, NY County 2013] [Bransten, J.], citing *Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz]*, 81 NY2d 219, 223 [1993]). "Absent a showing of a discernable difference in the laws

of the two states, no choice of law analysis is necessary" (*Zervos v Trump*, 171 AD3d 110, 128 [1st Dept 2019], *vacatur denied* 35 NY3d 938 [2020]).

"For an actual conflict to exist, 'the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 [1st Dept 2014]). The party asserting a conflict of laws bears the burden of demonstrating its existence (*MBIA Ins. Corp.*, *supra*, at 650).

To address Worldwide's third-party claims on this motion, Movants and Worldwide both rely on Missouri and New Jersey authorities. Neither Movants or Worldwide have identified any conflict between the laws of Missouri and New Jersey relevant to their dispute. Therefore, no choice of law analysis is warranted (*Zervos*, *supra*).

The Breach of Contract Third-Party Claim

In its third-party claims, Worldwide argues that Charter breached its Master Purchase Agreement and the MPA Amendment "by failing to use reasonable efforts to ensure that Charter purchased goods from [Worldwide] and to give [Worldwide] a right of refusal to sell Equipment to Charter" (answer, counterclaim and third-party complaint [NYSCEF Doc. No. 6] ¶ 46).

Movants argue that Worldwide's claim fails, not because Charter used reasonable efforts and afforded Worldwide a right of first refusal, but rather because the conduct alleged does not constitute a breach under the express terms of their contract. Specifically, in paragraph 8 of the MPA Amendment (answer exhibit C [NYSCEF Doc. No. 9]), Charter promises that it would "use reasonable efforts to include Supplier [i.e., Worldwide] on all requests for quotations for Goods when such Goods cannot be purchased directly from the OEM or an authorized reseller of the OEM" and that it would "use reasonable efforts to afford Supplier [i.e., Worldwide] the right

of first refusal before such Goods are purchased from any vendor other than directly from the OEM or an authorized reseller of the OEM. Charter's noncompliance with the foregoing does not constitute a breach of this Agreement." Movants conclude by arguing that contractual provisions like this, limiting liability, are enforceable in Missouri, citing *National Information Solutions v Cord Moving & Storage Co.* (475 SW3d 690, 692 [Mo App 2015]).

In opposition, Worldwide argues that the provision in the MPA Amendment is unenforceable because it purports to exonerate Charter completely "from gross negligence or intentional acts even though the parties may have agreed to such a provision," citing *In re NHB, LLC* (287 BR 475, 477 [Bankr ED Mo 2002] [noting that Missouri law only allows for a *limitation* of liability for gross negligence or willful injury arising out of contract performance by sophisticated businesses; but not "complete exoneration"]).

In Missouri, "'[t]he essential elements of an enforceable contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation'" (*Bath Junkie Branson, L.L.C. v Bath Junkie, Inc.*, 528 F3d 556, 561 [8th Cir 2008], quoting *L.B. v State Comm. of Psychologists*, 912 SW2d 611, 617 [Mo App 1995]). "Retaining the right to cancel a contract or to avoid one's promise is an unenforceable, illusory promise" (*American Laminates, Inc. v J.S. Latta Co.*, 980 SW2d 12, 23 [Mo App 1998]; *see also Fenberg v Goggin*, 800 SW2d 132, 136 [Mo App 1990] [same]).

Charter's promises in the MPA Amendment, to use reasonable efforts to purchase goods from Worldwide and to give Worldwide a right of first refusal before seeking to purchase such goods from another non-OEM source, are rendered illusory by the provision that Charter's "non-compliance" would not constitute a breach, thereby avoiding Charter's contractual obligations. It is for this reason that Charter's argument is unfounded. Charter's reliance on *National*

Information Solutions, supra, is misplaced. In that case, the Missouri Court of Appeals affirmed the lower court's grant of summary judgment in favor of the defendant moving company, enforcing a contractual provision limiting its liability to 30 cents per pound per article, for physical damage negligently caused to plaintiff's copier during a move. The Missouri Court of Appeals found that because the plaintiff was a sophisticated business entity and the provision limiting liability was not ambiguous, a *limitation* on liability could be enforceable (*see, id.,* 475 SW3d at 695). In the instant case, however, the provision at issue does not simply limit Charter's liability; it allows Charter to avoid its promises altogether.

The Master Purchase Agreement (answer exhibit B [NYSCEF Doc. No. 8]) provides in Section 17, captioned "Severability," that:

> Any term of this Agreement which is held by an arbitrator, court or other tribunal of competent jurisdiction to be invalid, illegal, unenforceable or void will not affect any other provision. If any provision of this Agreement is so determined to be invalid, illegal, unenforceable or void, this Agreement will remain effective and construed in accordance with its terms as if the invalid, illegal, unenforceable or void provision were not included.

By retaining the privilege to avoid its obligations in the MPA Amendment, Charter renders its reasonable-efforts and first-refusal promises illusory, in accord with the previous discussion (*see, e.g., Morrow, supra,* 273 SW3d at 30). Those purported promises are, therefore, severable out of the Master Purchase Agreement by virtue of the above-quoted "Severability" clause. Thus, Worldwide's breach of contract third-party claim against Charter cannot be a viable claim for the lack of any legal effect of Charter's said illusory, severed-out, promises.

Worldwide, however, does have a viable third-party cause of action for breach of the implied covenant of good faith and fair dealing.

> "In Missouri, all contracts have an implied covenant of good faith and fair dealing." To establish a breach of the covenant of good faith and fair dealing, the plaintiff has the burden to establish that the defendant "exercised a judgment

> conferred by the express terms of the agreement in such a manner as to evade the spirit of the transaction or so as to deny [the plaintiff] the expected benefit of the contract."

(*Lucero v Curators of Univ. of Missouri*, 400 SW3d 1, 9-10 [Mo Ct App 2013] [brackets in original]). Considering Worldwide's allegations regarding the benefits it expected to obtain from its growing business relationship with Charter, as manifested by their agreements, and giving it the benefit of every favorable inference (*Whitebox, supra,* 20 NY3d at 63), Worldwide has stated a cause of action for breach of the implied covenant of good faith and fair dealing under Missouri law. Indeed, Missouri law favors recourse to "an implied obligation to use good faith" to uphold contracts impaired by an illusory promise (*Magruder Quarry & Co., L.L.C. v Briscoe*, 83 SW3d 647, 650-51 [Mo Ct App 2002], relying on *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88, 91 [1917] [Cardozo, J.], *rearg denied* 222 NY 643 [1918]). Accordingly, the motion to dismiss Worldwide's third-party cause of action for breach of the implied warranty of good faith and fair dealing is denied.

Worldwide's remaining third-party causes of action for unjust enrichment and equitable estoppel are based on the same facts and allege the same damages as its claims for breach of contract and breach of the implied covenant (*see* answer, counterclaim and third-party complaint [NYSCEF Doc No 6] ¶ 54-63 and Prayer for Relief). As such they are properly dismissed as duplicative (*e.g., Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433 [1st Dept 2013]).

Finally, in light of the foregoing dispositions, Movants' application for costs and sanctions under NYCRR § 130-1.1 (a) against Worldwide is denied.

For all the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Time Warner Cable Enterprises, LLC, to dismiss the counterclaim of defendant Worldwide Supply, LLC, for breach of the implied covenant of good faith and fair dealing is granted; and it is further

ORDERED that the motion of third-party defendant Charter Communications Operating, LLC, to dismiss the causes of action of third-party plaintiff Worldwide Supply, LLC, for breach of contract, unjust enrichment, and equitable estoppel is granted; and it is further

ORDERED that the motion of third-party defendant Charter Communications Operating, LLC, to dismiss the cause of action of third-party plaintiff Worldwide Supply, LLC, for breach of the implied covenant of good faith and fair dealing is denied; and it is further

ORDERED that the application of plaintiff Time Warner Cable Enterprises, LLC, and third-party defendant Charter Communications Operating, LLC, for costs and sanctions under NYCRR § 130-1.1 (a) against defendant Worldwide Supply, LLC, is denied.

This will constitute the decision and order of the court.

ENTER:

11/30/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	☐ DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE