GUZZLER MANUFACTURING

2004 | Cited 0 times | E.D. Louisiana. | January 27, 2004

ORDER AND REASONS

Before the Court is the motion of plaintiff Guzzler Manufacturing,Inc. for summary judgment. For the following reasons, the Court grants inpart and denies in part plaintiff's motion. The Court grants summaryjudgment to plaintiff as to the liability of Global Remediation, Inc. andNicholas Popich and denies plaintiff's motion for summary judgment ondefendants' counterclaims as moot.

I. BACKGROUND

Global purchased industrial equipment from plaintiff GuzzlerManufacturing, Inc. and plaintiff's sister company, Vactor Manufacturing,Inc. over the period from February 1996 to January 1998. Global executedeleven promissory notes in connection withPage 2the purchases[1]. The notes totaled approximately $1.9 million.Popich, Global's president, director and 49% owner, personally guaranteedthe amounts due under the notes. After it executed the notes, Globalexperienced financial difficulties and frequently made late payments,missed payments and incurred late fees. Global was seriously in arrearson its note payments by January 2001.

The notes grant Guzzler a security interest in the purchasedequipment.[2] Global agreed to not "sell transfer lease or otherwisedispose of any of the Collateral" unless it obtained Guzzler's writtenconsent beforehand. Global had the right to retain possession of thecollateral until it defaulted under the notes. As defined in the notes,events of default included, inter alia, nonpayment of anyliabilities under the notes, failure to perform any obligation requiredby the notes or the bankruptcy of Global or a guarantor. If Globaldefaulted, Guzzler could declare all amounts under the notes immediatelydue and payable and was entitled to immediate possession of thecollateral. In a guarantee attached to each promissory note, Popichguaranteed the "full and prompt payment" of allPage 3liabilities under the note.

In September 2001, Guzzler consented to the sale by Global of some ofthe equipment, and the proceeds of the sale were applied to the notes.Around this time, Global found another buyer, Hydrovac Services, Inc.,that was interested in purchasing Global's assets in Alabama, whichincluded the remainder of the equipment that secured the promissorynotes. Popich and a Hydrovac representative negotiated the sale andagreed on a total purchase price of $1.6 million. The parties attributed$1.04 million of the price to the equipment that secured the notes.Popich notified Guzzler's parent corporation, Federal SignalCorporation[3], that he had found a potential buyer for the remainingequipment and confirmed with Federal Signal the amounts outstanding onthe promissory

notes.

Popich contacted Federal Signal on October 29, 2001 to propose aforbearance agreement, under which Global and Popich would use their bestefforts to negotiate the sale of Global's assets to a third party andFederal Signal would release all of its mortgages and security agreementsor rights related to Global's debt, including the personal guarantees byPopich.' The proposal indicated that the expected purchase price for theGuzzler equipment was substantially below the remaining amountsPage 4due under the promissory notes. At the time, approximately $1.6million remained outstanding on the notes, and the negotiated priceattributed only $1.04 million to the Guzzler equipment. In addition, theproposed sale required Federal Signal to finance a portion of thepurchase price for the buyer. In response to Popich's suggestedforbearance agreement, Federal Signal returned an unsigned copy of theagreement to Popich later that day with proposed changes handwritten onit. The proposed changes included the elimination of the release ofPopich's personal guarantees. The parties do not dispute that they didnot execute this or any other written forbearance agreement.

On November 1, 2001, Federal Signal offered in writing to settle theapproximately $1.6 million outstanding on the notes. Federal Signalindicated that it would accept in settlement cash and other assets with atotal value of $1.4 million, which included $1.04 million that Federalexpected to receive through the sale of Global's assets, certain propertyowned by Popich worth approximately $185,000[4] and a $175,000 noteexecuted by Global and guaranteed by Popich. The letter indicated thatPage 5Popich would remain liable under his original guarantees until therestructured obligation was paid in full. By letter sent later that day,Popich rejected the settlement offer and made a counteroffer thatreduced, but did not eliminate, the amount of Popich's guarantee. FederalSignal responded to the counteroffer the next day, on November 2, 2001.It stated that its initial settlement offer required Popich to remainliable until the restructured obligations were paid in full and stressedthat u[t]hat condition cannot be amended[5]." Popich attests that hethen spoke with Federal Signal's representative, Robert Racic, aroundNovember 2 or 3, 2001 and told Racic that he would go forward with theproposed sale of Global's assets only if Federal Signal released him fromthe guarantees. Popich attests that he told Racic that Federal Signal'sarrangement of the necessary financing with Hydrovac would constituteFederal Signal's acceptance of his settlement offer that included therelease of his personal guarantees. Popich does not assert that Racicresponded to his offer or verbally assented to Popich's terms. Indeed,Popich provides no indication of how Federal Signal reacted to hisstatements. Popich attests that he and Racic never spoke about thesettlement again. Popich never attempted to memorialize these settlementterms in writing.Page 6

Global sold its assets in November 2001, and Federal Signal financedthe portion of the purchase price attributed to the Guzzler equipment.Defendants now contend that plaintiff's completion of the financingarrangements signaled its acceptance of his offer, and, as a result,Guzzler released Popich's personal guarantees. After the completion ofthe sale, Federal Signal continued to try to collect on the outstandingbalance of the notes from Global and Popich. Federal Signal sent a letterto Popich on December 13, 2001 that indicated that it applied the $1.04million from the sale to Hydrovac to the

outstanding balance on thenotes, and the letter inquired as to the status of the other componentsof the proposed $1.4 million settlement package[6]. On January 7, 2002,the defendants' attorney asked for confirmation that Federal Signalcredited the notes for $1.04 million from the sale to Hydrovac andindicated that the bank that held the mortgage on Popich's property wouldnot refinance the mortgage to allow him to obtain additional cash[7].Federal Signal confirmed the next day that it credited the outstandingbalance on the notes with the $1.04 million from the sale of theequipment. Federal Signal also requested further information regardingthe refinancing of Popich's property and indicated itsPage 7desire to "continue to work cooperatively to resolve the remainingobligation guaranteed by Nick [Popich][8]." On January 15, 2002,Federal Signal sent another letter to defendants' counsel that requestedspecific details on a credible plan to pay the balance due[9]. FederalSignal sent defendants' counsel a letter on January 23, 2002 thatreferred to the settlement that the parties had discussed of the totalamounts under the notes owed by Global and guaranteed by Popich[10].This letter indicated that the total balance had been credited with the$1.04 million from the Hydrovac purchase, but the remaining balance stillneeded to be resolved[11]. On March 14, 2002, Federal Signal contactedPopich and demanded a good faith payment against the remainingobligation, additional collateral and a secured payment plan on thebalance[12]. Federal Signal stated that if the matter was not resolved,"we will pursue collection against the note guarantor[13]." In afacsimile memorandum dated March 21, 2002,Page 8defendants' counsel contended, for the first time, that thenegotiation and sale of Global's assets had been without authority oragreement by Global, and under the applicable law, the debt wasextinguished[14]. The memo went on to state that, in the spirit ofcompromise, Global would acknowledge its debt but Popich "can notpersonally guarantee this debt [15]." On May 9, 2002, Federal Signal'scounsel responded to defendants' counsel regarding the notes andindicated that defendants' counsel's statement "that Global's assets weresold without authority or agreement by Global and Popich is incorrect.The debt and guarantee are still in full effect[.][16]" Defendants'counsel responded on May 15, 2002 and stated that Global and Popichcontinued to dispute the debt and guarantee[17]. In addition, theletter again informed Federal Signal that Popich was still unable torefinance the mortgage on the property that he had proposed to put up assecurity[18].

Guzzler sued Global and Popich to recover the remainingPage 9amounts due under the notes, which totaled approximately $650,000when it filed suit. Plaintiff alleges that late fees continue to accrue.Defendants requested a jury trial and filed counterclaims for tortiousinterference with contract and business relations. Their counterclaimsincluded, inter alia, a claim that Guzzler contracted directlywith Hydrovac and sold Global's assets without authority or authorizationfrom Global and forced the sale of those assets at below market value.Defendants have since stipulated to a voluntary dismissal of theircounterclaims[19]. Plaintiff now moves for summary judgment againstGlobal and Popich for the amounts due under the promissory notes and ondefendants' counterclaims. Because defendants stipulated to the dismissalof their counterclaims, the Court denies plaintiff's motion for summaryjudgment on these claims as moot and addresses plaintiff's motion onlywith respect to the liability of Global and Popich.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when there are no genuine issues as toany material facts, and the moving party is entitled to judgment as amatter of law. See Fed.R. CIV. P. 56(c); see also CelotexCorp. v. Catrett, 477 U.S. 317, 322-23 (1986). The court, must besatisfied "that the evidence favoring the nonmovingPage 10party is insufficient to enable a reasonable jury to return averdict in her favor." Lavespere v. Niagara Mach. & Tool Works,Inc., 910 F.2d 167, 178 (5th Cir. 1990) (citing Anderson v.Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The moving partybears the burden of establishing that there are no genuine issues ofmaterial fact. If the moving party meets his burden, the non-moving partymay not defeat summary judgment with mere conclusory rebuttals. SeeMosely v. Trinity Industries, Inc., 1998 WL 186695, at *1 (E.D.La.)(citing Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.1992)). As the Fifth Circuit noted in Olabisiomotosho v. City ofHouston, "[c]onclusory allegations, speculation, and unsubstantiatedassertions are not evidence." See Olabisiomotosho, 185 F.3d 521,525 (5th Cir. 1999).

B. Choice of Law

It is well-settled that a federal court in a diversity case must applythe choice of law rules of the state in which the federal court sits.See Marchesani v. ellerin-Milner Corp., 269 F.3d 481, 485 (5thCir. 2001); New England Merchants National Bank v. Rosenfield,679 F.2d 467, 471 (5th Cir. 1982); Rousseau v. 3 Eagles Aviation,Inc., 2002 WL 31256199, at pp. *5-6 (E.D.La.). This Court's decisionas to choice of law is thus governed by the Louisiana Civil Code. Seeid. Article 3537 of the Code supplies the choice of law principle inthe absence of a contractual choice of law clause: "Except as otherwiseprovidedPage 11in this Title, an issue of conventional obligations is governed bythe law of the state whose policies would be most seriously impaired ifits law were not applied to that issue." LA. CIV. CODE ANN. art. 3537(West 2004). Article 3540 supplies choice of law doctrine when partieshave agreed to a choice of law rule: "All other issues of conventionalobligations are governed by the law expressly chosen or clearly reliedupon by the parties, except: to the extent that law contravenes thepublic policy of the state whose law would otherwise be applicable underArticle 3537." LA. CIV. CODE ANN. art. 3540 (West 2004).

Each promissory note specifies that it is to be interpreted inaccordance with Illinois law[20]. Each note also includes a provisionin which the borrower agrees that Illinois is the proper venue if alawsuit is necessary to enforce the parties' rights and obligations underthe note[21]. Further, each guarantee states that its validity andconstruction is governed by Illinois law. Because the parties have agreedto apply Illinois law to construe and enforce the contract, this Courtwill apply Illinois law unless doing so would seriously impair the publicpolicy of the state whose law would otherwise be applicable under Article3537. Under the following analysis, the Court concludes that,Page 12even in the absence of a choice of law provision, Illinois lawwould be applicable under Article 3537. Article 3537 and Article 3515 ofthe Louisiana Civil Code provide the following factors to consider indetermining which state's laws should apply in the absence of a choice oflaw clause: (1) the relationship of the

state to the parties and thedispute; (2) the contacts each state had with the parties and thetransaction including where the contract was negotiated, formed, andperformed; (3) the location of the domicile, residence, or business ofthe parties; (4) the nature, type, and purpose of the contract; and (5)the interest of facilitating "orderly planning of transactions, ofpromoting multistate commercial intercourse, and of protecting one partyfrom undue imposition by the other." LA. CIV. CODE ANN. arts. 3537, 3515(West 2004); Rousseau, 2002 WL 31256199, at pp. *5-6; seealso Petticrew v. ABB Lummus Global, Inc., 53 F. Supp.2d 864, 866-67(E.D.La. 1999).

In Petticrew, the court held that Texas had more significantcontacts with the parties than did Louisiana, because the negotiation andexecution of the contract took place in Texas. See Petticrew,53 F. Supp.2d at 868. The court in Rousseau applied Florida lawbecause the parties executed the promissory note and guaranty in Floridain facilitation of a Florida transaction, and payments under the notewere to be made and received in Florida. See Rousseau, 2002 WL31256199, at p. *6.Page 13

Under the analysis of the Petticrew and Rousseaucases, the relevant facts in this case point toward the application ofIllinois law. Plaintiff's principal place of business is in Illinois, anddefendant Global's principal place of business is in Louisiana. Eachpromissory note specifies that it was executed in Illinois. Paymentsunder the notes were due in Illinois. The parties executed the notes tofacilitate a transaction in Alabama. Under these facts, Illinois has moresignificant contacts with this dispute than does Louisiana or Alabama.Under the rules set forth in Articles 3515, 3537, and 3540 of theLouisiana Civil Code, Illinois is the state the policies of which wouldbe most seriously impaired if its laws were riot followed. Because theparties contractually agreed that Illinois law is to be applied to thepromissory notes, the public policy of Illinois obviously will not beimpaired by applying Illinois law. Moreover, Louisiana law recognizes andhonors choice of law provisions. See Delhomme Industries, Inc. v.Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir. 1982)(quoting Assoc. Press v. Toledo Investments, Inc.,389 So.2d 752, 754 (La. App.3d Cir. 1980)).

C. Global's Liability

Plaintiff moves for summary judgment against both Global and Popich foramounts due under the promissory notes. Plaintiff asserts that thebalance due under the notes is $683,856.79 as ofPage 14September 15, 2003, that late fees continue to accrue and that thedefendants also owe attorneys' fees and costs. Global admits that it isliable under the promissory notes to plaintiff for the amounts advancedby plaintiff. The record contains no evidence to challenge Global'sliability. Accordingly, the Court grants plaintiff's motion for summaryjudgment against Global.

D. Popich's Liability

Popich does not dispute that he personally guaranteed each of thepromissory notes. He contends, however, that there exists a question offact about whether Guzzler released Popich's liability under

theguarantees, and therefore summary judgment is inappropriate. Both partiesagree that Guzzler never executed a written release or waiver of itsrights to enforce the guarantees. The parties dispute whether Guzzler'sactions constitute an implicit release of Popich's guarantees.

Illinois has adopted the Uniform Commercial Code, and the partiesdispute which article of the UCC applies to Popich's guarantees[22].Plaintiff argues that the promissory notes andPage 15guarantees are negotiable instruments, and therefore Article 3 ofthe UCC applies. Defendants argue that their alleged modification to thepromissory notes and guarantees need not be in writing under an exceptioncontained in UCC Section 2-209. The Court discusses both arguments below, i. UCC Article 3

Promissory notes generally qualify as negotiable instruments as definedin Article 3 of the UCC. See 810 ILCS 5/3-104. Illinois courtsconsider guarantees attached to negotiable instruments to be negotiableinstruments also. See, e.g., Florsheim Group, Inc. v. Cruz, 2001WL 1134856, at *2-3 (N.D.Ill.) (discussing cases in which guaranteesattached to promissory notes were considered negotiable instruments);Addison State Bank v. Nat'l Maint. Mgmt., 529 N.E.2d 30, 32-33(Ill.App. 2 Dist. 1988). In Addison, the guarantee at issue wasattached to a promissory note that was issued in connection with thepurchase of industrial equipment, and the court applied Article 3 to theguarantee. See id. at 32-33. The guarantees in this case aresimilar to the guarantee in Addison, and the Court thereforeapplies Article 3 here.

Plaintiff argues that it did not release Popich's guaranteesPage 16under UCC Section 3-604(a), which provides: A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.Plaintiff contends that it did not discharge Popich's obligationbecause it did not do any of the voluntary acts listed in Section3-604(a), nor did it renounce its rights against Popich in writing.Plaintiff fails to note, however, that Section 3-604(a) lists only waysin which an obligee may discharge the obligation of an obligor.Under Section 3-601(a),

The obligation of a party to pay the instrument is discharged as stated in this Article or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.See Finocchio v. Grandinetti, 1989 WL 1177999, at *4(N.D.Ill.) (noting that Section 3-601 "controls the cancellation,renunciation and discharge of rights held under a promissory note.")Thus, in addition to the ways listed in Section 3-604, an obligee maydischarge an obligation by an agreement governed by contract law. UnderIllinois contract law, parties to a written contract may modify its termsby oral agreement. See R.T. Hepworth Co. v. Dependable Ins. Co.,Inc., 997 F.2d 315, 317-18 (7th Cir. 1993); A.W. Wendell &Sons, Inc. v. Qazi,Page 17626 N.E.2d 280, 287 (Ill.App. 2 Dist. 1993); see also TIC United Corp. v.Lisowski, 1994 WL 577255, at *4-5 (N.D.Ill.) (denying

summaryjudgment because the court found an issue of material fact with regard tothe existence of an oral agreement to release defendant's obligationsunder a promissory note); Finocchio, 1989 WL 1177999, at *4(N.D.Ill.) (same).

An oral modification of a contract must meet the criteria for a validcontract, i.e., there must be offer, acceptance, and consideration.See Great American Ins. Co. v. Bailey, 1989 WL 153365(N.D.Ill.). The terms of the oral agreement "`must be definite andcertain and there must be a meeting of the minds.'" TIC UnitedCorp., 1994 WL 577255, at *5 (citing Kemp v.Bridgestone/Firestone, Inc., 625 N.E.2d 905, 910 (Ill.App. 4 Dist.1993)). Defendants contend that Popich offered to arrange the purchase ofGlobal assets in exchange for the release of his personal guarantees, andFederal Signal indicated its acceptance when it financed Hydrovac'spurchase of Global's assets. The Court concludes that there is noevidence that there was a meeting of the minds on the terms of thealleged oral agreement to release Popich from the guarantees.

To begin with, Federal Signal's actions clearly and consistentlyindicate that it never assented to the terms imposed by Popich. WhenPopich first proposed the forbearance agreement, Federal Signal indicatedin writing that it would not releasePage 18Popich's obligations under the personal guarantees. On November 1,2001, Federal Signal proposed to restructure the debt to $1.4 million,represented by the sales proceeds, certain property owned by Popich and anote executed by Global and guaranteed by Popich. Federal Signal'sinclusion of Popich's property and a guarantee by Popich of the note fromGlobal in the proposed settlement, as well as its insistence that Popichremain liable on the guarantees until the full restructured balance onthe notes had been paid indicted that it intended not to release Popichfrom his guarantees. Popich counteroffered with a proposed settlementthat reduced, but did not eliminate, the total amount that he wouldguarantee. Popich's counteroffer limited his liability as guarantor to$1.175 million of the $1.4 million restructured balance. Thus, under hiscounteroffer, if the notes were credited for the $1.04 million from thesale of Global's assets, then Popich's guarantee would cover only anadditional $135,000 of the $360,000 remaining debt balance. FederalSignal responded on November 2, again in writing, and stated that therequirement that the personal guarantors remain obligated until therestructured obligations were paid in full could not be amended. Popichstates that he told Racic later that day or the next day that he wouldview Federal Signal's arrangement of financing for the purchaser ofGlobal's assets as Federal Signal's acceptance of his offer to releasehisPage 19guarantees. Popich does not allege that Racic confirmed FederalSignal's acceptance of his offer at that time or responded in any way tohis statements. He asserts only that the completion of the sale withfinancing by Federal Signal indicated its acceptance. Federal Signal'sactions after Popich's alleged statements to Racic belie this assertion.Consistent with its refusal to release Popich from the guarantees beforethe sale of Global's assets, Federal Signal continued after the sale toattempt to collect on the remaining balance due under the notes fromPopich. Federal Signal never indicated that it intended to release Popichfrom the personal guarantees. All of the correspondence from FederalSignal after the sale of Global's assets is evidence that it continued toview Popich as a guarantor of the amounts due under the notes. OnDecember 13, 2001, Federal Signal sent a letter to Popich to discuss howhe and Global

remediation intended to pay the difference between the$1.04 million credited from the sale of Global's assets and the $1.4million settlement amount. Federal Signal continued in January 2002 toinquire about that status of Popich's personal property that it hadidentified in its settlement proposal, which clearly indicated that itconsidered Popich liable on the guarantees. On March 14, 2002, FederalSignal sent a letter to Popich with the subject line: "`Remaining BalanceOwed by Global Remediation and Guaranteed by Nick Popich." When Popich'sPage 20counsel asserted that the sale of Global's assets was unauthorizedand released the debt, Federal Signal responded that [t]he debt andguarantee are still in full effect" (emphasis added)[23].Further, Racic attests in his affidavit that Guzzler never agreed torelease Popich from his guarantees. Federal Signal's statements andactions consistently indicate that it never intended to release Popichfrom the guarantees and thus never accepted Popich's alleged oral offer.

More importantly, Popich's own statements and actions flatly contradicthis assertion that Federal Signal accepted his offer to release hisguarantees and that, as a result, he proceeded with the sale of Global'sassets. After Federal Signal inquired about the status of the remainingportion of the $1.4 million proposed settlement, defendants' counsel'sresponse on January 7, 2002 asked Federal Signal to confirm the $1.04million credit to the amount due under the notes and advised FederalSignal on the status of the refinancing of Popich's personal property. AsPopich's agent, statements made by Popich's counsel are attributed tohim. Popich would not have updated Federal Signal on the status of hisproperty if he believed that the completion of the asset sale releasedhim from his guarantees, and thus the January 7, 2002 letter directlycontradicts Popich's assertion.Page 21Popich did not contend at that time that he was not liable underthe notes because the guarantees had been released.

In contrast to the "agreement" that Popich now asserts that he had withFederal Signal to release him when he agreed to the asset sale, Popichearlier asserted that he never agreed to the sale, and Federal Signalunilaterally sold the equipment out from under him. Thus, on March 21,2002, Popich, through counsel, sent a letter to Federal Signal thatasserted that the sale of Global's assets was without authority or assentby Global or Popich, and it therefore resulted in the extinguishment ofthe debt. Global also asserted in a counterclaim filed in this case thatGuzzler "without authority or authorization," interfered in defendants'negotiation with Hydrovac and contracted directly with Hydrovac[24].Further, defendants denied that Popich knew of and approved Global's saleof the equipment to Hydrovac[25]. These statements contradict Popich'scurrent self-serving assertion that he chose to proceed with the sale ofGlobal's assets because he believed Federal Signal had agreed to releasehis guarantees. In contradiction to Popich's earlier assertion thatplaintiff's actions extinguished the debt and his current assertion thatplaintiff agreed to release his guarantees, defendants' counselPage 22updated Federal Signal on the status of Popich's property again onMay 15, 2002[26]. As before, if Popich believed that Federal Signal'sactions had extinguished the debt or released him from his guarantees inNovember 2001, then he would not have viewed the status of his personalproperty as relevant.

Popich also asserts that he would not have sold Global's assets ifFederal Signal were not going to

release his guarantees. Defendants'counteroffer to Federal Signal's proposed $1.4 million settlement andPopich's negotiations with Jeff Noe, Hydrovac's president, bothcontradict this assertion. Popich's counteroffer contemplated the sale ofGlobal's assets with only a partial release of the personalguarantees, which is directly at odds with Popich's current,unsubstantiated contention that he would not have sold the assets withouta full release from his guarantees. Moreover, the sale ofGlobal's assets was in Popich's best interest even without a release ofthe guarantees because the sale eliminated over $1 million of the totaldebt that he had personally guaranteed[27]. Further, Noe attests in hisaffidavit that he negotiated directly with Popich for the purchase ofGlobal's assets[28]. He states that thePage 23parties agreed on the total purchase price in September 2001. Noenever indicates that the agreement that the parties reached wascontingent on Popich's release from the guarantees. The parties executeda letter agreement on November 2, 2001, and the agreement contains noindication that the sale is contingent on the release of Popich'sguarantees[29]. Federal Signal's arrangement of the financing for thesale, the action that allegedly released Popich from his guarantees, didnot occur until after Popich and Noe executed this letter agreement.Popich's agreement to sell Global's assets before Federal Signalallegedly indicated its acceptance of his oral offer contradicts hisassertion that he would not have sold the assets without a release of hisguarantees. Further, Global's board resolution that approved the sale toHydrovac and the final sale agreement were not conditioned on the releaseof Popich's guarantees. Moreover, the sale agreement states that it isthe complete agreement and supercedes any other agreements, oral orwritten, between the parties.

Furthermore, the Court notes that both Federal Signal's vice presidentand Popich are sophisticated and experienced businessmen. Popichinitiated the settlement discussions with a written, proposed forbearanceagreement. Federal SignalPage 24responded with written modifications of the agreement. When FederalSignal offered to settle the total balance due for $1.4 million, it didso in writing. Popich responded with a written counteroffer. Thesenumerous items of written correspondence between Federal Signal anddefendants about the resolution of the amounts owed under the notesindicate that the parties clearly contemplated a written workoutagreement. Popich's assertion that, in spite of his sophistication, henever obtained a written confirmation of the agreement to release hispersonal guarantee of almost $600,000, and instead relied on the implicitagreement by Federal Signal goes against the grain of the parties' entirecourse of dealing.

Moreover, a conclusion that Federal Signal agreed to Popich's terms iseconomically implausible. Federal Signal proposed a settlement agreementunder which Popich would guarantee $1.4 million of the debt. Popichcounteroffered that same day, and under his counteroffer he wouldguarantee $1.175 million of the debt. Federal Signal rejected Popich'soffer the next day and told him that the condition that he guarantee thefull amount of the debt could not be amended. Popich's asserts thatFederal Signal, promptly after it explicitly rejected his partialguarantee, then accepted an oral offer with no guarantee byPopich, when there was no material change in Federal Signal's economicposition. Popich's contention that Federal SignalPage 25agreed to his offer makes little economic sense and contradicts allof the other facts in the record. Cf. Matsushita Elec. Indust. Co. v.Zenith Radio Corp.,

475 U.S. 574, 587 (1986) (concluding in contextthe summary judgment that if the factual context renders a plaintiff'sclaim implausible, i.e. "the claim is one that simply makes no economicsense," then the plaintiff "must come forward with more persuasiveevidence to support [its] claim that would otherwise be necessary");Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,509 U.S. 209, 242 (noting that an expert opinion cannot support a juryverdict when "indisputable record facts contradict or otherwise renderthe opinion unreasonable").

As described above, Popich attempts to create an issue of fact basedonly on a self-serving, conclusory and uncorroborated affidavit. Popichraises this assertion for the first time two years after the transactionat issue. Popich's affidavit flatly contradicts his earlier statements toFederal Signal and defendants' earlier filings with this Court. InMartinez v. Bally's Casino Lakeshore Resort, 2000 WL 23099(E.D.La.), the court concluded that plaintiff's self-serving affidavitdid not create a genuine issue of material fact to defeat summaryjudgment. See id. at *2 (quoting Albertson v. T.J. Stevenson& Co., 749 F.2d 223, 228 (5th Cir. 1984)). The affidavit allegedphysical manifestations of emotional injury for the first timePage 26after her complaint and her discovery responses failed to allegeany such injuries. See id.; see also Mosely v. Trinity Industries,Inc., 1998 WL 186695, at *2 (E.D.La.) (concluding that "plaintiff'sself-serving affidavit, which contradicts the allegations contained inhis previous submissions to this Court, does riot create an issue ofmaterial fact"); cf. S.W.S. Erectors, Inc. v. Infax, Inc.,72 F.3d 489, 495 (5th Cir. 1996) (noting that a party may not defeat amotion for summary judgment with an affidavit that impeaches, withoutexplanation, sworn testimony). Here, Popich's self-serving affidavitcontradicts his earlier statements and defendants' filings with thisCourt and is not substantiated by any of the record evidence. Hisaffidavit is nothing more than a desperate attempt to unilaterally bindthe plaintiff to an oral modification to which it never agreed.Accordingly, the Court finds that defendant fails to create a genuineissue of material fact to defeat summary judgment.

ii. UCC Article 2

Defendants contend that the alleged modification to the promissorynotes by which Guzzler waived Popich's personal guarantees need not be inwriting under the exception contained in. UCC Section 2-209(4).See 810 ILCS 5/2-209. Plaintiff disputes the applicability ofUCC Article 2 to the promissory notes in this case. Article 2 applies to"transactions in goods; it does not apply to any transaction whichalthough in the formPage 27of an unconditional contract to sell or present sale is intended tooperate only as a security transaction [.]" 810 ILCS 5/2-102. Plaintiffcontends that Article 2 applies only to sales contracts, and thepromissory notes are not sales contracts. Courts apply Article 2,however, to promissory notes issued in connection with salestransactions. See, e.g., Fallimento C.Op.M.A. v. Fischer CraneCo., 995 F.2d 789, 793 (7th Cir. 1993); Peoria Harbor Marina v.McGlasson, 434 N.E.2d 786, 790 (Ill.App. 3 Dist. 1982); seealso Scott v. Ford Motor Credit Co., 345 Md. 251, 255-62 (Md. 1997).In Fallimento, the Seventh Circuit applied Article 2 topromissory notes issued in connection with a transaction covered byArticle 2, i.e., the sale of crane supplies. See Fallimento, 995F.3d at 793. The Court held that the key was that the promise to pay wasmade as a part of a

contract for sale, whether the promise was "called apromissory note, a negotiable instrument or by any other name."Id. In this case, the parties executed the promissory notes inconnection with Global's purchase of equipment from Guzzler. Evenaccepting that Article 2 may apply to the promissory notes in this case,defendants cite no authority for the proposition that Article 2 alsoapplies to a guarantee attached to the promissory note. The Court isunable to find any definitive authority on the issue. In RegentSecurity Partners III, Ltd. v. Automatic Fire & Burglar Systems ofSt. Louis, Inc., 1991 WLPage 28182257 (N.D.Ill.), the Court could not determine if the promissorynote at issue stemmed from a sale of primarily tangible or intangiblegoods. See id. at *2. The court noted that if the partiesexecuted the promissory note in connection with a sale of primarilytangible goods, then Article 2 would apply to the note and the attachedguarantee. See id. If, on the other hand, the parties executedthe note in connection with a sale of primarily intangible goods, thenArticle 3 would apply to both. See id. The court concluded thatit did not need to decide which article applied because its conclusionwas the same under either one. See id. Contrary to the approachtaken in Regent Security, however, the court in Addisonapplied Article 3 to a guarantee attached to promissory notes issued inconnection with the sale of equipment. See Addison, 529 N.E.2dat 32-33. Because the dicta in Regent Security implies that boththe promissory notes and the guarantees in this case would be governed byArticle 2, the Court addresses defendants' arguments out of an abundanceof caution.

Section 2-209 of the UCC provides: Modification, Rescission and Waiver. (1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.Page 29

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions. (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver. (5)A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.810 ILCS 5/2-209. The comments to Section 2-209 indicate that

Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct.Under Section 2-209, an attempt at modification of the contractthat does not meet the requirements of the statute of frauds cannevertheless operate as a waiver. See Cloud Corp. v. Hasbro,Inc., 314 F.3d 289, 297 (7th Cir. 2002); American Suzuki MotorCorp. v. Bill Kummer, Inc., 65 F.3d 1381, 1386 (7th Cir. 1995);N.J. Collins, Inc. v. Pacific Leasing, Inc., 1999 WL 7898, at *5(E.D.La.). A waiver is a "voluntary relinquishment of a known right."TIC United Corp., 1994 WL 577255 at *6 (citing Crum &Forster Managers Corp. v. Resolution

Trust Corp., 620 N.E.2d 1302,1310 (Ill. 1993)). A waiver under the UCC can be accomplished throughwords or conduct. See American Suzuki, 65 F.3d at 1386. Courtsrequire that the party who asserts aPage 30modification of the contract must show either that the waiver wasclear and unequivocal or that he reasonably relied on the other party'swaiver. See Cloud, 314 F.3d at 297-98 (citing cases). Thereliance requirement prevents one party to a contract from "usingself-serving testimony to prove that the other party waived a right underthe contract." Central Ill. Public Serv. Co. v. Atlas Minerals,Inc., 965 F. Supp. 1162, 1172-73 (C.D.Ill. 1997) (citing ColeTaylor Bank, 51 F.3d at 739). Furthermore, waiver is often limitedto minor conditions. See N.J. Collins, 1999 WL 7898, at *5(citing Cole Taylor Bank v. Truck Insurance Exchange,51 F.3d 736, 739 (7th Cir. 1995)).

Popich attests that he told Federal Signal that if it financed the saleof Global's assets for the purchaser, then completion of the financingarrangements would constitute Federal Signal's release of the guarantees.Defendants contend that Popich's affidavit coupled with Federal Signal'scompletion of the financing arrangements indicates that there is agenuine issue of material fact about whether Federal Signal waived itsrights under the guarantees. Popich also asserts that he relied uponFederal Signal's waiver of its rights under the guarantees because Globalwould not have sold its assets without the waiver. Plaintiff, on theother hand, asserts that it never intended to waive its rights under theguarantees. First, the Court notes that the remaining balance due underthe notes was almostPage 31$600,000 at the time of Federal Signal's alleged waiver, and theCourt finds that Popich's personal guarantee of this amount is more thana "minor condition" of the contract. See N.J. Collins, 1999 WL7898, at *5.

In addition, the Court finds that defendants have presented no evidenceof a clear and unequivocal waiver. Defendants assert only that FederalSignal's completion of the financing arrangement for the sale of Global'sassets signaled its waiver of its rights under the guarantees. FederalSignal's actions before and after the sale, however, contradict such anassertion. Indeed, defendants do not assert that plaintiff ever said itwould release the personal guarantees, and the written communicationsboth before and after the sale of Global's assets are contrary todefendants' assertion. The Court notes that although an attemptedmodification of a contract can operate as a waiver, Federal Signal neverattempted to modify the contract to eliminate Popich's guarantees. Also,Federal Signal explicitly rejected every written attempt by Popich toeliminate his guarantees. Before the sale, Federal Signal rejectedPopich's written forbearance agreement that eliminated his obligationsunder the guarantees. It then proposed a written settlement agreementthat included a guarantee by Popich of the full amount of the settlement.When Popich counteroffered with a proposal that reduced the amount of hisguarantee, Federal Signal rejectedPage 32his offer and specified that it would not release his guarantees.Thus Federal Signal indicated in writing on three different occasionsbefore the sale that it would not release Popich's personal guarantees.Further, Federal Signal sent six letters to Popich or defendants' counselafter the sale that indicate that Federal Signal still considered Popichto be a guarantor under the notes. Nothing in Federal Signal's statementsor actions could be construed as a clear and unequivocal waiver of itsrights.

Furthermore, the Court there is no evidence in the record to support acontention that Popich's reliance on Federal Signal's alleged waiver ofrights was reasonable. In light of plaintiff's repeated, writtenassertions that it would not release the personal guarantees, anyreliance by defendants on an implicit waiver by the plaintiff isunreasonable. Moreover, Popich's assertion that he relied on plaintiff'simplicit waiver is contradicted by evidence in the record. Popich clearlydid not rely on the waiver when he decided to sell Global's assets,because he signed an agreement to sell Global's assets to Hydrovac beforethe alleged release of the guarantees. In his settlement counteroffer,Popich agreed to sell Global's assets with a partial reduction of hisguarantees, which again contradicts his assertion that he would not haveotherwise sold the equipment and relied on the release of his guaranteeswhen hePage 33did so. In a March 2002 letter to Federal Signal, in responses toplaintiff's requests for admission and again in pleadings before thisCourt, defendants asserted that Federal Signal had sold the Global assetswithout their authorization, and now Popich contradicts himself when heclaims that he relied on Federal Signal's waiver when he decided to sellGlobal's assets. The Court therefore concludes that there is no evidenceto support Popich's self-serving assertion that he relied on FederalSignal's waiver of its rights under the guarantees. Furthermore, anyreliance by Popich on an implied waiver by Federal Signal wasunreasonable given Federal Signal's clear indications that it planned toenforce the guarantees.

As a result of the foregoing analysis, the Court concludes under bothArticles 2 and 3 of the UCC that defendant has failed to establish theexistence of a material fact about whether plaintiff released Popich'spersonal guarantees or waived its rights under the guarantees.Accordingly, the Court grants plaintiff's motion for summary judgment onPopich's liability.

III. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in partplaintiff's motion for summary judgment. The Court grants summaryjudgment to plaintiff on Global's and Popich's liability and deniesplaintiff's motion for summary judgment on defendants' counterclaims asmoot.

1. Of the eleven notes, two were payable to Vactor, and nine werepayable to Guzzler. Vactor assigned its two notes to Guzzler, and thusGuzzler now holds all eleven notes.

2. Pla.'s Mot. for Summ. J., Exs. 3(A)-3(K), Installment Notes.

3. Federal Signal handles the administrative aspects of Guzzler'sfinancing programs. Pla.'s Mot for Summ. J., Ex. 4, Affidavit of MarkZaslavsky.

4. The property identified in the proposed settlement agreement wasa condo/townhome unit in Tchefuncte Harbour. Pla.'s Mot. for Summ. J.,Ex. 1(E), Letter from Federal Signal to Defendants' Counsel dated Nov. 1,2001. The Tchefuncte Harbour Townhomes were owned by Harbour TownhomesLLC, in which Popich personally owned an interest. Pla.'s Mot. for Summ.J., Ex. 1(0)., Fax Memo from Defendants' Counsel to Federal Signal datedMay 15, 2002.

5. Pla.'s Mot. for Summ. J., Ex. 1(G), Letter from Federal Signal toDefendants' Counsel dated Nov. 2, 2001.

6. Pla.'s Mot. for Summ. J., Ex. 1(H), Letter from Federal Signal toNick Popich dated Dec. 13, 2001.

7. Pla.'s Mot. for Summ. J., Ex. 1(1), Letter from Defendants'Counsel to Federal Signal dated Jan. 7, 2002.

8. Pla.'s Mot. for Summ. J., Ex. l(J), Letter from Federal Signal toDefendants' Counsel dated Jan. 8, 2002.

9. Pla.'s Mot. for Summ. J., Ex. 1(K), Letter from Federal Signal toDefendants' Counsel dated Jan. 15, 2002.

10. Pla.'s Mot. for Summ. J., Ex. 1(L), Letter from Federal Signalto Defendants' Counsel dated Jan. 23, 2002.

11. Id.

12. Pla.'s Mot. for Summ. J., Ex. 1(M), Letter from Federal Signalto Popich dated Mar. 14, 2002.

13. Id.

14. Pla.'s Mot. for Summ. J., Ex. 1(N), Fax Memo from Defendants'Counsel to Federal Signal dated Mar. 23, 2002.

15. Id.

16. Pla.'s Mot. for Summ. J., Ex. 11, Letter from Federal Signal toDefendants' Counsel dated May 9, 2002.

17. Pla.'s Mot. for Summ. J., Ex. 1(0), Fax Memo from Defendants'Counsel to Federal Signal dated May 15, 2002.

18. Id.

19. See stipulation at Rec. Doc. 23.

20. Pla.'s Mot. for Summ. J., Ex. 3(A)-3(K), Installment Notes.

21. Id.

22. Neither party addresses whether the Illinois Credit AgreementsAct applies in this case. See 815 ILCS 160/1 et seq.The Act applies to credit agreements, and a credit agreement is definedas "an agreement or commitment by a creditor to lend money or extendcredit or delay or forbear repayment of money not primarily for personal,family or household purposes, and not in connection with the issuance ofcredit cards." Id. Under the Act, any agreement by a creditor tomodify or amend an existing credit agreement must be in writing. 815 ILCS160/3; see also Bank One, Springfield v. Roscetti,723 N.E.2d 755, 760-61 (Ill.App. 4 Dist. 1999). The Act defines a creditoras "a person engaged in the business of lending money or extending credit."815 ILCS 160/1. Based on the factual record before it, the Court is unableto determine if

plaintiff meets the definition of a creditor under theAct.

23. Pla.'s Mot. for Summ. J., Ex. 11, Letter from Federal Signal toDefendants' Counsel dated May 9, 2002.

24. Rec. Doc. 3, Global's Answer.

25. Pla.'s Mot. for Summ. J., Ex. 13, Global's Response to Requestfor Admissions, at p. 3, Ex. 16, Popich's Response to Request forAdmissions, at p. 2.

26. Pla.'s Mot. for Summ. J., Ex 1(0), Letter from Defedants'Counsel to Federal Signal's Counsel dated May 15, 2002.

27. Indeed, there is no evidence that defendants sold the assets atless than market value.

28. Pla.'s Mot. for Summ. J., Ex. 5, Affidavit of Jeff Noe.

29. Pla.'s Mot. for Summ. J., Ex. 7, Confidential Asset PurchaseAgreement dated Nov. 2, 2001.