IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MCF LIQUIDATION, LLC f/k/a MRS. CLARK'S FOODS, L.C., Plaintiff(s), vs. INTERNATIONAL SUNTRADE, INC. an MILLER & SMITH FOODS, INC., Defendant(s).	4:13-cv-00514-HCA RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motion for total summary judgment [40]. Plaintiff has resisted. Hearing was held on September 30, 2015.

MCF Liquidation, LLC purchased the assets of Mrs. Clark's Foods, L.C. in October 2012. For purposes of this ruling, the Court will refer to plaintiff as Mrs. Clark's. Mrs. Clark's business included labeling and distributing juices. Plaintiff's claim arises out of the sale of apple juice concentrate ("AJC") to Mrs. Clark's in April 2011 by defendants Miller & Smith Foods, Inc. and International Suntrade, Inc., Canadian food brokers/distributors. In November 2011 Mrs. Clark's found out the AJC contained isomaltose, rendering the AJC adulterated, resulting in a product recall.

Mrs. Clark's filed a lawsuit in the Iowa District Court for Polk County on October 16, 2013, asserting four causes of action against the defendants: breach of contract (Count I), breach of warranty (Count II), negligence (Count III) and fraud (Count IV). Defendants removed the case to this Court on December 27, 2013 on the basis of federal question and diversity jurisdiction. 28 U.S.C. § 1331, 1332(a). Defendants have answered denying plaintiff's claims. Defendants' summary judgment motion challenges all of plaintiff's claims. In response, plaintiff resists only

the challenges to its breach of contract and breach of warranty claims, acknowledging the economic loss doctrine precludes its negligence claim (Count III) and that there is no evidence to support the fraud claim (Count IV). The motion is submitted on the motion papers and arguments of counsel.

I.

STANDARDS FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (moving party has initial responsibility of demonstrating absence of genuine issue of material fact). "If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011)(en banc)(quoting *Celotex Corp.*, 477 U.S. at 324).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). "The court need consider only the cited materials, but it may consider other materials in the

record." Fed. R. Civ. P. 56(c)(3). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At this stage, the court's function is not to determine credibility, weigh the evidence or determine the truth of the matter. *Id.* at 249, 255. Instead, the court views the record in the light most favorable to the nonmoving party and determines whether there is a genuine issue for trial. *Id.*; *see also Torgerson*, 643 F.3d at 1042.

II.

FACTS

The following facts are undisputed. At all times material to this litigation Mrs. Clark's was an Iowa company engaged in the business of labeling and distributing juice beverages, among other food products. (Def. App. [40-1] at 3-4). Defendants International Suntrade, Inc. ("Suntrade") and Miller & Smith Foods, Inc. ("Miller & Smith") are Canadian companies which act as brokers distributing juice concentrates manufactured by third-parties. (*Id.* at 4, 46). Gary Lukins was Mrs. Clark's Vice President of Purchasing in April 2011. (*Id.* at 16, 45). Lydia Zhang was a representative for Miller & Smith. (Pl. App. [46-2] at 13, 23-33). Mr. Lukins and Ms. Zhang communicated about AJC purchases since at least 2009. (*Id.* at 23-33). Prior to April 19, 2011 Miller & Smith purchased Suntrade and Ms. Zhang remained an employee of Miller & Smith/Suntrade. (*Id.* at 34).

In April 2011 Mr. Lukins and Ms. Zhang negotiated a deal for the sale of AJC to Mrs. Clark's. (Def. App. [40-1] at 16; Pl. App. [46-3] at 36). They exchanged emails regarding the price,

quantities and color quality of the AJC. (Def. App. [40-1] at 22-23). The AJC had been manufactured by the Lingbao Xinyuan Fruit Industry Company ("Lingbao"). (Def. App. [40-1] at 32, 46). Mrs. Clark's had not purchased AJC produced by Lingbao nor had Suntrade brokered an AJC purchase with Mrs. Clark's prior to this transaction. (Def. Stmt. of Facts [41-1] ¶¶ 39, 41; Pl. Resp. [46-1] ¶ 39, 41). Before the paperwork was complete and the product shipped, Ms. Zhang emailed Mr. Lukins on April 19, 2011 stating: "Our company has purchased International Suntrade Inc. and I am into this company to work on the same business. So can you change the vender [sic] name and address to below in your system? Because we are going to invoice you from International Suntrade, Inc." (Pl. App. [46-3] at 34).

A Purchase Order generated by Miller & Smith on April 19, 2011 described the product as "Conc. Apple Medium Acid." (Def. App. [40-1] at 25). A Confirmation of Sale from Suntrade, also generated on April 19, 2011, described the product as "Apple Juice Concentrate 1.5%+ acid and 25-32% around color." (*Id.* at 24). Bills of Lading from Suntrade – stamped "received" on April 25, 2011 – described the AJC as "APPLECONC" and "Drums Apple Conc. Clr." (*Id.* at 26-28). Mrs. Clark's received the AJC on April 25, 2011. (*Id.* at 17, 26). A final invoice from Suntrade described the product as "Chinese Apple Juice Concentrate, Med Acid." (*Id.* at 31). That invoice also contained the language "All claims must be made upon receipt of goods." (*Id.*)[1] The first document identifying Lingbao as the manufacturer of the AJC is its Certificate of Analysis which described the product as "Apple Juice Concentrate." (*Id.* at 32). Mrs. Clark's paid for the AJC on May 19, 2011 by issuing a check payable to "International Suntrade, Inc." with a handwritten note stating "Miller + Smith was broker for International Suntrade." (*Id.* at 30). Neither Suntrade nor

[1] The copy included in the summary judgment record does not clearly contain that language; however, the parties agree it is contained in the invoice. (Def. Stmt. of Facts [40-1] ¶ 53; Pl. Resp. [46-1] ¶ 53).

Miller & Smith inspected the AJC or tested it for authenticity before distributing it to Mrs. Clarks. (Def. Stmt. of Facts [40-1] ¶ 15; Pl. Resp. [46-1] ¶ 15).

Mrs. Clark's had a Standard Operating Procedure ("SOP") No. 10.01.03, "Fruit Concentrate and Puree Authenticity Testing New Supplier" which discussed its requirements for testing concentrates it purchased. (Def. App. [40-1] at 87). Section 3.0 of the SOP provided the following testing procedure for product from a new supplier

> Prior to final approval and use in MCF products, the first lot of concentrate or puree supplied by a new supplier will be held for authenticity testing. If the concentrate or puree passes authenticity testing and all other routine tests conducted by MCF, the lot will be released and the supplier approved.

(*Id.*). Section 4.0 of the SOP dealt with products purchased from existing suppliers and provided: "Routine Testing. For those concentrates and purees obtained by MCF purchasing, random sampling for authenticity testing will be conducted." (*Id.*)

Mrs. Clark's did not do in-house authenticity testing on products although it performed other tests on AJC received from approved suppliers prior to using the concentrate in production. (Def. App. [40-1] at 79; Pl. App. [46-3] at 44-46). Mark Bence, operations manager for Mrs. Clark's, testified in his deposition that prior to November 2011 Mrs. Clark's did authenticity testing at random on product received from existing suppliers. (Pl. App. [46-3] at 41). On November 19, 2011, after receiving test results on AJC provided by a different Chinese company, Mitsui, stating that Mitsui's product was not authentic, Mrs. Clark's had an outside testing company, Eurofins, test the AJC obtained from Suntrade. (Pl. App. [46-3] at 54, 58). Eurofins test results allegedly determined that Suntrade's AJC contained isomaltose, which meant the AJC was "adulterated" for FDA purposes. (Def. App. [40-1] at 33-34). Mrs. Clark's had incorporated some of Suntrade's AJC in juice products that Mrs. Clark's had produced and distributed; therefore, Mrs. Clark's issued a recall of those products. (*Id.* at 35-36).

> On December 1, 2011 Mrs. Clark's provided the following notification to Miller & Smith:
>
> > Mrs. Clark's Foods has determined through testing by an independent laboratory that apple juice concentrate supplied to us by your company does not meet the certificate of authenticity.
> >
> > Mrs. Clark's Foods has incurred significant expense and damages as a result of the adulterated apple juice concentrate supplied by your company.
> >
> > Mrs. Clark's Foods will expect to recover all costs and damages as a result of this issue from you.

(Def. App. [40-1] at 38). This lawsuit followed.

III.

LEGAL ANALYSIS

The parties agree the Convention on International Sale of Goods (CISG) applies in this case because the parties are from the United States and Canada, respectively, and both countries are contracting states to the CISG. *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002)(citing 15 U.S.C. App., Art. 1(a)). There is little case law addressing the CISG, but generally "courts look to its language and to the 'general principles' upon which it is based" in resolving cases arising under it. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, 708 (N.D. Ill. 2004). The treaty preempts state law causes of action arising from "the formation of a contract of sale and the rights and obligations of the seller and buyer arising from such a contract." *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151-52 (N.D. Cal. 2001); *see Usinor*, 209 F. Supp. 2d at 885 (quoting Art. 4 of CISG). "The CISG does not preempt a private contract between parties; instead it provides a statutory authority from which contract provisions are interpreted, fills gaps in contract language, and governs issues not addressed by the contract." *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*,, No. 01 C 5938, 2003 WL 223187, at *3 (N.D. Ill. Jan. 30, 2003).

Under CISG, "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." *Chateau des Charmes Wines LTD v. Sabate USA, Inc.*, 328 F.3d 528, 531 (9th Cir. 2003)(quoting CISG, art. 11).

> A proposal is an offer if it is sufficiently definite to "indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price," [CISG], art. 14, and it demonstrates an intention by the offeror to be bund if the proposal is accepted. *Id.* In turn, an offer is accepted if the offeree makes a "statement . . . or other conduct . . . indicating assent to an offer." *Id.*, art. 18. Further, a contract is concluded at the moment when an acceptance of an offer becomes effective." *Id.*, art. 23.

Chateau, 328 F.3d at 531. "[A] contract may be modified or terminated by the mere agreement of the parties." *Id.* (quoting CISG, art. 29(a)). However, "[a]dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's ability to the other or the settlement of disputes are considered to alter the terms of the offer materially." *Miami Valley Paper, LLC v. Lebbing Eng. & Consulting GMBH*, No. 1:05-cv-00702, 2009 WL 818618, at *4 (S.D. Ohio March 26, 2009)(quoting CISG, art. 19(3)).

> [T]he CISG has no statute of frauds, and does not require contracts for sale to be concluded in writing, instead allowing a contract to be 'proved by any means, including witnesses.' CISG Art. 11. Finally, the CISG contains no parole evidence rule, but allows the Court to consider statements or conduct of a contracting party to establish, modify, or alter the terms of a contract. CISG Art. 8(2).

Id. at *4-5. "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. . . ." *Chicago Prime Packers*, 320 F. Supp. 2d at 709 (quoting CISG, Art. 25).

A. Failure to Examine Product and Give Reasonable Notice

Defendants mount three challenges to the timeliness of plaintiff's claims concerning the quality of the AJC, all independent of each other: (1) the final invoice language governs the time

by which claim should have been made; (2) Mrs. Clark's inspection and notice was not reasonable under the CISG or under Mrs. Clark's own Standard Operating Procedures; and (3) the Iowa UCC would bar Mrs. Clark's claims. At hearing defense counsel conceded there is a genuine disputed factual issue in conjunction with the final invoice language argument; therefore, the Court does not address that issue in this ruling.

1. Reasonableness under CISG

Citing to *Chicago Prime*, defendants argue Mrs. Clark's seven-month delay in subjecting the AJC to authenticity testing is *per se* unreasonable under the CISG. Alternatively, it argues Mrs. Clark's failed to follow its own procedures for product inspection because Suntrade and Lingbao were new suppliers under Mrs. Clark's SOP. Plaintiff responds there are fact issues concerning the reasonableness of Mrs. Clark's inspection. In reply, defendant argues the Court should hold as a matter of law the notice of nonformance was unreasonable because it occurred *after* Suntrade's product had been used and repackaged, citing to international cases under the CISG and state court cases based on UCC language closely approximating the language of CISG, Art. 39(1). (Reply [51] at 4).

The CISG provides: "The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances." *Chicago Prime Packers*, 320 F. Supp. 2d at 709 (quoting CISG, Art. 38(1)).

> (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity with a reasonable time after he has discovered it or ought to have discovered it.
>
> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Id. (quoting CISG, Art. 39). "The determination of what period of time is 'practicable' is a factual one and depends on the circumstances of the case." *Id.* at 712; *Miami Valley Paper*, 2009 WL 818618, at *8 ("[T]he determination of what time period is reasonable for a party to alert the other party of an alleged non-conformity is fact sensitive, and must be determined on a case by case basis."). For example, "[i]n making this determination, one court considered 'a number of other factors, such as the complexity of the machinery, the method of delivery, the need for training and ongoing repairs with respect to the machinery, and the skill of the plaintiff's employees." *Miami Valley Paper*, 2009 WL 818618, at *8 (quoting *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, 2001 U.S. Dist. LEXIS 21630, No. 01 C 691, 2001 WL 34046276 (W.D. Mich. Dec. 17, 2001)).

In the present case, the delay between receipt of the product and sampling was seven months. Defendants argue that cases discussed in *Chicago Prime* hold that timely inspection (in the case of perishable or durable goods) should be no more than three to four days. Plaintiff responds reasonableness is a fact-specific inquiry and the CISG sets an outer limit of two years in recognition that there may be long period of time before non-conformity is discovered with some products. (Pl. Brief [47] at 9). Plaintiff argues AJC had a shelf life up to two years (Pl. App. [46-3] at 9). Mr. Jahromi of Eurofins testified that receipt of a sample for testing seven months after it had been received from the shipper was not unusual in the industry. (*Id.* at 60). Defendants were notified of a problem within ten days after Mrs. Clark's received the Eurofins report, well within the two year period. (Pl. Brief [47] at 9).

With respect to Mrs. Clark's Standard Operating Procedures, there are material fact questions apparent in the record. The SOP provides that if Mrs. Clark's purchased product from a new supplier, an authenticity test would be performed before the product was put into production – the product was to be placed on "cautionary hold" (Def. App. [40-1] at 87; Pl. App. [46-3] at

44)). Defendants argue Suntrade as well as Lingbao were "new suppliers" under the SOP and Mrs. Clark's failed to place the product on hold in compliance with its own procedures. (Def. Brief [41] at 8-9). Plaintiff responds that Mr. Lukins testified Lingbao would be considered a manufacturer or producer but not a supplier under its procedures (Pl. App. [46-3] at 15). Mr. Bence testified Suntrade was a qualified/approved supplier because Mrs. Clark's had purchased from them as Miller & Smith previously, therefore, the "new supplier" procedures would not apply. (*Id.* at 42). Mr. Bence also testified, however, that Mrs. Clark's required new supplier qualification for the various producers tied to a broker. (Pl. App. [46-3] at 42). Plaintiff also has offered the report of its expert witness Dr. James Marsden, who gives the opinion that Mrs. Clark's "quality assurance programs, specifications and protocols . . . [are] consistent with best practices in the food industry." (Pl. App. [46-3] at 49). Dr. Marsden also gives the opinion "[t]he responsibility for assuring that the ingredient meets specifications and all FDA requirements lies with the supplier of that ingredient." (*Id.*) From Dr. Marsden's report and defendants' supplemental appendix it appears defendants have expert witnesses with contrary opinions. (*Id.*; Def. Supp. App. [51-1] at 22-24).

As for the cases defendants cite in their reply concerning the buyer's loss of right to sue for nonconformity if goods are transformed or substantially changed prior to their inspection, the German case involving the sale of apple juice concentrate, *12 March 2001 Appellate Court Stuttgart (Apple Juice Concentrate case),* http://cisgw3.law.pace.edu/cases/010312gl.html. appears to have gone to trial and was decided on a full evidentiary record, not on pretrial motions. It is difficult to discern the procedural posture of the other international cases cited by defendant.[2] At this time there is insufficient evidence in the summary judgment record for the Court to make any determination as a matter of law whether Mrs. Clark's "transformed" or "substantially

[2] The Court thanks counsel for providing translated versions of the cases. [54].

changed" the AJC prior to its inspection. The UCC cases cited by defendant also were determined by trial on a full evidentiary record concerning the circumstances of the respective sales and use of product.

The factual record on breach of contract under the CISG is sufficiently disputed on this record to preclude entry of summary judgment in favor of defendants on Count I of the removed Petition.[3]

2. Reasonableness under Iowa UCC

As discussed above, the CISG preempts state law relating to contract claims between a buyer and seller. *Asante Technologies,* 164 F. Supp. 2d at 1151-52; *Usinor*, 209 F. Supp. 2d at 885 (quoting Art. 4 of CISG). In *Chicago Packers*, the court noted that "[c]ase law interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC") may also inform the court where the language of the relevant CISG provisions tracks that of the UCC. . . . However, UCC caselaw 'is not *per se* applicable.'" 320 F. Supp. 2d at 709 (quoting *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995)(quoting in turn *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (C.I.T. 1989)). Defendants argues that analysis under the Iowa UCC would lead to the same result for which it argues under the CISG. Specifically, defendants refer to two sections in the Iowa UCC as applying in this case:

> (1) Whether a time for taking an action required by this chapter is reasonable depends on the nature, purpose, and circumstances of the action.
>
> (2) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

[3] At hearing, defendants' counsel clarified that the timeliness arguments applied to both the contract and warranty claims. Factual disputes exist as to both claims on the timeliness arguments.

Iowa Code § 554.1205. Defendants point to the final invoice language (which at hearing counsel agreed was a factual issue) as supporting application of this provision to bar plaintiff's claim for failing to inspect the AJC upon receipt. In addition, defendants cite to

> 2. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

Iowa Code § 554.2608. Defendant argues Mrs. Clark's failure to follow its SOP requiring authenticity testing for ingredients obtained from a new supplier before it blended the AJC into other products and failure to test the product until seven months after it had been accepted falls within this provision of the Iowa UCC.

As plaintiff responded at hearing and noted above, there are factual issues concerning Mrs. Clark's SOP, how it was applied and whether Suntrade was a new supplier under the SOP. Also at issue is whether Mrs. Clark's substantially changed the condition of the AJC. At hearing, counsel noted that a large portion of the AJC used was as 100% apple juice, entailing bottling and labeling the product from the barrels with no change in the product otherwise.

The factual record on breach of contract under the Iowa UCC, if applicable, is sufficiently disputed on this record to preclude entry of summary judgment in favor of defendants on Count I of the removed Petition.

B. Warranty of Authenticity or Fitness for Particular Purpose

Defendants argue they did not promise the AJC was 100% pure nor did they know the purpose for which Mrs. Clark's purchased the AJC. Plaintiff responds there are genuine issues of material fact concerning what defendants warranted or knew about Mrs. Clark's purpose.

The CISG provides that "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract," and "the goods do not conform with the contract unless

they . . . are fit for the purpose for which goods of the same description would ordinarily be used" or "are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." *Chicago Prime Packers*, 320 F. Supp. 2d at 709 (quoting CISG, Art. 35); CISG, Art. 35(2)(b). "The seller is liable in accordance with the contract and this Convention for any lack of conformity." *Id.* (quoting CISG, Art. 36).

Here as with the breach of contract claim, there is a factual dispute concerning defendants' knowledge of Mrs. Clark's requirement of only 100% apple concentrate. Defendants point to the various transaction documents, which do not reference 100% AJC. (Def. App. [40-1] at 24-29, 31). In response plaintiff points to Mr. Lukins' testimony:

> . . . Mrs. Clark's Foods, had never bought concentrates that are less than 100 percent unless it's a blend, ... [W]e have a long practice of – you know, decades, actually of buying apple juice that, by definition, apple juice is 100 percent apple juice or it would have another label attached to it by definition.

(Pl. App. [46-3] at 7). Mrs. Clark's specifications at issue state "[t]he concentrate is prepared by physically removing water from unsweetened, unacidified, unfermented apple juice. The juice is produced from sound, clean, ripe apples. No other fruit juice, sugars or other additives shall be added." (Ex. 20 (Pl. App. [46-3] at 10). The summary judgment record contains evidence of defendant's knowledge of specifications in Ms. Zhang's emails that the product she had for Mr. Lukins met Mrs. Clark's "specifications." (Pl. App. [46-3] at 26-27). Mr. Lukins testified he shared Exhibit 20 with Lydia Zhang. (Pl. App. [46-3] at 19). "[T]he CISG contains no parole evidence rule, but allows the Court to consider statements or conduct of a contracting party to establish, modify, or alter the terms of a contract. CISG Art. 8(2)." *Miami Valley Paper*, 2009 WL 818618, at *4.

The factual record on breach of warranty under the CISG is sufficiently disputed on this record to preclude entry of summary judgment in favor of defendants on Count II of the removed Petition.

C. Waiver of Contract Defenses

Finally, in its resistance, plaintiff argues defendants waived their right to assert contract defenses based on an email from Rick MacNeil, a representative of Suntrade, in response to Mr. Lukins' notification that AJC should be removed from Mrs. Clark's warehouse. (Pl. App. [46-3] at 82-84). At first Mr. MacNeil responded to Mr. Lukins telling him Suntrade would "look into from this end and arrange payment and removal." (*Id.* at 82). As defendants point out in reply, however, some twenty-six minutes later Mr. MacNeil responded he had reviewed documents and had no record of any claim or rejection since delivery in April 2011. (*Id.*) The email exchange post-dates Mrs. Clark's December 1, 2011 notice of defect. (Def. App. [40-1] at 37-38) Additional emails in defendants' reply appendix indicate Mr. MacNeil was not aware Mrs. Clark's had made a claim concerning the AJC until Mr. Lukins provided further information. (Def. Supp. App. [51-1] at 8-9). The steps taken after Mr. Lukins' initial email exchange with Mr. MacNeil are not consistent with waiver of any defenses. (*Id.*) Given this state of the record, and the fact that plaintiff has not filed a summary judgment motion on Suntrade's defenses, the Court will not treat Mr. MacNeil's email as an affirmative waiver of substantial rights by Suntrade.

IV.

RULING AND ORDER

Plaintiff has conceded that summary judgment should be entered on Counts III and IV of the removed Petition. There are factual disputes which preclude entry of summary judgment on Counts I and II of the removed Petition.

Defendants' motion for summary judgment [40] is **granted in part and denied in part** as above. The motion **is granted** as to Counts III and IV of the removed Petition, which are dismissed with prejudice. The motion **is denied** as to Counts I and II of the removed Petition.

IT IS SO ORDERED.

Dated this 16th day of November, 2015.

Helen C. Adams

HELEN C. ADAMS
UNITED STATES MAGISTRATE JUDGE