IceMOS Technology Corporation v. Omron Corporation

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IceMOS Technology Corporation,

Plaintiff/Counter-Defendant, v. Omron Corporation,

Defendant/Counter-Claimant.

No. CV-17-02575-PHX-JAT ORDER

Pending before the Court, among other things, are IceMOS Technology Omron Motion for Partial Summary Judgment (Doc. 229), and Motion to Preclude Testimony of Mischou (Doc. 296). This Order substantially addresses these motions and also rules on other pending motions. I. BACKGROUND The Court has previously articulated the basic facts underlying this case:

Plaintiff offers super junction metal oxide semiconductor field-effect advanced engineering substrates to third parties. (Doc. 25 at 2). To produce these products, Plaintiff needs fabrication services. (Id.). In 2007, Defendant purchased a fabrication facility and began fabricating complementary metal-oxide semiconductor products. (Id.). Around this time, Defendant approached Plaintiff to suggest that Defendant and Plaintiff enter into business together. (Id.).

on February 28, 2011 after negotiations. (See id.). Their agreement included, inter alia

duration of the Supply Agreement. (Id.; see also Doc. 59 at 10; Doc. 60 at 15). Defendant asserts that Plaintiff represen d]emand for Super Junction MOSFETs is estimated to reach a volume of up to three (See Doc. 28 at 42 (alteration in original) (quoting Doc. 14-1 at 2)). Defendant also monthly demand would reach 3,850 wafers per month by the fourth quarter of 2012. Id. (citing Doc. 14-1 at 14)). On March 6, 2018, the Supply Agreement terminated. (Doc. 60 at 37). Plaintiff alleges breach of contract and fraud and seeks damages. (Doc. 59 at 33 38). Plaintiff claims that Defendant breached several provisions of the Supply Agreement.

(Id. at 33 35 llegations include that Defendant improperly terminated the Supply Agreement, which, according to Plaintiff, has resulted in lost profits, lost business value, and lost development support costs. (Id.).

Defendant has counterclaimed and alleges breach of the implied covenant of good faith and fair dealing, two counts of breach of contract, and fraud in the inducement (relating to the alleged projections by Plaintiff) and also seeks damages. (Doc. 28 at 46 50).

II. LEGAL STANDARD A party is entitled to summary judgmen shows that there is no genuine dispute as to any material fact and [it] i Civ. P. 56(a). As such, a court must grant summary judgment

make a showing sufficient to establish the existence of an element essential to that party s Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant must establish the basis for summary judgment and the elements of the claims upon which the nonmovant will be unable to show a genuine issue of material fact. Id. at 323. Then, the burden shifts to the nonmovant to show the existence of any dispute of material fact. Id. at 323 24. To meet this burden, the nonmovant must point to competent evidence, meaning that the evidentiary content but not necessarily its form must be admissible at trial. Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). 1

This evidence mply show that there is some metaphysical doubt as to the material facts that there is a genuine issue for trial Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 87 (1986) (quoting Fed. R. Civ. P. 56(e) (1963)). A genuine issue of material fact exists if the disputed issue of fact could reasonably be resolved in favor of either party. Ellison v. Robertson, 357 F.3d 1072, 1075 (9th Cir. 2004). A dispute is about a material fact when ht affect Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must construe all facts in the light most favorable to the non-moving party. Ellison, 357 F.3d at 1075 76 (citing Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001)). However, the nonmovant s bare assertions, standing alone, are insufficient to create a material issue of fact that would defeat the motion for summary judgment. Anderson, 477 U.S. at 247 48.

1 Plaintiff objects to certain evidence that Defendant cites in its controverting statement of and improper legal conclusion are inappropriate for summary judgment because they are either superfluous to the summary judgment standard or are objections relating to form rather than content. See Fraser, 342 F.3d at 1036; Dillon v. Cont l Cas. Co., 278 F. Supp. 3d 1132, 1137 (N.D. Cal. 2017). Thus, these objections are overruled. Plaintiff also objects knowledge sufficient to testify on behalf of Defendant as a corporation. (Doc. 223 at 8 n.1). ring the deposition that Hasegawa was -7 at 1, 4 ection. Moreover, it is not clear what specific Docs. 190-9 to 109-11 and Doc. 190-13 are overruled because the Court did not consider these materials. Defendan -14 as an unauthenticated document is moot because the Court did not rely on this evidence in its analysis. III. ANALYSIS a. Partial

Summary Judgment breach of contract. (Doc. 153 at 7 21). 2

1. Fraud Counterclaim aud counterclaim. Plaintiff 153 at 7 8). It also asserts that Defendant cannot prove certain elements of its fraud

counterclaim as a matter of law. (Id. at 9 13).

A. Statute of Limitations First, Plaintiff contends that summary judgment must be entered on the fraud counterclaim because it is barred by the statute of limitations under Arizona law. (Doc. 153 at 7 8). As the Court has noted, Arizona law applies to Defendant choice of law purposes. (See Doc. 152 at 9; see also Doc. 25 at 19 20 (stating Arizona law

2 Plaintiff argues that the Court must grant its Motion for Partial Summary Judgment (Doc. 153) because it asserts Defendant did not comply with District of Arizona Local Rule of Civil Procedure 56.1. (Doc. 223 at 7 10). Specifically, Plaintiff contends that Defendant failed to controvert facts as required by LRCiv. lies on Marceau v. International Brotherhood of Electrical Workers, 618 F. Supp. 2d 1127, 1141 (D. Ariz. 2009). (Doc. 153 at 9 in the . . . Marceau, 618 F. Supp. 2d at 1141 (citation omitted). The Marceau court adopted that proposition from Pruett v. Arizona, 606 F. Supp. 2d 1065, 1075 (D. Ariz. 2009). See Marceau, 618 F. Supp. 2d at 1141 (quoting Pruett, 606 F. Supp. 2d at 1075). In Pruett, the defendant identified Local Rule 56.1. 606 F. Supp. 2d at 1075. The Pruett court did not strike the entire controverting statement of facts but instead disregarded the additional explanation and argument that the defendant specifically objected to. 606 F. Supp. 2d at 1075. In contrast, h statement of facts, and the Court cannot identify any particular response within it that Plaintiff takes issue with as violative of Local Rule 56.1 or why Plaintiff specifically ct that Plaintiff itself is guilty of the same briefing technique in its controverting statement of facts Partial Summary Judgment (Doc. 229). (See Doc. 308). Accordingly, the Court will take no action. See Albano v. Shea Homes Ltd. P ship, 634 F.3d 524, 528 (9th Cir. 2011).

Arizona law provides that the statute of limitations for a fraud claim is three years. Ariz. Rev. Stat. Ann. § 12-543(3). However, the time for calculating the statute of

facts c Id. begins to run for [fraud claims] when the plaintiff knew or through reasonable diligence

Cavan v. Maron, 182 F. Supp. 3d 954, 962 (D. Ariz. 2016) (citing Coronado Dev. Corp. v. Superior Court, 678 P.2d 535, 537 (Ariz. Ct. App. 1984)); see Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am., 898 P.2d 964, 966 (Ariz. 1995).

Plaintiff argues that it provided the fraud counterclaim in September 2011, and thus, Defendant should have known that these forecasts, assuming they were fraudulent representations, were inaccurate in September 2011, which started the clock on the statute of limitations. (Doc. 153 at 7 8). Plaintiff also argues Defendant knew that Plaintiff was not meeting the projections at least as early as

counterclaim could have begun accruing. (Id. fraud counterclaim was barred by the Arizona statute of limitations because Defendant did not file the counterclaim until July 16, 2018. (Id.). Defendant responds that the time to file its fraud counterclaim did not begin accruing until it could have discovered the fraud with reasonable diligence, which is a question of fact that precludes summary judgment. (Doc. 189 at 9 11; see e.g., Doc. 191 at 3 5 3

; Doc. 192 at 2 4; Doc. 193 at 27 28). . . . Logerquist v. Danforth

of the subject event and resultant injuries, 3 declaration (Doc. 191), (Doc. 223 at 11 n.7), is overruled because it is an inappropriate objection at the summary judgment stage. See Dillon, 278 F. Supp. 3d at 1137. Id. resolution of such factual issues

summary judgment. See id.; see also Gust, Rosenfeld & Henderson, 898 P.2d at 969 (

the exercise of reasonable diligence should have known that it had been injured. The trial .

Defendant asserts there is a dispute of material fact as to when it discovered t 11). The Court agrees. Arizona law makes clear that when a claim begins to accrue is a question of fact that generally cannot be determined on summary judgment. But, Plaintiff argues that a party cannot in the [r] to a motion for summary judgment. (Doc. 223 at 12 (quoting Breeser v.

Menta Grp., Inc., 934 F. Supp. 2d 1150, 1159 (D. Ariz. 2013))). Plaintiff cites Breeser, 934 F. Supp. 2d 1150, for this proposition. Breeser did not proclaim such an edict. Cf. Long v. Ford Motor Co., No. CV07-2206-PHX-JAT, 2008 WL 2937751, at *8 (D. Ariz. July 23, 2008) (allowing plaintiff to raise discovery rule despite the fact that plaintiffs did not plead factual allegations relevant to the discovery rule in its complaint). Rather, the issue in Breeser was that both parties indicated that the date of accrual of claim was beyond the limitations period. 934 F. Supp. 2d at 1158 e date of accrual. See id. Although plaintiff contradicted her earlier statements regarding the date of accrual, the court invoked the doctrine of judicial estoppel in determining that her later inconsistent statements did not create a genuine issue of material fact as to the issue of accrual. See id. In contrast, here, it is disputed as to when

counterclaim began to accrue. Thus, Breeser is distinguishable because there was no genuine dispute of fact there, id. at 1159 60, while there is one here. Because there is a , the Court cannot grant summary judgment. 4

B. Merits of Fraud Counterclaim Plaintiff also argues that summary judgment should be entered on the fraud counterclaim because Defendant cannot establish all its elements. (Doc. 153 at 9 13). The enter into the Supply Agreement with Plaintiff based on projections of monthly demand

that it knew it could never meet. (See Doc. 28 at 49 50; Doc. 152 at 3; Doc. 189 at 6 8). Defendant

asserts that, during the negotiations that ultimately culminated in the Supply Agreement, Plaintiff fraudulently represented to Defendant that monthly demand for its SJ MOSFETs would be at a forecasted volume of up to 3,500 wafers per month by 2014. (See Doc. 189 at 6 8). Moreover, Defendant contends that it relied on these projections in deciding to enter into the Supply Agreement with Plaintiff. (Doc. 189 at 6 8, 16).

A party must show the following elements to establish a fraud claim under Arizona law:

(1) a representation; (2) its falsity; (3) its materiality; (4) the sp the

consequent and proximate injury. 4 Should the jury find for Defendant on its fraud counterclaim and should it conclude that the date of discovery was on July 15, 2015, or earlier, Plaintiff may raise the statute of limitations issue again. The Court notes that it has made no determination as to whether on August 2, 2017. Compare W.J. Kroeger Co. v. Travelers Indem. Co., 541 P.2d 385, 397 (Ariz. 1975) originally by a statute of limitation, it is barred as a counterclaim even if it arises from the same transaction except as it falls quoted in Unispec Dev. Corp. v. Harwood K. Smith & Partners, 124 F.R.D. 211, 214 (D. Ariz. 1988), and Occidental Chem. Co. v. Connor, 604 P.2d 605, 607 (Ariz. , with Religious Tech. Ctr. v. Scott, 82 F.3d 423 (9th Cir. 199 and Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure appears to be tha Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 631 (Ariz. 1982) (in division); see Comerica Bank v. Mahmoodi, 229 P.3d 1031, 1033 34 ¶ 14 (Ariz. Ct. App. 2010). Plaintiff contends that the undisputed facts prevent Defendant from establishing the first, second, third, seventh, and eighth elements of its fraud counterclaim. (Doc. 153 at 9). Defendant responds that Plaintiff has not shown that Defendant cannot prove each element of its fraud counterclaim. (Doc. 189 at 13). i. Representation

A projection can be a representation for purposes of establishing fraud. See Law v. Sidney s actionable when it was made with a present intention on the part of the promisor that he would not Id.; see also Allstate Life Ins. v. Robert W. Baird & Co., 756 F. Supp. 2d 1113, 1165 (D. Ariz. 2010) (determining forward-looking statements made are actionable

representations). Plaintiff argues that there is no dispute of material fact as to whether has provided no evidence to support any allegation that [Plaintiff] did not intend to perform its obligations under the

to support that there is an actionable representation here. See Celotex Corp., 477 U.S. at 322 23.

Although Defendant did not specify in its Response that it has evidence that shows Plaintiff never intended to perform, 5

it does offer evidence that Plaintiff knew its projections were false. (See Doc. 189 at 14 15; Doc. 193 at 22 24). For example, Defendant offers evidence that Plaintiff only ordered approximately two percent

of the 5 for Judgment on the Pleadings (Doc. 69). (See Doc. 189 at 13 14 (citing Doc. 152 at 11 12)). At summary judgment, a party cannot rely on bare allegations alone, and thus, Defendant cannot base its argument that summary judgment is not appropriate on the issue of representation simply because the Court has previously determined that, based on Anderson, 477 U.S. at 247 48. It is axiomatic that allegations are not sufficient on summary judgment; instead, the nonmovant must offer proof of its claims. See Butler v. San Diego Dist. Attorney s Office, 370 F.3d 956, 963 (9th Cir. 2004). forecasted volume. (Doc. 193 at 22 (citing Doc. 191 at 5); see also Doc. 241-1 at 8 9). A reasonable fact-finder could find that such a disparity means that Plaintiff knew its forecasts were false. Construing the evidence in the light most favorable to Defendant, there is a dispute of material fact as to whether Plaintiff knew its projections were false, and thus, whether it never intended to meet the projections of monthly demand. 6

See Orlando v. Carolina Cas. Ins., No. CIV F 07-0092AWISMS, 2007 WL 781598, at *8 (E.D. Cal. Mar. 13, 2007). Thus, the Court cannot say Defendant will be unable to establish that Plaintiff made an actionable representation. 7

ii. Falsity of Representation Plaintiff contends that Defendant cannot establish that the representation was false. (See Doc. 153 at 9). In response, Defendant offers evidence that supports its claim that Plaintiff knew its projections of monthly demand were false. (See Doc. 189 at 14 16; Doc. 193 at 22 24; see also Doc. 241-1 at 8 9). A projection or estimate typically cannot be deemed a false representation. See Allstate Life Ins., 756 F. Supp. 2d at 1164 65; Sidney, 53 P.2d at 66. However, if one makes a projection or estimate with actual knowledge that See Allstate Life Ins., 756 F. Supp. 2d at 1164 65. Thus, for the same reason that the Court found that Defendant has offered sufficient evidence to create a dispute of material fact on 6 irrelevant, (Doc. 223 at 16 n.10), an inappropriate objection that the Court therefore overrules. See Dillon, 278 F. Supp. 3d at 1137. Plaintiff objects to a statement in Takahiro at 17 n.11), another objection that is inappropriate at the summary judgment stage. See Dillon, 278 F. Supp. 3d at 1137. 7 by [Plaintiff] as Although that might be true, Defendant has made clear that its fraud counterclaim is based on the projections of monthly demand Plaintiff made during negotiations prior to signing of the Supply Agreement. (Doc. 189 at 14). The Court even noted this fact when it denied 12). If no representations, promises, Plaintiff to judgment on the pleadings, it is unclear why Plaintiff believes it entitles it to summary judgment now. the issue of representation here, it has done the same on the issue of the falsity of such a representation.

iii. Materiality of Representation Plaintiff contends that Defendant cannot establish the materiality of its alleged terms of the Supply Agreement had already been negotiated before the forecasts in Exhibit

10 (quoting Doc. 60 at 19)). However, Plaintiff leaves out A Agreement contains the only forecasts that [Plaintiff] provided to Doc. 60

at 19; Doc. 193 at 3 4; see also Doc. 191-1 at 15 (draft agreement with projections)).

false representation that occurred during negotiations prior to signing of the Supply Agreement; it is not necessarily based on the terms of the Supply Agreement alone.

See Lerner v. DMB Realty, LLC, 322 P.3d 909, 914 ¶ 15 (Ariz. Ct. App. 2014). onexistence Caruthers v. Underhill, 287 P.3d 807, 815 ¶ 28 (Ariz. Ct. App. 2012) (quoting Restatement (Second) of Torts § 538(2)(a) (1977)); see also M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX- NVW, 2011 WL 5445416, at *4 (D. Ariz. Nov. 10, 2011). Defendant has offered sufficient evidence to create a dispute of material fact as to whether the alleged false representation mattered to it because it has evidence showing Plainti were relevant to its decision to enter the Supply Agreement. (Doc. 189 at 16; Doc. 193 at 24); see M & I, FSB, 2011 WL 5445416, at *4 (holding alleged false representation was material because plaintiff offered evidence that false representation was relevant to ; Lerner, 322 P.3d at 915 ¶ 19 (noting that materiality depended on whether material (emphasis added)).

projections specifying monthly demand would be material to Defendant s decision to enter the Supply Agreement. See M & I, FSB, 2011 WL 5445416, at *4; see Radware, Ltd. v. F5 Networks, Inc., 147 F. Supp. 3d 974, 1012 (N.D. Cal. 2015). The jury could reasonably infer that the projections included in a prior draft agreement, (Doc. 191-1 at 15), would translate to future business revenue for Defendant, and thus, would be material. Indeed, as Caruthers makes clear, materiality is an objective standard, and thus, the jury must determine if a reasonable person, under the circumstances, would attach importance to the projections of monthly demand in deciding whether to enter the Supply Agreement. Additionally, Defendant offers

Agreement. (See Doc. 191 at 2 3). 8

In sum, Defendant has offered sufficient evidence to create a genuine dispute of material fact as to materiality.

iv. Reliance on Representation Next, Plaintiff asserts Defendant cannot establish that Defendant relied on the projections. (Doc. 153 at 10 11). Plaintiff raises three primary arguments: (1) the her just estimates of future events based on depended on Defendant, and (3) that Defendant signed the Supply Agreement because it

e projections were irrelevant to its decision to enter

8 Plaintiff objects to a statement regarding the materiality of the projections in Takahiro people [Defendant] identified as participating in the negotiation of the Supply Agreement were Yoshio Sekiguchi and Takahiro Hasegawa see also Doc. 204- knowledge as to the materiality of the projections if he was part of the negotiations that led to the signing of the Supply Agreement. At any rate, although the Hasegawa declaration is relevant as to this issue, the other evidence that the Court discussed that is relevant to this issue sufficiently creates a dispute of material fact. The objection is overruled. the Supply Agreement. (Id.). Defendant responds that evidence supports a finding that

Defendant did rely on the projections. (Doc. 189 at 16 17; Doc. 193 at 5 6, 24).

A party relies on a misrepresentation when the party acts or refrains from acting based on it. See Sw. Non-Profit Hous. Corp. v. Nowak, 322 P.3d 204, 212 ¶ 29 (Ariz. Ct. App. 2014). Defendant asserts that it acted on the alleged misrepresentation because it Defendant also points to the fact that it agreed to resource the development of the SJ

MOSFET and that it agreed to take on fifty percent of the cost of producing th of the SJ MOSFETs. (Id. (citing Doc. 190-1 at 5 6 (§§ 4.0 and 4.2.1 of the Supply

Agreement))). In fact, at thirty entered into the Supply Agreement with Plaintiff and sustained monetary losses but for the alleged misrepresentations as to the projections of monthly demand. This fact alone creates a dispute as to whether Defendant relied on the alleged misrepresentation. Cf. Int l Franchise Sols. LLC v. BizCard Xpress LLC, No. CV13-0086 PHX DGC, 2013 WL 2152549, at *3 (D. Ariz. May 16, 2013) (denying motion to dismiss on fraud claim where the allegation was that party agreed to do business and lost money as a result of misrepresentation). And, nothing indicates that Defendant did not believe the projections, which would show it did not rely on the projections. See Sw. Non-Profit Hous. Corp., 322 P.3d at 212 ¶ 29; (cf. Doc. 191 at 2 5). Simply the fact that Defendant has evidence that it did rely on the projections of monthly demand

when it decided to enter the Supply Agreement with Plaintiff. Thus, there is a dispute of material fact on this issue as well.

v. Right to Rely on Representation Finally, Plaintiff contends that Defendant cannot establish that Defendant had a

Id. (quoting Doc. 60 at 18)). As the Court has noted, a promise of future performance is generally not an actionable basis for fraud unless the party that made the promise had no intent to perform. See supra Section III.a.1.B.i.

Here, Defendant has offered evidence to create a dispute of material fact as to whether Plaintiff never intended to perform its promise. Therefore, the Court cannot say

that question must be answered by the jury. Lerner, 322 P.3d at 914 ¶¶ 15 16; cf. Staheli v. Kauffman, 595 P.2d 172, 175 (1979) (in division) (noting there is no right to rely on promises, expressions of intent, or statements regarding future events unless such were

As indicated above, Defendant offers evidence that supports a reasonable inference that Plaintiff knew it would never reach the monthly demand it was projecting and that ere material to decision to agree to the provisions of the Supply Agreement. 9

nce is Reserve Life Ins., 742 P.2d 808, 817 (Ariz. 1987) (holding that party reasonably relied on

misrepresentation because misrepresentation was material); see Maki v. N. Sky Partners II LP, No. CV-15-02625-PHX-SRB, 2017 WL 10128386, at *6 (D. Ariz. Dec. 11, 2017) Sitton v. Deutsche Bank Nat l Tr. Co., 311 P.3d 237, 243 ¶ 31 (Ariz. Ct. App. 2013))). Plaintiff has

9 ation (Doc. 191) relating to whether Defendant took part in creating the forecasts that were incorporated into the Supply Agreement. (Doc. 223 at 13 14 n.8). Plaintiff appears to argue that Nukii and Hasegawa lack personal knowledge on this subject. (Id.) But, Plaintiff indicates that Defendant identified Hasegawa as being a participant in the negotiation of the Supply Agreement. (Id.). Because Plaintiff effectively acknowledges Hasegawa took part in the Supply Agreement negotiations, the objection to , and thus, the objection to on this topic is rendered moot Judgment (Doc. 153). not shown, based on the undisputed material facts, that Defendant cannot establish at trial 10

Accordingly, because there are genuine disputed issues of material fact on the

this counterclaim is denied. 11

2. Breach of Contract Counterclaims contract counterclaims. (Doc. 153 at 13 21). Defendant alleges that Plaintiff breached the

(Doc. 28 at 47 48). Defendant also alleges Plaintiff breached the Supply Agreement by

Id. at 48 49).

Preliminarily, the Supply Agreement provides that New York law governs the Supply Agreement. (Doc. 59-1 at 9 (§ 9.2 of the Supply Agreement)). To prevail on a breach of contract act

Harris v. Seward Park Hous. Corp., 913 N.Y.S.2d 161, 162 (App. Div. 2010).

A. Late Payment Counterclaim Plaintiff makes three general arguments in support of its claim that it is entitled to summary judgment on the Late Payment Counterclaim. First, Plaintiff argues that 10 Plaintiff also seems to argue that Defendant did not have a right to rely on the projections in deciding whether to enter the Supply Agreement because Defendant understood the projections of monthly demand were not guarantees. (Doc. 153 at 9 10; Doc. 193 at 6 7). Plaintiff then cites a bevy of quotes from discovery that it suggests support this proposition. (Doc. 153 at 9 10; Doc. 193 at 6 projections were not guarantees, this undisputed fact does not prevent Defendant from establi had a right to rely on them. See Anderson, 477 U.S. at 247 48; cf. of Def., 34 F.3d 1469, 1475 n.4 (9th Cir. 1994) (concluding that a dispute of fact was not 11 Plaintiff did not raise arguments as to whether Defendant can establish the fourth, fifth, sixth, or ninth element of its fraud claim. As such, Plaintiff has failed to shift the burden to Defendant on these elements because Plaintiff, as the movant, must

show that the Defendant, as the nonmovant, will be unable to establish a genuine issue of material fact as to these elements. Defendant committed material breaches of the Supply Agreement that excused Plaintiff from further performance, including having to pay any invoice on time. (Doc. 153 at 13 16). Second, Plaintiff contends that it did not breach the Supply Agreement as a matter of

law based on the undisputed facts. (Id. at 16 17). Third, Plaintiff claims Defendant waived the right to timely payment. (Id. at 17 19). The Court evaluates each argument in turn.

i. Material Breach If a party commits a material breach, the other party is excused from further performance. See Hadden v. Consol. Edison Co. of N.Y., 312 N.E.2d 445, 449 (N.Y. 1974); Markham Gardens L.P. v. 511 9th LLC, 954 N.Y.S.2d 811, 815 (Sup. Ct. 2012). But, when a material breach occurs, the party must elect to either terminate the contract or to continue under it. Awards.com, LLC v. Kinko s, Inc., 834 N.Y.S.2d 147, 156 (App. Div. 2007). If it Id.

In re Dissolution of Ongweoweh Corp., 14 N.Y.S.3d 212, 213 (App. Div. 2015); Residential Holdings III LLC v. Archstone-Smith Operating Tr., 920 N.Y.S.2d 349, 352 (App. Div. 2011) failed to be performed [goes] to the root of the contract or . . . render[s] the performance of

the rest of the contract a thing different in (alterations in original)). Whether a breach is material is generally a question of fact for the jury that precludes summary judgment. See F. Garofalo Elec. Co. v. N.Y. Univ., 754 N.Y.S.2d 227, 230 (App. Div. 2002); see also Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc. materiality of breach is a mixed question of fact and law usually more of the former and less of the latter and thus is es of the Supply Agreement, which is a question of

fact that the Court cannot determine on summary judgment, this argument fails.

ii. No Breach Plaintiff also contends that Defendant cannot show breach of the Supply Agreement. There are thirty-three invoices that Defendant alleges Plaintiff did not pay on time that serve as the basis of its breach of contract claim for late payments.

Plaintiff ar because it relates to SJ MOSFET product. (Doc. 153 at 16). Although Defendant agrees that this invoice relates

to cavity lid wafer process, (Doc. 193 at 11), Defendant asserts that this invoice is nonetheless covered by the Supply Agreement but provides no evidence to support this assertion. (Doc. 189 at 20). The Court finds that Defendant did not carry its burden in rebutting Plaintiff does not apply to this invoice (No. MD140611OM150514). Defendant, as the nonmovant, d

genuine issue for trial Matsushita Elec. Indus. Co., 475 U.S. at 586 87 (quoting Fed. R. Civ. P. 56(e) (1963)). Accordingly, the Court grants summary judgment on this issue in favor of Plaintiff.

Plaintiff also claims it did not breach the Supply Agreement by failing to pay Invoice No. MD140401-2. (Doc. 153 at 16). Plaintiff specifically argues that this invoice relates to development costs and that Defendant is required to pay all development costs under § 4.2.1 of the Supply Agreement, which relieved Plaintiff of any duty to pay Invoice No. MD140401-2 under the Supply Agreement. (Id.). However, it is unclear what

§ 4.2.1 of the Supply Agreement. (See Doc. 59-1 at 6). In other words, this provision is ambiguous. Indeed, neither party even attempted to provide the Court with an argument as to whether the provision applies to Invoice No. MD14040401-2 based on a reasonable construction of § 4.2.1. 12

Thus, there is a dispute of material fact as to whether Plaintiff 12 Section 4.2.1 of the Supply Agreement is also at Summary Judgment (Doc. 229). The parties do offer conflicting interpretations of the provision within that discussion, as will be discussed. Infra Section III.b.1.C. breached the Supply Agreement by not paying Invoice No. MD140401-2. See Five Corners Car Wash, Inc. v. Minrod Realty Corp., 20 N.Y.S.3d 578, 579 (App. Div. 2015).

Finally, Plaintiff contends it was not required to pay for any late paid invoices where the invoice is for a lot that Plaintiff asserts it was not required to pay for under the Supply Agreement. (Doc. 153 at 16 17). Specifically, Plaintiff argues that the Supply Agreement required that Defendant meet a target yield 13

of eighty percent for each lot and that certain lots did not meet this alleged requirement. (Id.). Thus, Plaintiff claims it does not need to pay invoices relating to the lots that did not meet the target yield requirement. (See id.). Defendant responds that there was no agreement that it needed to meet an eighty-percent target yield, and even if there was, such a requirement would not relieve Plaintiff of its duty to pay. (Doc. 189 at 20 21; Doc. 191 at 1 . . .).

The parties therefore dispute whether there was an agreement on target yield, (Doc. 193 at 16 17), which precludes the Court from granting summary judgment. And, even if Plaintiff is correct that there was an agreement as to target yield, as noted above, a party is only relieved from performance of a contractual provision if the other party commits a material breach. See supra Section III.a.2.A.i. Under New York law, Plaintiff is

with a target yield of eighty percent assuming that this requirement exists under the Supply Agreement constituted a material breach, which creates another dispute of material fact that the Court cannot answer on summary judgment. See supra Section III.a.2.A.i. In short, Plaintiff, as the movant, has not carried its burden of establishing that there are no disputes of material fact relating to whether Defendant has failed to establish breach of the Supply Agreement for invoices that relate to SJ MOSFET lots that Plaintiff claims were below eighty-percent target yield.

13 The Supply Agreement defines resulting from production wafers which shall be agreed between

[Plaintiff] and [Defendant] (Docket 59-1 at 4 (§ 1.0 of the Supply Agreement)).

iii. Waiver waived the requirement for timely payment by repeatedly and knowingly accepting late payments from [Plaintiff] over an extended period of time. (Doc. 153 at 17 18). The Supply Agreement specifies, waived unless such a waiver is 59-1 at 9 (§ 9.1 of the Supply Agreement)). Non- under New York law. Awards.com, LLC, 834 N.Y.S.2d at 155 56 (holding that contractual

provision specifying there was no waiver of a provision of the contract unless the provision was waived in writing meant that acceptance of late payments did not effectuate a waiver of the requirement for timely payments). Plaintiff has offered no evidence that Defendant waived timely payment in writing. Moreover, whether a party waived a contractual provision is a question of fact for the jury because the party asserting waiver must show that there was an intent to waive. See Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 850 N.E.2d 653, 658 (N.Y. 2006). Thus, Plaintiff has not shown it is entitled to summary judgment on the Late Payment Counterclaim as a result of waiver.

B. No Payment Counterclaim Plaintiff also contends that it is entitled to summary judgment on the No Payment Counterclaim for invoices Defendant alleges Plaintiff did not pay. (Doc. 153 at 19 21). First, the Court again denies summary judgment to Plaintiff on its argument that it was not required to pay these invoices because the lots were below the eighty-percent target yield it claims Defendant was required to meet or because Defendant did not timely produce the lots. Supra Section III.a.2.A.ii; (see Doc. 153 at 19 20). Sec it is entitled to summary judgment because Defendant said Plaintiff did not have to pay

these invoices fails as well. (Doc. 153 at 19 21). Plaintiff states that Defendant agreed that Plaintiff would not have to pay for these two invoices if Plaintiff destroyed the lots. (Id. at 20). No proof has been offered that Plaintiff destroyed the lots. (See id. at 19 21; Doc. 153- 21 at 8 11; Doc. 189 at 22; Doc. 193 at 19). Thus, there are disputed issues of material fact that preclude summary judgment on the No Payment Counterclaim.

3. Conclusion Accordingly, the Court grants summary judgment on the reason specified above. The Court denies summary judgment as to the rest of

b. Partial Summary Judgment

Defendant lost business value damages, and lost development support cost damages which Plaintiff

asserts arise from its breach of contract claim. (Doc. 229 at 9 22). Defendant also asserts (Id. at 22).

1. Breach of Contract Claim Defendant only asserts that certain types of damages Plaintiff seeks for its breach of

breach of contract claim in toto. The Court will evaluate each type of damages Defendant asserts is unavailable here in turn.

As the Court has noted, New York law governs the Supply Agreement. See supra Section III.a.2. There are two overarching classifications of damages that can arise from a breach of contract under New York law. Fir Yenrab, Inc. v.

794 Linden Realty, LLC, 892 N.Y.S.2d 105, 110 (App. Div. 2009). Second, a party may special or extraordinary damages that do not flow directly from the breach Id. A party seeking special damages must plead that the damages were foreseeable and within the contemplation of the parties at the time the contract was made. Id. (quoting Am. List Corp. v. U.S. News & World Report, 549 N.E.2d 1161, 1164 (N.Y. 1989)).

A. Lost Profits Damages Claim A claim for lost profits is generally a claim for special or extraordinary damages Yenrab, Inc., 892 N.Y.S.2d at 110. Therefore, lost profits must be foreseeable, and the party

must show that lost profits were in was made Id. Moreover, the party must establish lost profits with reasonable certainty.

Ashland Mgmt. Inc. v. Janien, 624 N.E.2d 1007, 1011 (N.Y. 1993); Kenford Co. v. Erie County, 493 N.E.2d 234, 235 (N.Y. 1986) (per curiam). Therefore, the Court must evaluate profits damages claim is capable of proof with reasonable certainty and that lost profits were foreseeable from breach and that they were within the contemplation of the parties when the Supply Agreement was made. Kenford Co., 493 N.E.2d at 235; see also Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 970 (9th Cir. 2013) (Under New York law, in order to recover lost profits [the plaintiff] must prove that (1) the damages were caused by the breach; (2) the alleged loss must be capable of proof with reasonable certainty, and (3) the particular damages were within the contemplation of the parties to the contract at the time it was made.).

Kenford Co., 493 Id. Generally, because a new business , a

new business See id.; Blinds to Go (U.S.), Inc. v. Times Plaza Dev., L.P., 931 N.Y.S.2d 105, 108 (App. Div. 2011); see also Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 332 (2d Cir. 1993) (articulating same standard). This stricter standard requires a new business to Kidder, Peabody & Co. , 28 F. Supp. 2d 126, 131 (S.D.N.Y. 1998). In other ngoing operation of course will affect the quantity and quality of evidence relied upon by a plaintiff to prove lost future Washington v. Kellwood Co., No. 05CV10034 MHD, 2015 WL 6437456, at *24 (S.D.N.Y. Oct. 14, 2015) (quoting Coastal Aviation, Inc. v. Commander Aircraft Co., 937 F. Supp. 1051, 1066 (S.D.N.Y. 1996)).

As such, the new business or venture. Plaintiff argues because it had been in business for years at the

, it does not constitute a new business. (See Doc. 306 at 9 10). Defendant responds that New York law requires a track record in the relevant market to support lost profits or the party is a new business. (Doc. 327 at 7 8).

An established business that attempts to enter into a new or different market is a new business. See Blinds to Go (U.S.), Inc., 931 N.Y.S.2d at 108. For example, in Blinds to Go (U.S.), Inc. v. Times Plaza Development, the plaintiff operated a chain of stores. Id. at 107 08. A lease dispute arose between plaintiff and defendant, and plaintiff was left without space to sell its product in a new location that it had not sold in previously. Id. at 107. Plaintiff sought lost profit damages it asserted arose from that dispute. See id. The illustrated it was a new business. See id. at 108; see also Ho Myung Moolsan, Co. v.

Manitou Mineral Water, Inc., No. 07 CIV.07483 RJH, 2010 WL 4892646, at *7 n.3 (S.D.N.Y. Dec. 2, 2010) The critical newness is not of the business itself or of the logistical foundations for sales, but for the (citing Aviation Inc., 937 F. Supp. at 1068)).

Because Plaintiff was also breaking into a new market, it must be considered a new business. It is undisputed that Plaintiff never sold its SJ MOSFET until July 2011 and that Plaintiff was attempting to enter the Chinese SJ MOSFET market. (Doc. 308 at 33, 36). And importantly, Plaintiff has not offered any proof of a history of profit in the SJ MOSFET market. (Id. at 47). Plaintiff even notes in its Response to the Motion that i Thus, just as in Blinds to Go (U.S.), Inc., here, Plaintiff is a new business under New York law because it is breaking into a new market, and the Court must apply the stricter evidentiary standard.

When a business is new, projections of future profit typically will not be enough to establish reasonable certainty. Kenford Co., 493 N.E.2d at 236. Indeed, in Kenford Co. v. Erie County, the New York Court of Appeals concluded, projections of future profit were not

sufficient to establish reasonable certainty as to lost profit damages. Id. The experts based their projections of profits on the following hypothetical scenario: completed, available for use and successfully operated by [the plaintiff] for 20 years,

providing professional sporting events and other forms of entertainment, as well as hosting meetings, conventio Id. The court held that this type

reasonable Id.

To establish reasonable certainty, a new business must generally support its lost profits damages claim with evidence of a history of profit or comparison of the new business with other comparable and profitable businesses. See, e.g., Schonfeld v. Hilliard, 218 F.3d 164, 173 75 (2d Cir. 2000); Blinds to Go (U.S.), Inc., 931 N.Y.S.2d at 108 09; Vasquez v. Gesher Realty Corp., 985 N.Y.S.2d 819, 821 (App.

Term. 2014) (per curiam). Moreover, a new business must account for that might negatively affect its future entry of competitors; (2) technological developments; (3) regulatory changes; or (4) general Schonfeld, 218 F.3d at 174 75; see also Trademark Research Corp., 995 F.2d at future of the CD-ROM market is subject to too many uncertain variables to project lost

Plaintiff has offered insufficient proof to show lost profit damages with reasonable certainty. principal support for lost profits is the projections of its president, Sam , and its experts Walter Bratic Bratic Uzi Sasson . 14

(Doc. 306 at 12 14). But, for a new business, like Plaintiff, projections are 14 Plaintiff also apparently offers the fact that its business valuation expert, Greg Mischou, raise capital with no guarantee of any compensation unless he was succ generally not sufficient under New York law to establish lost profits with reasonable certainty. At bottom Kenford Co. was not enough for the New York Court of Appeals to find reasonable certainty of lost profits there, then the opinion of Anderson and the expert testimony that relied upon it certainly cannot establish lost profits with reasonable certainty here.

Indeed, Plaintiff has failed to show a history of lost profits or any comparison with the profitability of other profits experts failed to make comparisons between IceMOS and its competitors. Sasson failed to compare IceMOS to its competitors or product to any of products. (Doc. 308 at 35 36). Similarly, entry to the MOSFET marketplace, or how Plaintiff would have competed with its

competitors. (Id. at 44). Without a history of profit or evidence showing the profitability of other like-businesses, Plaintiff cannot establish lost profit damages with the reasonable certainty New York law requires for new businesses.

It is also unclear if Plaintiff accounted for various factors that could affect its ability to make profit. Plaintiff stated, -industry sales forecast . . . depends upon -22 at 3). Plaintiff went on to say that these third parties include the buyers of the product, competitors who could introduce new products, and new market entrants that could cause Plaintiff to reduce the price for its product. (Id.) Plaintiff also suggested it may be required take other actions to preserve customer relationships, another scenario that could affects its ability to meet its projections. (Id.). Plaintiff noted that economic recession, supply disruptions, man-made events could affect its ability to make a profit on its product as well. (See id. at 4). technological developments;

(3) regulatory changes; or (4) general market movements, precludes a finding of reasonable certainty of lost profits. (Doc. 306 at 14). As the case law above indicates, this reasonable certainty. Schonfeld, 218 F.3d at 174 75. Indeed, in Trademark Research Co., the court concluded the uncertainty in the market this uncertainty rendered lost profits damages too uncertain. Similarly here, Plaintiff cannot show the requisite certainty necessary to establish lost profit damages given the uncertainty [its] control. (Doc. 232-22 at 3 4).

In sum, the Court concludes Plaintiff did not establish lost profit damages with reasonable certainty. As a new business, Plaintiff may not rely solely on projections but instead must offer proof of profitability to establish lost profits with reasonable certainty. summary judgment motion.

Nonetheless, Plaintiff argues that it could rely on its projections to establish lost profits damages with reasonable certainty because it has been an established business. (Doc. 306 at 14). Plaintiff contends that Kenford Co. and its progeny turned on the fact that, in those cases, er existed or businesses that never operated, and therefore, Plaintiff should not be classified as a new business. (Id.). Not so. As noted above, when an established company enters into a new market, it must show lost profits under the heightened evidentiary burden that New York law applies to new businesses. See, e.g., Blinds to Go (U.S.), Inc., 931 N.Y.S.2d at 108. But, even if the Court assumes Plaintiff is correct, Plaintiff still must prove lost profit damages with reasonable certainty. Ashland Mgmt. Inc., 624 N.E.2d at 1011

While a party can approximate lost profits damages, the approximation upon known reliable factors without undue speculation Id. at 1010 11 (citations omitted);

cf. , No. 16 CIV. 9610 (JSR), 2017 WL 2839668, at *7 (S.D.N.Y. June 26, 2017) (noting a court can dismiss a claim for lost profit damages where it [P]rojections of future establish reasonable certainty of lost profit damages. Louis Hornick & Co. v. Darbyco, Inc., No. 12CV5892 (VSB) (DCF), 2015 WL 13745787, at *7 8 (S.D.N.Y. Aug. 19, 2015) (citation omitted) (concluding because plaintiff failed to provide any data behind its projections of profit despite plaintiff

having ed), adopted, No. 12-CV-5892 (VSB), 2015 WL 9478239 (S.D.N.Y. Dec. 29, 2015).

Thus, Plaintiff has failed to establish lost profits with reasonable certainty even if the Court assumes it was not a new business for the same reasons the Court articulated above. Plaintiff has not cited to any reliable evidence in support of its lost profits damages. Its expert opinions are laden with assumptions, and Plaintiff has failed to connect any quantifiable data to its projections of lost profits, just like the plaintiff in Louis Hornick & Co., rendering its lost profit damages claim not reasonably certain. As noted above, the principal s damages is projections, and Plaintiff itself recognizes the numerous factors that are beyond its control that could affect the accuracy of these projections, rendering the projections too speculative to support lost profit damages with reasonable certainty.

Plaintiff highlighted Ashland Management at oral argument; however, Ashland Management provides Plaintiff no refuge from the speculativeness of its lost profits claim. Indeed, Ashland Management illustrates exactly why Plaintiff cannot establish its lost profits claim with reasonable certainty. In Ashland Management, the court determined that the projection of future profits udied senc the venture was part of a strategy that had a strong track

record, among other things. 624 N.E.2d at 1012. Thus, the projections in Ashland Management were

unlike the speculative nature of the projections in Kenford Co., which Id. (citing Kenford Co., 493 N.E.2d at 236). Id. at 1010. At bottom, the key takeaway from Ashland Management is that a lost profits

claim cannot be based on projections of profit that are built on assumptions and speculation. See id.

Ashland Management. ns and few, if any, known factors to establish its claim with reasonable certainty. Plaintiff has not senc Doc. 306 at 14); see Ashland Mgmt., 624 N.E.2d at 1012. Nor are track record that helped establish reasonable certainty in Ashland Management. As noted, Plaintiff has failed to show that its SJ MOSFET had a history of profit and Plaintiff recognized the numerous factors beyond its control that could affect its ability to make profit on its product. Thus, Ashland Management fails.

The newness of the business only affects the quantity and quality of the evidence Plaintiff must offer to establish its lost profits claim. Because Plaintiff has not cited sufficient reliable evidence on which to base its lost profits damages claim, its claim is not based on the reasonable certainty that New York law demands, and summary judgment will be granted in favor of Defendant on this claim. Given this conclusion, the Court need not determine whether these damages were foreseeable or within the contemplation of the parties when the Supply Agreement was formed.

B. Lost Business Value Damages Claim Defendant argues that lost business value damages are unavailable because IceMOS was not destroyed, Plaintiff cannot prove lost valuation with reasonable certainty, and that lost business value damages were not within the contemplation of the parties or foreseeable from breach. (Doc. 229 at 18 20). Because the Court concludes that Plaintiff has failed to establish business value damages with reasonable certainty, it need not address whether these damages were within the contemplation of the parties or whether these damages were foreseeable from breach.

[T]he most accurate and immediate measure of damages Washington v. Kellwood Co. 35, 41 (2d Cir. 2017) (ellipsis in original) (citation omitted). Fair market value is usually

determined by calculating capitalization of expected future profits. 24/7 Records, Inc. v. Sony Music Entm t, Inc., 566 F. Supp. 2d 305, 317 (S.D.N.Y. 2008); see also Matter of Seagroatt Floral Co., Inc., 583 N.E.2d 287, 290 (N.Y. 1991). Calculating lost business value based on its market value at the time of breach measuring damages throu is willing to pay for the chance that the business will produce substantial income.

Washington (quoting Schonfeld, 218 F.3d at 177). However, a party must still show lost business value damages with reasonable certainty because lost business value damages are special damages. Id.; Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 886 N.E.2d 127, 129 30 (N.Y. 2008). To do so a party must typically offer a history of profit. See 24/7 Records, Inc., 566 F. Supp. 2d at 316 17

(rejecting that past revenue was sufficient to establish lost business value damages with reasonable certainty given that business was unprofitable for a year-and-a-half); S.A.B. Enters., Inc. v. Village of Athens, 564 N.Y.S.2d 817, 822 (App. Div. 1991) calculation because it was not based on proof of profit); cf. In re Ford, 312 N.Y.S.2d 966,

973 (App. Div. 1970) (noting, in litigation involving valuation of businesses that had been .

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lost business value damages expert, Greg Mischou

15 based his business valuation on revenue projections for 2017 and 2018 that he made in 2014. (Doc. 308 at 50 52

In summary, in 2014, based on Comparable M&A Transactions analysis, I determined that a conservative financial valuation base for IceMOS in a M&A transaction would be 1.9 to 4.1 times revenue, resulting in a value range based on [Plaintiff] redacted] for 2017 and extending this analysis to 2018 projected revenues results in a transaction valuation range of [redacted] for 2018. Likewise, based on Comparable Public Company Valuation analysis, a conservative financial valuation base for IceMOS in a company sale would be [redacted] times revenue, resulting in a value range of [redacted] for 2017 and [redacted] for 2018. (Doc. 296-4 at 16). speculative because it is based on hypothetical future revenue without any proof of profit. As discussed supra Section III.b.1.A., it is undisputed that Plaintiff had no history of profit at the time of the alleged breach. (Doc. 308 at 33, 36). Plaintiff points to no other relevant evidence in support of its lost business value damages that overcomes this fact. Thus, b lost business value claim is based only on projections and because Plaintiff has failed to establish a history of profit, Plaintiff has not established lost business value damages with reasonable certainty. Accordingly, the Court grants the motion for 16

15 (Doc. as discussed below, infra Section IV, the Court assumes, for purposes of analyzing whether liable. 16 value damages are only available under New York law where a business is destroyed. (Doc. 229 at 18 19). But see Stanacard, LLC v. Rubard LLC, No. 12 CIV. 5176 (CM), 2016 WL 6820741, at *4 (S.D.N.Y. Nov. 10, 2016) (indicating lost business value damages Kenneth M. Kolaski & Mark Kuga, Measuring Commercial Damages via Lost Profits or Loss of Business Value: Are these Measures Redundant or Distinguishable?, 18 J.L. & Comm. 1, 5 n.8 (1998) (noting business value damages may be available where business was

C. Lost Development Support Damages Claim D unavailable because: (1) Plaintiff has failed to show any damage, (2) lost development

support damages were not foreseeable, and (3) Plaintiff has not offered proof that shows lost development support damages with reasonable certainty. (Doc. 229 at 20). Plaintiff

contractually obligated to provide developmental support for various generations of the SJ Plainti claim for lost development support damages is grounded in a provision in the Supply Agreement fully resource the development of all generations of Super Junction MOSFETs as indicated

-1 at 6 (§ 4.2.1 of the Supply Agreement)).

anguage is ambiguous, there is a material dispute of fact that the court cannot resolve on a motion for summary judgment. Five Corners Car Wash, Inc., 20 N.Y.S.3d at court. See Amusement Bus. Underwriters, a Div. of Bingham & Bingham, Inc. v. Am. Int l

Grp., Inc., 489 N.E.2d 729, 732 (N.Y. 1985). A contract is ambiguous Ellington v. EMI Music, Inc.,

21 N.E.3d 1000, 1003 (N.Y. 2014) (citation omitted).

Defendant asserts that the phrase obligations as a foundry, not that Defendant must pay for development support costs.

(Doc. 327 at 18 support costs. (Doc. 306 at 19). Thus, Plaintiff claims there is a genuine issue of material fact that precludes summary judgment. (Id.). Plaintiff also contends that whether these development support costs are general or special damages is a question of fact that is not properly before the Court on a motion for summary judgment. (Id. at 19 20).

Resource, Oxford English Dictionary tocks or reserves of money, materials, people, or some other asset, which can be drawn on when necessary. Oxford English Dictionary, supra. Given these definitions on the text of § 4.2.1 of the Supply Agreement, is not foreclosed as a matter of law because

to resource includes providing monetary support when necessary. As such, there is a genuine issue of material fact because the term is ambiguous.

Additionally, just as Plaintiff suggests, this genuine issue of material fact precludes claimed development support damages are general or sp may be that lost development costs are the natural and probable consequence of breach of the Supply Agreement. Yenrab, Inc., 892 N.Y.S.2d at 110. criticism that Plaintiff has not offered sufficient evidentiary support for the specific amount of damages Plaintiff claims as its lost development support costs cannot be resolved on a motion for summary judgment. See Anderson, 477 U.S. at 248 ny proof or evidentiary requirements imposed by the substantive law are not germane

obligations under the Supply Agreement were as to development support costs, the Court

these damages.

2. Fraud Claim 229 at 22). Defendant argues that the fraud claim is barred by the economic loss doctrine the Supply Agreement. (Id.). Plaintiff responds that the economic loss doctrine does not apply here because it asserts the doctrine is generally inapplicable to fraud claims and because it . (Doc. 306 at 21 23). 17

17 Local Rule of Civil Procedure 7.2(e)(1), argument on why the economic loss doctrine does not apply here, (Doc. 327 at 19 20), the Court has wide discretion on whether to sanction a party for violation of Local Rule 7.2(e). See Christian v. Mattel, Inc., 286 F.3d 1118, 1129 (9th Cir. 2002). The Court finds no

As the Court previously noted, Arizona law See Doc. 25 at 19 20). Under Arizona law, the economic loss doctrine precludes common law tort actions that seek [s] Sullivan v. Pulte Home Corp., 306 P.3d 1, 3 ¶ 8 (Ariz. 2013) (alteration in original) (citation omitted). Thus, a contracting party is limited to contractual remedies for the recovery of purely economic loss that is not accompanied by physical injury to persons or other property. Flagstaff Affordable Hous. Ltd. P ship v. Design All., Inc., 223 P.3d 664, 667 ¶ 12 (Ariz. E i commercial damage, including any decreased value or repair costs for a product or property

that is itself the subject of a contract between the plaintiff and defendant, and consequential Id. ¶ 11.

The rationale behind the economic loss doctrine is that contract law better protects a is designed to protect the safety of persons and property. See Gilbert Unified Sch. Dist. No. 41 v. CrossPointe, LLC, No. CV 11-00510- PHX-NVW, 2012 WL 1564660, at *4 5 (D. Ariz. May 2, 2012) (citing Flagstaff , 223 P.3d at 667 ¶¶ 11 12). To determine whether the economic loss doctrine applies, the court must analyze whether the facts preponderate in favor of the application of tort law or commercial law exclusively or a combination of the two Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198, 210 (Ariz. 1984). When the allegations underlying a tort claim are inseparable from the essence of the contractual agreement, the court should apply contract law rather than tort law because the facts preponderate in favor of applying contract law. CIT Fin. LLC v. Treon, Aguirre, Newman & Norris PA, No. CV-14-00800-PHX-JAT, 2016 WL 6610604, at *5 (D. Ariz. Nov. 9, 2016) economic loss doctrine because the alleged misrepresentations at the foundation of the

sanction is warranted though the Court warns Plaintiff that future rule violations may result in sanctions. See Kimoto v. McDonald s Corp., No. CV063032PSGFMOX, 2007 WL 9711198, at *2 n.1 (C.D. Cal. July 5, 2007). ; Gilbert Unified Sch. Dist. No. 41, 2012 WL 1564660, at *4 6 (same).

Preliminarily, Plaintiff appears to contend that fraud claims are exempt from the economic loss doctrine. (See Doc. 306 at 21 Jes Solar Co. v. Matinee Energy, Inc., No. CV 12-626

TUC DCB, 2015 WL 10943562, at *5 (D. Ariz. Nov. 2, 2015)))). But, the cases Plaintiff cites do not stand for the proposition that a fraud claim is never barred by the economic loss doctrine. For example, in

Jes Solar Co. v. Matinee Energy, Inc., the plaintiffs

2015 WL 10943562, at *5. Therefore, the Jes Solar Co. court found that the facts there preponderated in favor of applying tort law because the plaintiffs would not have expected the defendants to have no intention of performing the contracts. See id. No such claim is presented here. Arizona law does not otherwise provide for a fraud exception to the economic loss doctrine. See, e.g., CIT Fin. LLC, 2016 WL 6610604, at *5 (concluding fraud claim was barred by economic loss doctrine).

act claim and fraud claim are the same. In short, each of

concern issues regarding of various provisions of the Supply Agreement. (Doc. 59 at 35 38). As such, like CIT Finance LLC, fraud claim is inseparable from its breach of contract claim, and thus, the facts preponderate in favor of applying contract law. Moreover, the policy considerations underlying the economic loss doctrine identified above also weigh in favor of applying the doctrine here. Both Plaintiff and Defendant are sophisticated parties that had equal bargaining power, and thus, each party could negotiate and bargain to order their contractual relationship and allocate the risks of breach according to their preferences. See Gilbert Unified Sch. Dist. No. 41, 2012 WL 1564660, at *4 5. As a result, there are contractual remedies available to Plaintiff should Plaintiff show Defendant did not perform its end of the bargained-for Supply Agreement. The fact that Plaintiff seeks punitive damages does not affect this analysis. See CIT Fin., 2016 WL 6610604, at *5 6. Consequently, the facts here preponderate in favor of applying contract law; thus, barred by the economic loss doctrine.

3. Conclusion

(Doc. 229) s claim, lost business value claim, and its fraud claim (and thus its prayer for punitive damages as well (Doc. 59 at 38)). The Court denies the The Court clarifies that this Order

claim. IV. As noted above, also pending before the Court is Motion to Preclude T Expert Greg Mischou (Doc. 296).

A party seeking to offer an expert opinion must show that the opinion satisfies the Rule 702 requires ensure that any and all scientific testimony or evidence admitted is not only See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). See id. at 591.

n See supra Section III.b.1.B. testimony will be offered for. (Doc. 324 at 18 20 (stating that Mischou wa .

expert report, that his testimony could be offered for any other relevant issue. (See Doc. 296-4 at 4 asked to consider and provide [his] opinions regarding the potential value [Plaintiff] would have been able to obtain from a merger and acquisition or company sale absent alleged breaches of the Supply Agreement) as an expert is granted because his expert testimony is irrelevant, and thus, not fit for

this case. 18 V. MOTIONS TO SEAL

Plaintiff and Defendant have filed various motions to seal in connection with the partial summary judgment motions (Docs. 153; 229) motion to exclude Mischou from offering expert testimony (Doc. 296). (See Docs. 194; 228; 304; 309; 321; 323; 345; 346 resolution of these motions, the requests to file unredacted versions of these materials into the record are denied as unnecessary. See Maui Elec. Co. v. Chromalloy Gas Turbine, LLC, No. CIV. 12-00486 SOM, 2015 WL 1442961, at *16 17 (D. Haw. Mar. 27, 2015). All documents filed lodged under seal will thus remain lodged under seal. VI. CONCLUSION 19 Based on the foregoing, IT IS ORDERED is GRANTED IN PART and DENIED IN PART. The Motion is GRANTED as to

No. MD140611OM150514. The Motion is DENIED Counterclaim relating to the thirty-two other invoices (i.e., each

invoice other than Invoice No. MD140611OM150514) Counterclaim.

18 Although the Court had previously indicated that granting De Summary Judgment on the issue of lost profits damages could be a ground to exclude the expert testimony of Bratic and Sasson, (Doc. 343 at 1 n.1), t discuss the other issues that Bratic and Sasson have opined on. (See Doc. 293 (motion to exclude Bratic); Doc. 299 (motion to exclude Sasson)). 293-1) -1), the Court finds that the expert testimony of Bratic and Sasson may be relevant despite the unavailability of lost profit damages. Accordingly, to follow. 19 To be clear, any partial summary judgment may proceed to trial.

IT IS FURTHER ORDERED Judgment (Doc. 229) is GRANTED IN PART and DENIED IN PART. The Motion is

GRANTED profits claim, lost business value claim, and fraud claim. The Motion is DENIED lost development support costs claim. IT IS FURTHER ORDERED ou (Doc. 296) is GRANTED as his

expert testimony is irrelevant. IT IS FURTHER ORDERED that the following motions to seal (Docs. 194; 228; 304; 309; 321; 323; 345; 346) are DENIED for the reason indicated above. The Clerk of Court shall not unseal the related documents and shall instead leave Docs. 195; 230; 298; 305; 307; 310; 325; 329; 336 lodged under seal. Dated this 13th day of November, 2019.