Case No. 05-13005

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

TREIBACHER INDUSTRIE, AG,
Plaintiff-Appellee,

v.

ALLEGHENY TECHNOLOGIES, INC.
a Pennsylvania corporation, et al.,
Defendants,

TDY INDUSTRIES, INC.,

Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of Alabama
Case No. CV-01-HS-2872-NE

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The defendant/appellant, TDY Industries, Inc., certifies that the following is a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations known to it that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judge:

Virginia Emerson Hopkins

Plaintiff/Appellee:

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Defendant/Appellant:

TDY Industries, Inc.

Parent Company of Defendant/Appellant:

Allegheny Technologies Incorporated

Subsidiaries of Allegheny Technologies Incorporated:

Active Domestic Entities:

Allegheny Technologies Incorporated

Allegheny Ludlum Corporation

ALC Funding Corporation

Allegheny Technologies Asia, Inc.

Allegheny Technologies Export Sales Corporation

Allegheny Technologies International, Inc.

AII Acquisition Corporation

AII Investment Corporation

ATI Canada Holdings, Inc.

ATI Funding Corporation

ATI Properties, Inc.

Environmental, Inc.

International Hearth Melting LLC

Jessop Steel Company

Jewel Acquisition, LLC

Oregon Metallurgical Corporation

Relentless Insurance, Inc.

Rome Metals, LLC

TDY Companies, Inc.

TDY Holdings, LLC

TDY Industries, Inc.

Ti Oregon, Inc. (formerly known as Titanium Industries, Inc.)

Titanium Wire Corporation

Active Foreign Legal Entities:

Allegheny Technologies GmbH

Allegheny Technologies Japan Ltd.

Allegheny Technologies Taiwan Inc.

Allvac Ltd.

ATI Garryson Ltd.

Metalworking Products Canada Co.

Shanghai STAL Precision Stainless Steel

Stellram GmbH

Stellram Iberica S.A.

Stellram Limited (United Kingdom)

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STATEMENT REGARDING ORAL ARGUMENT

Appellant desires oral argument because this case presents the following questions of apparent first impression in any United States Court of Appeals:

(1) under the United Nations Convention on Contracts for the International Sales of Goods ("CISG"), 15 U.S.C.A. App. (West 1997), may an industry-wide usage be overridden without an express agreement to that effect by the parties to a contract?;

(2) may the courts of signatory nations to the CISG supplement the remedies specified in the treaty with additional local tort-based remedies?; and

(3) does Article 77 of the CISG permit a plaintiff to delay mitigation for many months, particularly in a volatile market?

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 (2002) because Treibacher alleged a claim for breach of contract under the CISG, a treaty of the United States, and under 28 U.S.C. § 1332(a)(2), because the matter in controversy exceeded $75,000 in value and was between citizens of the United States and a citizen of a foreign state.

This Court has jurisdiction under 28 U.S.C. § 1291 (2002) over the appeal from the Order of Judgment of the District Court entered on April 27, 2005, which disposed of all parties' claims. Doc 85. The Notice of Appeal was filed on May 26, 2005. Doc 86.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in its application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), 15 U.S.C.A App. (West 1997), by permitting a trade usage to be overridden by an alleged practice between the parties?

2. Whether the District Court erred in finding that under the CISG, evidence about a single instance could establish a practice between the parties?

3. Whether the District Court erred in finding that vague statements and ambiguous conduct could establish a practice between the parties?

4. Whether TDY is entitled to judgment in its favor on the contract claims because the evidence cannot support a conclusion that TDY was obligated to purchase any consigned materials?

5. In the alternative, whether the December 2000 communication established a contract under the CISG?

6. Whether Treibacher's promissory fraud claim is preempted by the Supremacy clause and the CISG?

7. In the alternative, whether Treibacher proved the elements necessary to establish promissory fraud?

8. Whether the District Court erred in not applying the CISG's reasonableness standard to Treibacher's delayed efforts to mitigate losses?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Plaintiff, Treibacher Industrie AG ("Treibacher") filed a Complaint on November 9, 2001, in the United States District Court of the Northern District of Alabama ("District Court"). Doc 1.[1]

The Complaint asserted claims for breach of contract under the CISG; breach of contract under the Alabama Uniform Commercial Code; unjust enrichment and similar theories; conversion; and "misrepresentation." Doc 1 – Pgs 6-10. The District Court later granted TDY's motion for summary judgment on the unjust enrichment, conversion, and Alabama contract claims, but denied summary judgment on the CISG contract claim and the state-law misrepresentation claim. Doc 47. That order also granted a motion to strike an affidavit of Robert Packer ("Packer") relating to his claimed expert opinion regarding industry practice, but denied the motion as to his dealings with Treibacher. The District

[1] On January 28, 2002, the Complaint was amended to correct the name of one defendant ("Alldyne Powder Technologies") to TDY Industries, Inc. ("TDY"). Doc 12. Claims against another defendant, Allegheny Technologies, Inc., were dismissed by stipulation on July 1, 2004. Doc 52.

Another named Defendant, "Teledyne Advanced Materials and Metalworking Products," was another incorrect designation for TDY. *See* Doc 14. Although no formal act removed that Defendant from the action, the District Court informally eliminated references to it in its working caption and ordered "fictitious parties" stricken, *see,* Doc 57 -- ¶ 3. The final judgment refers only to TDY. Doc 85.

Court reaffirmed this ruling in response to TDY's motion in limine to preclude testimony by Packer. Doc 67 – Pgs 1-3; Doc 70.

A non-jury trial was held on February 22, 23, and 24, 2005. Doc 78. The parties later stipulated to the admission of three additional exhibits. Doc 77. On April 27, 2005, the District Court issued its Memorandum of Decision and Order of Judgment in favor of Treibacher on the CISG and promissory fraud claims. Docs 84, 85.

B. Statement of the Facts

1. The Industry and Its Usages

TDY manufactures tungsten-graded carbide products at its plant in Gurley, Alabama. Tantalum Carbide ("TaC") and a mixture of Tantalum Carbide and Niobium Carbide ("TaC NBC 50/50" or "TaC 50/50") are used in manufacturing TDY's products, which themselves are used to harden other metals. Treibacher, organized and existing under the laws of Austria, produces and refines alloys and metal powders, including TaC and TaC 50/50. Doc 1 – Pgs 1-2.

The "hard metals industry" consists of those who deal in hard metals, such as TaC, TaC 50/50, tungsten carbide, cobalt, titanium, and certain combinations Doc 78 – Pgs 760-61. The only expert testimony on trade usage established that from the 1970s to the present, the "consignment" system was widely used in the

hard metals industry. Doc 78 – Pgs 763-65, 769, 778-80. Under the system, a supplier of hard metal ships the material to a segregated location at its customer's plant. The customer withdraws material as it is needed and reports withdrawal to the supplier, which only then bills the customer for the material used, and replenishes the stocks stored with the customer. The supplier, however, remains free to retrieve the material at any time before the customer uses it, and the customer is under no obligation to use or pay for the consigned material if it is not used. Doc 78 – Pgs 783-84.[2]

2. Background of Treibacher's Dealings with TDY

Treibacher began doing business in the United States in 1991, through a sales agent, Trinitech International, Inc. ("Trinitech"). Doc 78 – Pgs 51, 54; PX 1.[3] The 1991 "Consignment Stock Agreement" between Treibacher and Trinitech provided for Treibacher to establish a consignment stock at Trinitech. PX 1.

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[2] Treibacher presented no expert testimony to contradict TDY's expert trade usage testimony. The District Court excluded Treibacher's proffered "expert" testimony from Packer, regarding industry usage. Doc 47 – Pgs 11-12; Doc 70. Packer was permitted to testify about his "understanding" that an arrangement between Treibacher and one other company required that company to consume consigned materials within a reasonable time . PX 72.

[3] "PX" refers throughout this brief to a Plaintiff's Exhibit admitted during trial. Each reference to a Plaintiff's Exhibit is followed by the exhibit number used in the trial court.

Trinitech identified customers for Treibacher's material, including TDY. Doc 78 – Pgs 54-55, 56. TDY issued blanket orders to Trinitech providing for delivery of material on "consignment," without any provision requiring TDY to use the product within any period of time. PX 4, PX 5-A, PX 6-B, PX 11-A.[4] As TDY used the Treibacher material, it would issue "usage reports" to Trinitech, PX 5-H, 5-J, 5-K, 5-M, 5-O; Doc 78 – Pgs 73-75, whereupon Treibacher would bill TDY for the amounts actually used. PX 5-I, 5-L, 5-N, 5-P; Doc 78 – Pgs 73-75. Trinitech, in its reports to Treibacher, treated the usage reports as the events giving rise to "sales" to TDY. PX 11-C, 11-D, 11-E; Doc 78 – Pgs 96-97. Similarly, Treibacher retained the goods in its inventory and did not record a "sale" until a usage report was received. Doc 78 – Pg 279.

Treibacher and Trinitech were aware that at least one other supplier (Starck) had material on consignment at TDY, PX 14,[5] and that at one point TDY had stated that it would not use the Treibacher material unless TDY had Treibacher's

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[4] By contrast, the 1991 agreement between Trinitech and Treibacher expressly provided that if Trinitech did not withdraw material within a certain time (six months), a deemed withdrawal would occur, and Trinitech would be invoiced, or, at Treibacher's option, Treibacher could retrieve the material. PX 1 ¶ 5.

[5] The District Court's finding that until November 2000 Treibacher had been TDY's "sole source" of the materials at issue is therefore contrary to the undisputed evidence in the record. Doc 84 – Pg 23.

price information and could determine whether the prices were competitive. PX 9-B.

In 1997, Treibacher terminated Trinitech's agency relationship, and began dealing directly with TDY. PX 3; Doc 78 – Pgs 66, 104. Treibacher's Peter Hinterhofer, who had handled Treibacher's relationship with Trinitech, Doc 78 – Pgs 51-52, 54, now dealt with TDY. Hinterhofer dealt initially with Harold Wiley at TDY, and following Wiley's retirement in 1998, with Conard Atchley. Doc 78 – Pg 480; PX-16; PX-17. It is undisputed that Treibacher and TDY never discussed the meaning of the term "consignment." Doc 78 – Pg 634. Nor did Treibacher and TDY ever enter a written agreement establishing the terms and conditions of their ongoing commercial relationship, or include in their communications any provision for mandatory or deemed usage by TDY based on the period of time Treibacher's material had been under consignment to TDY.

In early 1998, Treibacher noted to TDY that TDY's consumption was at a "lower level," but did not claim that TDY was under any obligation to use Treibacher's material by any deadline. PX 16. Hinterhofer testified in fact that he never told TDY that it was obligated to withdraw (i.e., use and pay for) consigned materials within any particular time. Doc 78 – Pg 337. Treibacher and TDY discussed projected volumes and prices, and the rest of the arrangement continued

"as usual," including "delivery on consignment," PX 18, PX 21, with the periodic issuance of usage reports followed by invoicing by Treibacher. Doc 78 – Pg 123. There was not a single instance in the seven years that TDY received goods on consignment from Treibacher where TDY paid for TaC that it had not withdrawn from the consignment store. There was no evidence that Treibacher had never requested payment for materials that had not been withdrawn and used until well after the present dispute arose.

On February 24, 2000, Atchley at TDY advised Hinterhofer by email that TDY would like to return 200 kilograms of titanium carbonitrate ("TiCN") being held in the consigned inventory, and requested advice on where to ship the TiCN. PX 27. On the same day, Atchley and Hinterhofer agreed by telephone that TDY would retain the TiCN. Hinterhofer's notes state: "He will store the 2 x 100 kg TiCN in Gurley. Shipment was made because of [his] explicit requirement."[6] In any event, TDY shortly thereafter used the TiCN and issued a usage report for it. PX 28-A; Doc 78 – Pg 141. The District Court relied "[p]articularly" on the isolated February 24, 2000, exchange to find that there was a practice between the parties requiring consigned material to be used rather than returned. From this, the

[6] Tr. 140. The transcript reads "this" rather than "his." The German word in the document reads "seinen," meaning his. PX 27.

District Court concluded that the trade usage of consignment did not apply to the meaning of consignment "as between these parties." Doc 84 – Pg 5.[7]

3. The Companies Respond to Shortages and Price Volatility

In October 2000, Treibacher executive Ulf Stromberger met with TDY's John Johnson and claimed that because of tantalum shortages, Treibacher could not commit to ship any more materials in 2000. Doc 78 – Pgs 641-42. The same month, Hinterhofer and Atchley met in Huntsville to discuss TDY's 2001 projected needs. Doc 78 – Pgs 144, 145-46. Hinterhofer asserted that demand in the electronics business had caused the market price for tantalum raw material to increase substantially, Doc 78 – Pgs 143-44; 146-47; 642, and advised TDY that Treibacher could not present an offer for next year because no raw materials were in place yet. Doc 78 – Pgs 146-47. It was about this time that TDY sensibly started seeking other suppliers of TaC, Doc 78 – Pgs 553, 588, an action the District Court found duplicitous. Doc 84 – Pgs 14-15, 23-34.

[7] The District Court did not expressly rule that the industry usage was inapplicable in this case, but implicitly did so. It noted TDY's expert testimony regarding industry usage and Packer's testimony of his contradictory understanding of his former company's arrangement with Treibacher, Doc 84 – Pg 5, but then did not rule on whether TDY had proven the industry-wide meaning of "consignment." Instead, the District Court simply stated that it had ascertained the parties' understanding of the term "consignment" by considering the parties' course of dealing; specifically, the February 2000 incident. Doc 84 – Pg 5.

4. The Disputed November Transactions

Contrary to his prior statements, on November 10, 2000, Hinterhofer advised Atchley by email that for January 2001, Treibacher could provide 1000 kg of TaC 50/50 at $492.50/kg, and 500 kg of TaC at $925/kg, and for February 2001, 1000 kg of TaC 50/50 and 400 kg of TaC at the same prices. The email gave Atchley only three days to respond to the offer. PX-30; Doc 78 – Pgs 151-52. On November 13, Atchley and Hinterhofer spoke by telephone, and Hinterhofer stated that Treibacher could supply an additional 1,600 kg of TaC in form of "choice,"[8] that Treibacher would not place the order for raw materials without an agreement in place with TDY, and needed to know TDY's decision the next day. PX-30; Doc 78 – Pgs 154-55. On November 14, 2000, Atchley replied to Hinterhofer's November 10 email, stating "I agree with the shipment's [sic] below, and also for the 1.6 ton of choice in feb. mar. and apr. 2000 [sic]." PX 32. On November 15, Hinterhofer replied by email "For order's sake, I would like to put down that you agreed to quantities and prices as mentioned below, except for the 400 kgs of TaC for Feb. 2001 arrival. The final quantities are: 1,000 kgs TaC/NbC 50/50 and 500 kgs TaC for mid/end Jan. 2001 arrival. 1000 kgs TaC/NbC 50/50 for late Feb.

[8] "Choice" meant that TDY could choose whether to receive shipment of pure TaC or the same amount of TaC blended with other substances, such as TaC 50/50. Doc 78 – Pg 155.

2001. 1,600 kgs of TaC contained in the quality (pure, 50/50, etc.) of your choice.” PX-34 (bottom email); Doc 78 – Pgs 159-60.

The November 2000 communications do not discuss or even mention the word “consignment,” but it was undisputed at trial that the materials were governed by the same “consignment” arrangement that previously existed between the parties. Doc 78 – Pgs 25-26, 244-45 (Hinterhofer testimony that all TDY business was “on consignment”). Treibacher asserted a claim for damages arising from TDY’s claimed duty to use and pay for the materials referred to in the November communications (the “November 2000 Claim”).

5. The Disputed December Transactions

Hinterhofer testified that on December 7 or 8, he offered additional TaC to Atchley, Doc 78 – Pg 177, and that he told Atchley: “I need his confirmation; I need his agreement for the quantities, otherwise I can’t purchase the raw material.” Doc 78 – Pg 178. Hinterhofer also testified that on December 14, he and Atchley agreed in a telephone call upon a volume of 2,000 kg of TaC, as “choice,” for arrival in May, June, and July 2001, at $1,100/kg. Doc 78 – Pgs 179-80; PX-40. On December 15, 2000, Hinterhofer sent an email to Atchley, stating:

Hi Conard,

> Following our phone conversation yesterday I'd like to put down that you confirmed to purchase 2,000 kgs of TaC contained in the quantity (pure, 50/50, etc.) of your choice for May, June and July 2001 arrival.
>
> Price: USD 1.100,00/kg for TaC resp. USD 580,00/kg for TaC/NbC 50/50.
>
> Please let me know as soon as possible which quality you will need because this is very important for our production/capacity planning.
>
> I'm looking forward to receiving your reconfirmation and remain with best regards
>
> Peter.

PX 40.

Atchley did not respond to the December 15 email. Doc 78 – Pgs 181, 432.

As with the November 2000 communications, Treibacher conceded at trial that to the extent that materials were discussed in December 2000, they were governed by the same "consignment" arrangement that previously existed between the parties. Doc 78 – Pgs 25-26; 244-45. No materials were ever delivered into consignment as a result of the December conversations, but Treibacher asserted a claim for damages arising from TDY's claimed duty to use and pay for the materials referred to in the December communications (the "December 2000 Claim").

6. The Relationship Deteriorates

As noted above, a significant part of the November 2000 transaction and all of the purported December 2000 transaction involved TDY's "choice" of TaC or TaC 50/50, and in the December 15 email, Hinterhofer asked to know TDY's choice "as soon as possible" because it was "very important" for Treibacher's planning. Treibacher did not inquire further until February 8, 2001. PX 43; Doc 78 – Pgs 170-71. The parties never reached an agreement on the form of "choice" (TaC or TaC 50/50) in which 100 kg of the November TaC would be delivered, PX 34, or any of the TaC referred to in the December 2000 communications. None of the December TaC was ever delivered to TDY.

In May 2001, Hinterhofer met with Atchley and for the first time proposed that by December 2001, TDY withdraw (i.e., use) all the November 2000 and December 2000 material. Doc 78 – Pgs 184-88. Later that month, Stromberger met with Johnson and set forth Treibacher's position that it had a "fixed and binding contract" with TDY and that it awaited TDY's instructions on the quality of material (TaC, TaC 50/50) and shipment. Doc 78 – Pgs 644, 646.

There ensued a long exchange of emails and letters. Johnson in late June 2001 proposed that TDY attempt to sell the material PX 47-A (bottom email), but following Stromberger's response that TDY was obligated to consume the entire amount covered by the November 2000 Claim and the December 2000 Claim, PX

47-A (top email), Johnson responded that he was putting together a schedule to use or sell material covered by specified internal TDY 'purchase orders.' PX 48.[9] On July 5, Stromberger repeated his position that TDY was required to consume the entire amounts claimed by Treibacher, PX 49, and Johnson responded that he could speak only to the material covered by the 'purchase orders,' and did not need any more material shipped. PX 50.

On July 9, Treibacher's CEO (Reinhard Iro) wrote to Johnson, stating that he (Iro) had been advised that TDY was not honoring its contract and stressing that Treibacher did not intend to accept losses due to TDY's "non performance." PX 51. Johnson wrote back on July 12, repeating his proposal to use or sell the Treibacher products covered by TDY's internal 'purchase orders,' indicating that those materials would likely be consumed by the first quarter of 2002, and proposing to prepare a list of the 'purchase orders,' quantities, and usage and milestone dates. PX 52. Iro responded expressing dissatisfaction with Johnson's proposal. Iro stated that "I have no idea what you mean with PO numbers. I just

[9] Upon receipt of materials at its facility, TDY would use its standard form of purchase order to serve as an internal tracking document to identify and track materials. The references in Johnson's e-mails to "POs" or "purchase orders" refer to these internal tracking documents, which, in turn, refer to materials already received by TDY. Doc 78 – Pg 582.

know that we have valid contracts for materials with a content of 5,975 kg TaC and with a total price of US$ 5.618.850 ….” PX 53.

On July 20, Johnson replied to Iro:

> At current business levels we have only small usage needs for the Treibacher material consigned at our plant. It looks like it will take into the middle of next year to consume this material. The question to you is does it make sense to just let it set on the shelf or should you move it into a productive location. We currently have no purchase orders issued to you for any material.

PX 54. On July 24, Johnson received a letter from Treibacher's U.S. lawyers. Doc 78 – Pg 605; Doc 77 – Pg 3. The letter stated that TDY (referred to as "Alldyne" in the letter), had "an agreement to purchase" tantalum from Treibacher, and declared that "Alldyne has breached its agreement with Treibacher. As a result of its breach of contract, Alldyne owes Treibacher the sum of $5,618,850.00."

7. Mitigation of Losses

Notwithstanding Treibacher's July demand letter, it made no sale in mitigation of claimed damages until October 2001, with the bulk occurring in November 2001. PX 65. By then, the market price had fallen significantly below the prices quoted in November and December 2000 ($925/kg and $1100/kg, respectively). In October 2001, Treibacher sold a small quantity of TaC at $475 and $490/kg. Larger amounts were sold in November 2001 at approximately

$200/kg.[10] The total proceeds from the sale of the TaC relating to Treibacher's November and December 2000 claims generated proceeds of only $919,345.04.[11]

C. Statement of Standard of Review

This is an appeal of an order entering judgment after a bench trial in favor of Treibacher on its claims for breach of contract and promissory fraud.

Conclusions of law are reviewed *de novo* and an appellate court may substitute its own judgment for that of the lower court. *Lumber & Wood Prods., Inc. v. New Hampshire Ins. Co.*, 807 F.2d 916, 918 (11th Cir. 1987). The interpretation of provisions of an international treaty is a question of law reviewed *de novo*. *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostina S.p.A.*, 144 F.3d 1384, 1387-1389 (11th Cir. 1998) (reversing district court's conclusion that the parol evidence rule applied to a contract governed by the CISG); *Furnes v. Reeves*, 362 F.3d 702, 711-712 (11th Cir. 2004) (applying *de novo* review to determine the meaning of Article 12 of the Hague Convention). Similarly, whether an international treaty preempts a state law cause of action is a question of law subject to *de novo* review. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 166,

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[10] The two sales in mid- to late-November, covering the vast majority of the undelivered material, were at $188/kg and $227/kg. PX 65-F & PX 65-P.

[11] Some of the TaC pertaining to Treibacher's November 2000 Claim had been delivered to TDY, and Treibacher did not attempt to sell that portion. Doc 78 – Pgs 218-19.

119 S. Ct. 662, 671 (1999) (concluding as a matter of law that the Warsaw Convention preempts the plaintiffs state law claim). Whether parties are bound by an agreement is also a legal question for the Court. *Multi-Financial Secs., Corp. v. King*, 386 F.3d 1364, 1366 (11th Cir. 2004) ("This Court reviews *de novo* questions of law such as the district court's interpretation of an agreement . . . and whether it binds the parties . . . .").

Facts found by a district court after trial are reviewed for clear error. Fed. R. Civ. P. 52(a). Clear error requires deferential review, but

> [o]ur deference to the district court is not unlimited . . and we will hold a finding of fact clearly erroneous if the record lacks substantial evidence to support it. Even if substantial evidence supports a finding, we must consider the evidence as a whole and set the finding aside if we are left with the impression that it is not the truth and right of the case.

Lincoln v. Board of Regents of the University System of Georgia, 697 F.2d 928, 939 (11th Cir. 1983) (citations omitted); *see also Epic Metals Corp. v. Souliere*, 99 F.3d 1034, 1042 (11th Cir. 1996) (reversing trial court's fact finding based on "ample evidence" to the contrary in the record when reviewed in its entirety); *General Trading Inc. v. Yale Materials Handling Corp*. 119 F.3d 1485, 1502 (11th Cir. 1997) (acknowledging that some facts supported trial court's finding, but reversing on review of record as a whole).

Thus, “[t]he ‘clearly erroneous’ standard under which we review the district court’s factual findings does not insulate factual findings influenced by legal error.” *Lincoln*, 697 F.2d at 939 n. 13 (citations omitted). The clearly erroneous standard has no application where the order under review presents mixed questions of law and fact. The court reviews such questions *de novo. Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

The CISG generally allows parties to a contract to define their relationship by agreement. CISG Article 6. Here, it is undisputed that although the parties used the term "consignment" to describe the dealings between them, the parties never discussed the meaning of "consignment." Under Article 9 of the CISG, in the absence of an actual agreement on the meaning of a term, the trade usage applies. TDY established at trial an industry-wide usage and understanding of "consignment" whereby the consignee was under no obligation to use the goods. The District Court erred in relying on what it called a "course of dealing" (a term defined under the Uniform Commercial Code) to supersede a trade usage, because under CISG Article 9(2), a usage can be overridden only by express agreement, and not merely by the parties' dealings or past practices.

The District Court also erred because it relied on a single ambiguous event to establish the parties' "course of dealing." Although Article 9(1) of the CISG, recognizes the effect of "practices … established between [the parties]," a single event cannot establish a "practice" under Article 9(1). Furthermore, the facts simply do not support the District Court's conclusion regarding the event. Because of these errors, and because the evidence is legally insufficient to contradict the evidence of the trade usage of "consignment," this Court should direct the District Court to enter judgment in favor of TDY on the contract claims.

In the alternative, because Treibacher's own witness testified that the parties' practice was to have written confirmation of agreements, the alleged December 2000 communications, with no written confirmation from TDY, did not form an agreement.

The District Court erred in entertaining and finding in Treibacher's favor on the tort claim for "promissory fraud." The claim arose from the same alleged facts as the breach of contract claim and resulted in the same alleged injury. As such, the claim was within the preemptive scope of the CISG, a federal treaty that provides the exclusive source of law defining the rights and obligations of international buyers and sellers of goods.

Even if Treibacher's promissory fraud claim was not preempted, Treibacher failed to carry its burden of proof on each element of the tort because there was no evidence that TDY had a "present intent to deceive" Treibacher at the time of the November and December 2000 communications.

Finally, even if liability remains undisturbed, the District Court's calculation of damages should be reversed. CISG Article 77 required Treibacher to take reasonable measures to mitigate damages, yet Treibacher waited months between TDY's unequivocal denial of any obligation under the claimed contracts and Treibacher's mitigation sales. Following substantial delay, the goods were sold at

a price sharply lower than the supposed contract price. The District Court did not address the reasonableness of the delay, but mechanically accepted Treibacher's sales as the correct mitigation amount.

ARGUMENT AND CITATIONS OF AUTHORITY

The dispute between Treibacher and TDY is governed by the CISG, an international treaty to which both Austria (Treibacher's principal place of business) and the United States (TDY's principal place of business) are signatories. An international treaty must be applied so as to give effect to the intent of the signatory nations. *El Al*, 525 U.S. at 167, 119 S. Ct. at 671.

This intent is best determined by the language of the treaty itself. *See MCC-Marble*, 144 F.3d at 1387 (relying on "plain language of convention"). However, when a treaty "contains no express statement" on a particular issue, *id.* at 1389, or when the "words lend themselves to divergent interpretations," *see El Al*, 525 U.S. at 168, 119 S. Ct. at 671, the court should rely on persuasive authority from the courts of other countries that are also parties to the treaty. "Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result." *MCC-Marble*, 144 F.3d at 1391; *see also El Al*, 525 U.S. at 175, 119 S. Ct. at 675. This Court has noted that in the absence of available international precedent, the court must rely on "academic commentary" to

determine the treaty's meaning. *Id.* at 1390-92 (relying on numerous secondary sources to determine whether the CISG recognized the parol evidence rule).

I. THE DISTRICT COURT COMMITTED LEGAL ERROR UNDER THE CISG BY ALLOWING TRADE USAGE TO BE OVERRIDEN BY A CLAIMED PRACTICE BETWEEN THE PARTIES CONSISTING OF A SINGLE AMBIGUOUS INCIDENT.

A. The District Court Erred as a Matter of Law under the CISG by Disregarding a Recognized Trade Usage in Favor of an Alleged Practice Between the Parties.

Article 9(2) of the CISG provides that an internationally recognized trade "usage" of which the parties to a contract knew or should have known becomes part of the contract, "unless otherwise agreed." TDY presented expert testimony that in the hard metals industry, "consignment" meant that material would be shipped to the customer, but would be stored separately and identified as property of the supplier until actually used by the customer, and that the customer was under no obligation to use any of a supplier's consignment inventory, and the supplier remained free to retrieve its product at any time. Doc 78 – Pgs 783-84.[12] The existence of such a usage would be decisive in this case because the District Court

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[12] Although the terminology varies, similar arrangements between suppliers and industrial consumers have been discussed in court decisions. *See, e.g., In re Georgetown Steel Co. LLC*, 318 B.R. 352, 354-55, 361 (Bankr. S.C. 2004) (summarizing consignment arrangement between supplier of hot briquetted iron and a steel producer); *Meinhard-Commercial Corp. v. Hargo Woolen Mills*, 112 N.H. 500, 503, 300 A.2d 321, 323 (1972) (summarizing arrangement between supplier of "card waste" and its customer, a producer of cloth).

acknowledged that all the dealings between TDY and Treibacher, including the November 2000 Claim and the December 2000 Claim, were on a "consignment" basis. Doc 78 – Pgs 25-26, 244-45. Supposedly to rebut TDY's expert testimony on trade usage, a former Treibacher customer testified that his arrangement with Treibacher obligated him to use the consigned material within a "reasonable time." PX 72.

The District Court acknowledged the evidence regarding the trade usage, Doc 84 – Pg 5, but never decided whether the industry usage was as TDY claimed. Instead, the District Court concluded that ***to TDY and Treibacher***, "consignment" meant only that invoicing would be delayed until actual withdrawal (use) of product, which was required to occur within some reasonable time after delivery. Doc 84 – Pg 5. The District Court relied on the parties' supposed "course of dealings," "[p]articularly" on a single February 2000 incident of considerable ambiguity in which TDY had requested Treibacher to take back some consigned TiCN. Doc 84 – Pgs 5-6. Although the inference drawn from that event by District Court is unsustainable (see section I.C. below), the District Court's analysis is flawed for a more fundamental reason.

In disregarding trade usage and relying on a supposed "course of dealing between <u>these</u> <u>parties</u>" to establish the parties' understanding of the term

"consignment," Doc 84 – Pg 5 (emphasis in original), [13] the District Court failed to follow CISG Article 9(2), which provides:

> The parties are considered, unless otherwise ***agreed***, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. (emphasis added)

Thus, Article 9(2) by its terms allows a trade usage to be overridden only by an agreement of the parties, and not merely by a practice that they (allegedly) have established between themselves.

Confirmation that the word "agreed" in Article 9(2) requires actual agreement, and not a mere practice found in a course of dealing, is provided in CISG Article 9(1). Article 9(1) provides: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." By distinguishing "agreed" from "established," Article 9(1) confirms that "agreed" refers to a process different from the establishment of a practice.

The drafting history of Article 9(2) of the CISG also confirms that a mere practice between the parties does not suffice to override a trade usage. *See*

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[13] The term "course of dealing" is a term in the Uniform Commercial Code. *See* Uniform Commercial Code § 1-303 (2004 ed.); former Uniform Commercial Code § 1-205 (1978 ed.). The CISG does not use the term; the analogous term in the CISG is "practices established between [the parties]." CISG Article 9(1).

generally El Al, 525 U.S. at 168, 119 S. Ct. at 671 (noting that negotiation and drafting history of a treaty is entitled to "great weight" in interpreting a treaty). In the drafting of what became Article 9(2), the Pakistani delegation proposed adding the words "[or] unless their conduct shows otherwise" following "unless otherwise agreed."[14] The proposed amendment was rejected.[15] As noted in a leading treatise on the CISG (by a member of the German delegation), "Accordingly, it can be assumed that a party can show that a usage does not apply only by proving that it rejected it." Peter Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sales of Goods* at 41 (1986).[16]

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[14] In the initial draft, what is now Article 9 was designated Article 8. *See* Legislative History of the 1980 Vienna Diplomatic Conference, Report of the First Committee, Document A/CONF.97/11, reproduced at www.cisg.law.pace.edu/cisg/1stcommittee/summaries9.html. The Pakistani amendment is found at subsection B(3)(v). Although the wording of the amendment suggested that Pakistan proposed substituting "unless their conduct shows otherwise" for "unless otherwise agreed," the Pakistani representative made clear in his comments that that was a mere "drafting error" and that "the phrase was in fact to be added to the existing text." *See* Legislative History of the 1980 Vienna Diplomatic Conference, Summary records of Meetings of the First Committee, 7th Meeting, 14 March 1980, reproduced at www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html at ¶ 26.

[15] *See* Legislative History of the 1980 Vienna Diplomatic Conference, Report of the First Committee, Document A/CONF.97/11, reproduced at www.cisg.law.pace.edu/cisg/1stcommittee/summaries9.html.

[16] An English translation of Professor Schlechtriem's text, from which the above quotation was taken, is set forth at www.cisg.law.pace.edu/cisg/biblio/schlechtriem.

Courts and commentators interpret CISG Article 9(2) to require an express agreement to override a usage. *See Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002) ("The usages and practices of the parties on the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties."), *aff'd in part and rev'd in part, on other grounds*, 386 F.3d 485 (2d Cir. 2004); Jorge Oviedo Albán, *Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9* § 4(b) (2004) (usages "will be superseded by any contrary express contractual terms");[17] S.K. Date-Bah, "Problems of Unification of International Sales Law from the Standpoint of Developing Countries" (noting that usage will not become an implied part of contract under CISG Article 9(2) if "it is in conflict with any express term agreed upon by the parties" and that usages can be excluded by the parties "if they agree on terms inconsistent" with the usages), as quoted in Alexandar Goldstajn, "Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention," at 82.[18]

[17] Professor Albán's article can be found at www.cisg.law.pace.edu/cisg/biblio/oviedoalban5.html.

[18] Professor Goldstajn's article, originally published in Petar Sarcevic & Paul Volken, eds., *International Sales of Goods: Dubrovnik Lectures* (1986), can be found at www.cisg.law.pace.edu/cisg/biblio/goldstajn.html.

Therefore, the District Court erred by relying on a claimed practice of the parties instead of deciding whether there existed the "consignment" trade usage asserted by TDY. Because the existence of such a trade usage would decide the case in TDY's favor, the District Court's judgment in favor of Treibacher should be reversed.

B. Even if the Parties' Practices Could Override an Industry Usage, the District Court Erred in Ruling under the CISG that a Single Instance of Conduct Could Constitute a Practice.

Apart from the error in considering the parties' practices as a basis for overriding trade usage, the District Court erred in concluding that the one instance that it cited from the parties' seven-year dealings (the February 2000 request for Treibacher to take back the TiCN), constituted a "practice" of the parties within the meaning of the CISG.

Courts applying the CISG have held that "practice" requires more than one or two instances. One decision held that a practice "would require a conduct regularly observed between the parties and thus requiring a certain duration and frequency …. Such duration and frequency does not exist where only two previous deliveries have been handled in that manner." Duisburg Amtsgericht (Lower Court) 13 April 2000, Case No. 49 C 502/00, ¶ 3(a) (at p. 6 of translation available at http://cisgw3.law.pace.edu/cases/000413g1.html). Another court held that the fact that plaintiff-seller on one instance allowed defendant-buyer to settle its open

account by shipping defendant's own goods to plaintiff did not establish a practice of doing so under Article 9(1). *See* Landgericht (District Court) Zwickau 19 March 1999, Case No. 3 HK0 67/98, at page 3 of translation attached as Addendum 2 hereto.[19]

Leading commentators agree that a "practice" consists of repeated behavior, not an isolated incident. *See, e.g.* John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* § 116, p. 125 (3d ed. 1999) ("'Practices' are established by a course of conduct that creates an expectation that this conduct will be continued."); Jorge Oviedo Albán, *Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9* § 3 (2004) ("It is a series or sequence of previous behaviors of the parties, related in particular to transactions carried out previously between the parties ….").

The District Court cited testimony that the consignment agreements were "individually negotiated" to support its conclusion that the industry usage could be

[19] Although the international authorities are more influential, a "course of dealing" under the Uniform Commercial Code also requires more than a single instance of conduct. *See* Uniform Commercial Code § 1-303(b) (2004 ed.); former Uniform Commercial Code § 1-205(1) (1978 ed.); *see also, e.g., Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543, 1547 n.18 (11th Cir. 1987); *International Theraputics, Inc. v. McGraw-Edison Co.*, 721 F.2d 488, 491 (5th Cir. 1983); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 230, 385 N.E.2d 1068, 1071-72 (1978).

disregarded. Doc 84 – Pgs 5, 19. Those individual negotiations, however, dealt with price and type of product, and expressly left unaddressed the consignment relationship. PX 18, PX 21. Negotiations about price and type of product provide no basis to determine the parties' practices regarding matters outside the realm of the negotiations.

C. In any Event, the February 2000 Incident Is Ambiguous and Not Probative.

Even if the February 2000 incident could be relevant under CISG Article 9, the District Court mischaracterized the evidence. The District Court stated that it was "undisputed" that in February 2000, "Treibacher refused to accept [the] return [of TiCn] on the basis that the goods had been specially ordered and sold to TDY, and TDY acquiesced in Treibacher's position …." Doc 84 – Pgs 5-6. The testimony and exhibits do not convey acknowledgement by either party that the goods had been "sold" to TDY.

The entirety of the evidence regarding February 2000 events is Hinterhofer's testimony that after receiving Atchley's email, PX 27, he and Atchley spoke. Hinterhofer's notes state: "He will ***store*** the 2 x 100 kg TiCN in Gurley. Shipment was made because of [his] explicit requirement." (emphasis added). No evidence supports the conclusion that TDY "acquiesced" in the position that there had been a "sale" of the TiCN.

II. TDY IS ENTITLED TO ENTRY OF JUDGMENT IN ITS FAVOR BECAUSE THE EVIDENCE DOES NOT SUPPORT A CONCLUSION THAT TDY WAS REQUIRED TO PURCHASE CONSIGNED TREIBACHER MATERIALS.

Because of the District Court's legal errors in applying Article 9 of the CISG, the present judgment should be reversed. Ordinarily, on remand, the District Court could reconsider the evidence in light of the proper legal standard, but in the present case, it is appropriate for the Court to direct the entry of judgment in favor of TDY because, for the reasons set forth below, the evidence cannot support a conclusion that TDY was required to consume and purchase consigned or undelivered Treibacher materials. *See* 28 U.S.C. § 2106 ("[A]ny … court of appellate jurisdiction may … direct the entry of such appropriate judgment, decree, or order … as may be just under the circumstances."). *See generally Fabric v. Provident Life & Accident Ins. Co.*, 115 F.3d 908, 915 (11th Cir. 1997) (holding court of appeals may direct entry of summary judgment where facts bearing on the issue are before the court and the party is entitled to judgment as a matter of law); *Weisgram v. Marley Co.*, 528 U.S. 440, 457, 120 S. Ct. 1011, 1022 (2000) (holding that "the authority of the courts of appeals to direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.").

A. The Deposition Testimony Concerning Treibacher's Dealings with Another Customer Does Not Suffice to Refute the Evidence of an Industry Usage.

The District Court acknowledged that, through the testimony of Charles Weiser, TDY had presented evidence of a trade usage of the term "consignment" whereby a supplier's customer is not under any obligation to use the consigned goods, and becomes obligated to pay for the goods only if and when they are used. The District Court, however, concluded that there was "conflicting" evidence on this issue, Doc 84 – Pg 5, citing the testimony of Robert Packer regarding his understanding of what he considered a "consignment" arrangement that his former employer ("Ultra-Met") once had with Treibacher. *Id.*; PX-72 at 10, 52. The Packer testimony, however, is legally insufficient to create an issue of fact concerning the existence of a trade usage, and thus the usage must be taken as uncontroverted.

Under CISG Article 9(2), parties will be bound to a usage that in international trade is "widely known to, and ***regularly*** observed by, parties to contracts of the type involved in the particular trade concerned" (emphasis added) if they knew or ought to have known of it. By its clear terms, Article 9(2) requires only regular observance, not universal or absolute usage.[20] Therefore, even if

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[20] *See also* Oberster Gerichtshof (Supreme Court of Austria) Case No. 10 Ob 344/99g (March 21, 2000) ("International trade usages are widely known and

Packer considered Ultra-Met's arrangement with Treibacher to be a "consignment" and believed that Ultra-Met had an obligation to consume the materials within a reasonable time, his testimony does not suffice to show that the type of consignment usage testified to by Weiser was not "regularly" observed.

Moreover, Article 9(2)'s use of the phrase "knew, or ought to have known" further demonstrates that occasional departures from a usage do not deprive the usage of its force. By providing that a party can be bound to a usage of which it "ought to have known," Article 9(2) necessarily establishes that a party can be bound even if it did not know of the usage or did not observe it in other instances. Because Article 9(2) would not allow Treibacher to avoid being bound by a usage by claiming ignorance, Treibacher cannot accomplish the same result by claiming an understanding with one other customer inconsistent with the usage.

Accordingly, whether the issue is considered to be the relevance of Packer's testimony under Federal Rules of Evidence 401 and 402, or the legal sufficiency of that testimony to refute the existence of a usage under CISG Article 9(2), there is no sufficient admissible evidence in the record to contradict Weiser's expert testimony regarding the consignment usage in the hard metals industry.

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regularly observed, in the sense Art. 9(2) CISG demands, when recognized by the ***majority of persons*** doing business in the same field.") (emphasis added), translation available at www.cisg.law.pace.edu/cisg/wais/db/cases2/000321a3.html.

Therefore, that usage must be taken as established. Because it is undisputed that the contested transactions in this case were made on consignment, Doc 78 – Pgs 25-26, 244-45, those transactions are governed by that industry usage, and Treibacher's claims cannot survive.

B. The Evidence Is Insufficient to Support a Conclusion that TDY Was Obligated to Consume Consigned Treibacher Materials.

The District Court concluded that in November and December 2000, TDY made a "firm commitment to buy" TaC from Treibacher. Doc 84 – Pgs 11-12, 13, 21. Those conclusions were made on the basis of the District Court's legally erroneous rejection of the industry usage and its conclusion regarding the parties' supposed practice (course of dealing) regarding consignment requiring TDY to use and pay for product once it had been delivered, Doc 84 – Pgs 5, 20, and for that reason alone, they cannot stand. Moreover, none of the November or December 2000 communications (written or oral) speak of a "firm commitment" to buy.[21] The confirming email from November 2000 speaks of TDY's agreement to the "shipment's" listed below. PX 32. The testimony regarding the December 2000 telephone call referred only to an agreement on quantities. Doc 78 – Pg 178. Given the undisputed fact that the November and December 2000 transactions (if the latter in fact occurred) were on consignment, Doc 78 – Pgs 25-26, 244-45, the

[21] The phrase "firm commitment" first appears in the transcript as a characterization of the testimony by Treibacher's counsel. Doc 78 – Pg 701.

only agreements that could have been reached in November and December 2000 would have been agreements that Treibacher could ship specified amounts of specified products to TDY on consignment, and that if TDY thereafter used them, TDY would pay the specified prices. Because such an agreement would not satisfy Treibacher's burden of proving its claim for breach of contract, the Court should direct the entry of judgment in favor of TDY. *Compare Weisgram v. Marley Co.*, 528 U.S. at 457, 120 S. Ct. at 1022.

III. IN THE ALTERNATIVE, THE DECEMBER 2000 COMMUNICATIONS WERE LEGALLY INSUFFICIENT TO FORM A CONTRACT UNDER THE CISG , WHETHER OR NOT THE PARTIES' PRACTICE ESTABLISHED AN IDIOSYNCRATIC MEANING OF "CONSIGNMENT" CONTRARY TO THE INDUSTRY MEANING.

Even if the District Court were legally and factually correct that "consignment" as between TDY and Treibacher imposed on TDY an obligation to consume consigned materials within a reasonable time, the December 2000 communications were legally insufficient to form a contract under the CISG, and the portion of the judgment based on the goods covered by those communications should be reversed.

According to Hinterhofer, Treibacher's practice was to obtain what he variously called a "firm written offer," a "separately agreed sales contract," or a "separate written sales agreement" with TDY for the goods consigned to TDY.

Doc 78 – Pgs 95, 102, 111, 117. In his internal discussions with Trinitech, Treibacher's agent, Hinterhofer noted that with tantalum prices rising, Trinitech should be "very careful on the sales side, i.e, no shipments to the customer on consignment stock without a firm written order from the customer …." PX 10-B. Consistent with that practice of securing confirmation before shipping goods, in the November 2000 communications, Hinterhofer received Atchley's email response agreeing to the shipments proposed by Hinterhofer. PX 32.

In December 2000, however, TDY did not respond to Treibacher's request for a confirmation.

Under CISG Article 9(1), Treibacher is bound by any "practices established" between it and TDY. If Treibacher's own testimony is accepted, the requirement that there be in place a "separate written sales agreement" or similar confirmation, as manifested through the many years of the relationship between TDY and Treibacher, is such a practice. Such a practice would be to the benefit not only of Treibacher, but also to TDY in protecting it from unfounded claims that TDY had made a commitment. Therefore, TDY cannot be bound by the alleged oral agreement in December 2000, when it did not provide any such confirmation.

IV. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FINDING TDY LIABLE FOR PROMISSORY FRAUD.

The District Court found that TDY's alleged breach of its "sales agreements" with Treibacher also gave rise to liability for "promissory fraud" because TDY allegedly "enter[ed] into the sales agreements, yet . . . never intended to honor the agreements unless TDY was unable to locate a cheaper source before it needed to use the materials ordered." Doc 84 – Pg 24. Because TDY's alleged fraud is premised on a supposedly false promise to *buy* from Treibacher, the fraud claim is wholly contingent on the existence of "sales agreements" between Treibacher and TDY. For the reasons discussed above, no such "sales agreements" existed. Therefore, TDY cannot be liable in tort for its refusal to purchase the materials from Treibacher.

Even if the promissory fraud judgment against TDY could survive in the absence of a contractual breach, the fraud claim nevertheless fails as a matter of law.

A. Treibacher's Fraud Claim Is Preempted by the Supremacy Clause and the CISG.

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme law of the Land; and the Judges in every State shall be bound

> thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. Art VI, cl. 2 (emphasis added). Under the Supremacy Clause, a state-law cause of action encompassed by a federal treaty is without force or effect. "State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230-231, 62 S. Ct. 552, 566 (1942) (internal citations omitted). Thus, to the extent a cause of action cognizable under the law of any individual state "falls within the scope of [the] CISG," that cause of action is preempted, relief under the common law is not available, and the party is limited to the claims and remedies provided in the CISG. *Asante Tech. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001); *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Il. 2002) ("[T]he CISG is a treaty, and thus federal law, and under the Supremacy Clause, it preempts any inconsistent provisions of state law.").

The CISG provides the exclusive source of rights and obligations arising from a contractual relationship involving the international sale of goods. The District Court's finding that relationships governed by the CISG are also subject to overlapping non-treaty tort-based duties and remedies is inconsistent with the express language and fundamental purpose of the CISG. Therefore, Treibacher's

promissory fraud claim was preempted by the CISG, and the District Court erred in not granting judgment as a matter of law to TDY on Treibacher's claim for promissory fraud.

1. The Preemptive Scope of a Treaty Is Determined by the Intent of the Treaty Signatories.

Whether a cause of action is preempted by a federal statute is generally a question of legislative intent. *See, e.g., Crosby v. Nat. Foreign Trade Council,* 530 U.S. 363, 372, 120 S. Ct. 2288, 2293-2294 (2000). However, where the preempting enactment is an international treaty, the analytic framework is significantly altered. "[T]he nation-state, not subdivisions within one nation, is the focus of the Convention and the perspective of our treaty partners. Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations." *El Al*, 525 U.S. at 175, 119 S. Ct. at 674.

The touchstone for determining the preemptive scope of an international treaty is the intent of the signatory nations. *El Al*, 525 U.S. at 167, 119 S. Ct. at 671 ("Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) and the post ratification understanding of the contracting parties."); *see also Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 201 F. Supp. 2d at 285

("Confronting the question of preemption by a treaty, the Court focuses on the intent of the treaty's contracting parties.").

In *El Al*, the Supreme Court established the analytic framework for ascertaining the "shared expectations of the contracting parties" and, therefore, the preemptive scope of a treaty. 525 U.S. at 167, 119 S. Ct. at 671. The Court held that the Warsaw Convention , which governs international carriage by air, preempted state law tort claims for mental pain and suffering arising from international air travel. *Id.* at 160 and 667. The Court relied on several factors probative of the underlying intent and purpose of the signatory nations.

First, the Court noted that its "inquiry begins with the text of" the treaty in the context of drafting history and its "purpose and overall structure." *Id.* at 167, 169 and 671. Second, finding that the "words lend themselves to divergent interpretations," the Court considered the "reasonable views of the Executive Branch concerning the meaning of an international treaty." *Id.* at 168 and 671. "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Id.* (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-185, 102 S. Ct. 2374 (1982)). Finally, the Court considered the "decisions of the courts of other Convention signatories," reasoning that treaties should be

interpreted harmoniously by the respective judiciaries. Divergent legal precedents interpreting the treaty would replicate the problem the treaty was intended to address. *El Al*, 525 U.S. at 175, 119 S. Ct. at 675 ("Courts of other nations bound by the Convention have also recognized the [Warsaw Convention's] encompassing preemptive effect.") (citing cases from British Columbia, Ontario, New Zealand, and Singapore).

2. <u>The CISG Preempts All Claims Between a Buyer and Seller that Arise from their Contractual Relationship</u>.

Appropriate preemption analysis leaves little doubt that the CISG precludes Treibacher's Alabama common law tort claim. Each of the relevant factors articulated by the Supreme Court points to a single conclusion: the principal purpose of the CISG was to provide a uniform set of rules to guide parties engaged in international trade. Uniformity is the touchstone because commercial entities from fifty-seven judicial systems, each recognizing different claims and causes of action (differing even with respect to whether common law actions are recognized at all) could not be expected to be familiar with every nuance of local law. Thus, the goal was a "comprehensive set of rules" that could be referred to by all parties to international sales agreements. David Frisch, "Commercial Common Law, the United Nations Convention on the International Sale of Goods, and the Inertia of Habit," 74 *Tul. L. Rev.* 495, 503 (1999). By allowing the same factual predicate to

state a claim under both legal regimes, the District Court violated the principal purpose and express terms of the CISG.

a. The Language of the Treaty

At least two district courts have concluded that the CISG's "expressly stated goal of developing uniform international contract law to promote international trade indicates the intent of the parties to the treaty to have the treaty preempt state law causes of action." *Asante Techs, Inc.*, 164 F. Supp. 2d at 1151 (holding that CISG preempts state law contract claims); *Geneva Pharms.*, 201 F. Supp. 2d at 285 (same). This "expressly stated goal" is found in the CISG's preamble, which articulates the underlying purpose of the CISG: "the removal of legal barriers to international trade" through the "adoption of uniform rules which govern contracts for the international sale of goods." CISG Preamble.

In addition, Article 4 of the treaty specifically defines the parties and transactions to which it will apply: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." CISG Art. 4. Where the "rights and obligations" arising from the contractual relationship of a "seller and buyer" are at issue, the CISG requires that a uniform set of rules apply. *Usinor Industeel*, 209 F. Supp. 2d at 885 (CISG "applies only to buyer and seller, not to third parties," and "displace[s] any contrary state sales law such as the UCC"). The fortuity of an Alabama forum

cannot impose duties or remedies not contemplated by the CISG upon a purchaser of international goods.

CISG Article 7 requires that Article 4 be interpreted in a manner that "promote[s] uniformity" and "good faith" in private international transactions. *See* CISG Art. 7. Thus, the treaty contemplates that issues of interpretation should be resolved in favor of relieving international contracting parties from the burden of examining local law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 325, cmt. d (1987). ("Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.").

The language, structure, and purpose of the treaty, all support giving it broad preemptive force, encompassing both contract and tort claims between parties subject to contractual duties as buyer and seller. *Asante Tech.*, 164 F. Supp. 2d at 1151; *Geneva Pharm.*, 201 F. Supp. 2d at 286 n.30 ("Just because a party labels a cause of action a 'tort' does not mean that it is automatically not pre-empted by the CISG. A tort that is in actuality a contract claim, or that bridges the gap between contract and tort law may very well be pre-empted.").[22] In light of the CISG's

[22] In *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, No. Civ. A. 99-6384, 2000 WL 1224903, at *1 (E.D.Pa. Aug. 29, 2000), the court stated: "The CISG does not apply to tort claims." This conclusion was reached without any analysis or

strong "textual emphasis on uniformity," it is doubtful that the delegates to the convention intended that those engaged in international trade would be "subject . . . to the distinct, nonuniform liability rules of the individual signatory nations." *El Al*, 525 U.S. at 169, 119 S. Ct. at 672; *see also Asante*, 164 F. Supp. 2d at 1151 ("Allowing such avenues for potential liability would subject contracting parties to different states' laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid.").

b. The Views of the Executive Branch

The views of the Executive Branch agency involved in negotiating or interpreting the treaty support interpreting the CISG as broadly preemptive. *See El Al*, 525 U.S. at 168, 119 S. Ct. 671. In his transmittal letter to the President, the Secretary of State observed:

> Sales transactions that cross international boundaries are subject to legal uncertainty – doubt as to which legal system will apply and the difficulty of complying with unfamiliar foreign law. . . . The convention's approach provides an effective solution for this difficult problem. When a contract for an international sale of goods does not make clear what rule of law applies, the Convention provides uniform rules to govern the questions that arise in making and performance of the contract.

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discussion of the treaty's purpose, history, or language. In fact, the court in *Viva Vino* provided no analysis at all to support its conclusion that claims labeled as torts are *per se* outside the scope of the CISG. *Id.* Thus, *Viva Vino* is not persuasive authority.

15 U.S.C.A. App. at 365.

The State Department's view was adopted by the President in transmitting the CISG to the Senate.

> International trade now is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.

15 U.S.C.A App. at 363. The views of the State Department and the President are "entitled to great weight" in treaty interpretation. *El Al*, 525 U.S. at 168, 119 S. Ct. at 671.

c. Foreign Precedent and Academic Commentary

The CISG's core purpose of uniformity cannot be achieved unless the treaty is interpreted consistently in the dozens of CISG signatory nations. Thus, the courts of each signatory nation must be mindful of the treaty's interpretation in other countries. In *MCC-Marble*, 144 F.3d at 1389 n.14, this Court sought foreign precedent to inform its analysis of whether the CISG incorporated or rejected the parol evidence rule. In the absence of existing foreign case law, the court relied on

"academic commentary on the issue" as persuasive authority for how foreign courts would address the issue. *Id.* at 1390-1392.[23]

Foreign case law is likewise sparse as to CISG preemption of concurrent tort claims. However, academic commentary supports the conclusion that "insofar as the Convention is invoked it must, in our view, be applied as it is i.e. it *excludes claims under the domestic law of torts*." Fritz Enderlein & Dietrich Maskow, "Commentary on the United Nations Convention on Contract for the International Sale of Goods" at § 4.2 in *International Sales Law* (1992) (emphasis in original)[24]; *see also* Ulrich Huber, in Schlechtriem, P., *Commentary on the UN Convention on the International Sale of Goods* (Oxford 1998) at 370-371 (concurrent domestic remedies should be available in very limited situations).

The assessment of one commentator is particularly apt.

> The substance rather than the label or characterization of competing rule of domestic law determines whether it is [displaced] by the Convention. In determining such questions, the tribunal, it is submitted, should be guided by the provisions of Article 7, and give the Convention the widest possible application consistent with its aim as a unifier of legal rules governing the relationship between parties to an international sale.

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[23] *See* Harry Flechtner, *The U.N. Convention (CISG) and MCC-Marble Ceramic Center v. Ceramica Nuova d'Augistino S.p. A.,* 18 J. of Law & Commerce, 259, 268-272 (1999).

[24] The Enderlein and Maskow Commentary can be found at http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art044a.

Warren Khoo, in Bianca-Bonell *Commentary on the International Sales Law* at 47 (1987)[25]; *see also* John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* § 65(a), p. 67 (3d ed. 1999) ("[T]he crucial question is whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention.").

3. Plaintiff's Claim for Promissory Fraud Is Inextricably Intertwined With the Contractual Relationship Between the Parties.

Given the CISG's focus on international legal uniformity, there is no room for the application of local tort law to the contractual relationship. The facts of this case exemplify the mischief that is created when the disappointed commercial expectations of a foreign seller are pled as torts. Here, the District Court found TDY liable for "promissory fraud" even though (1) the parties, a buyer and seller of international goods, clearly fell within the jurisdictional scope of the CISG, *see* CISG Articles 1, 4; (2) the same underlying facts formed the basis of both the contract and the tort claim; (3) the same injury is alleged to have resulted from the breach of both contractual and tort obligations; and (4) the same alleged damages were incurred from both "wrongs." Doc 84 - Pgs 23, 25, 29.

[25] The Khoo article can be found at www.cisg.law.pace.edu/cisg/biblio/khoo-bb4.html.

Though pled as a tort, the claim arose from the contractual relationship relating to the international sale of goods. *See Genpharm Inc. v. Pliva-Lachema a.s.*, 361 F. Supp. 2d 49, 55 (E.D.N.Y. 2005) ("Indeed, it is clear that the only reason [the plaintiff] and the Defendants had any relationship at all was for the international sale of warfarin . . . .").[26] *cf. Holman v. Childersburg Bancorporation, Inc.*, 852 So. 2d 691, 701 (Ala. 2002) ("Thus, here, the facts underlying the fraud claims merely duplicate those underlying the breach-of-contract claims."); *White v. Miller*, 718 So. 2d 88, 90 (Ala. Civ. App. 1998) ("the contractor cannot circumvent the licensing statute by asserting claims for fraud and deceit when the facts surrounding the claims are grounded in contract").

The pleading of supplementary tort claims in contract cases is often for the purpose of raising or threatening punitive damages. Any such award under American state law would be beyond the damages authorized by Article 74 of the CISG. *See El Al*, 525 U.S. at 171, 119 S. Ct. at 672-73 (allowing "claims under

[26] The fact that a contract for the "sale" of goods may not have been completed, does not alter the preemption analysis. *El Al*, 525 U.S. at 161, 119 S. Ct. at 668 (holding that Warsaw Convention preempts state law tort claim although no cause of action would exist under the treaty); *Genpharm*, 361 F. Supp. 2d at 55 ("The CISG expressly provides that it 'governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract.' *The applicability of the CISG is not restricted to contracts after formation* or contracts containing definite prices or quantities. Therefore, this dispute falls within this Court's treaty jurisdiction, and this Court's subject matter jurisdiction.") (emphasis added).

local law when the Convention does not permit recovery could . . . encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty").

In short, review of all relevant criteria shows that the CISG was intended to facilitate international trade by replacing the divergent and conflicting liability systems in the dozens of signatory countries with a unified and consistent regime governing the "rights and obligations of the seller and the buyer" arising from their contractual relationship. Where, as here, a federal treaty has created a comprehensive scheme addressing both liability and damages, common-law claims inconsistent with the treaty are preempted. The tort judgment against TDY must be reversed.

B. Under Alabama Law, Treibacher Did Not Satisfy its Burden of Proving Every Element of a Claim for Promissory Fraud.

Assuming *arguendo* that the CISG permits a companion tort claim for promissory fraud, Treibacher's claim nevertheless fails on the merits.

Under Alabama law, there are six elements to a promissory fraud claim. The plaintiff must prove the four traditional elements of fraud (falsity, materiality, reliance, and damages) and two additional elements; namely "that at the time of the misrepresentation, [1] the defendant had the intention not to perform the act

promised, and [2] that the defendant had an intent to deceive." *Padgett v. Hughes*, 535 So. 2d 140, 142 (Ala. 1988).

> The plaintiff cannot meet his burden merely by showing that the alleged promise ultimately was not kept; otherwise, any breach of contract would constitute a fraud. It is well-settled that a 'jury does not have untrammeled discretion to speculate upon the existence of the requisite intent for promissory fraud.' There must be substantial evidence of a fraudulent intent that existed when the promise was made.

Goodyear Tire and Rubber Co. v. Washington, 719 So. 2d 774, 776 (Ala. 1998) (internal citations omitted) (reversing verdict in favor of plaintiff on promissory fraud claim).

1. <u>A Plaintiff Must Present Direct Evidence of Intent or Evidence of a Pattern of Misrepresentation to Satisfy its Burden on the Heightened Intent Elements of a Promissory Fraud Claim.</u>

Generally, to prove the heightened intent elements necessary to support a claim for promissory fraud, a plaintiff must present "direct documentary evidence, or direct testimony" of an intent not to fulfill a promise. *Goodyear Tire*, 719 So. 2d at 776 (citing *Purcell Co. v. Spriggs Enterprises, Inc.*, 431 So. 2d 515, 519 (Ala. 1983)). Alternatively, a plaintiff may prove the requisite intent by showing a "consistent pattern of purposefully making distinct unkept promises . . ." *Id.; see also B.K.W. Enterprises, Inc. v. Tractor & Equipment Co.*, 603 So. 2d 989, 992 (Ala. 1992); *Hillcrest Center Inc. v. Rone*, 711 So. 2d 901 (Ala. 1997) ("continued

assurances" of false material fact sufficient for jury to infer intent not to fulfill promise).

Treibacher presented no direct evidence of TDY's alleged fraudulent intent. Nor did Treibacher contend that TDY engaged in a pattern of prior misrepresentations from which its alleged misrepresentations in November and December 2000 may be inferred. To the contrary, the District Court expressly found that TDY had faithfully paid for Treibacher goods that it had used throughout the course of their seven-year commercial relationship. Doc 84 – Pg 1 ("The parties have a course of dealing extending back to 1994."); 6-9 (parties' course of dealing); *see also* Doc 78 – Pgs 21-25. In finding that TDY had an "intent to deceive," the District Court relied exclusively on TDY's post-agreement conduct and inferred from that conduct that "TDY never intended to honor the agreements unless TDY was unable to locate a cheaper source before it needed to use the material ordered." Doc 84 – Pg 24. Such post-agreement conduct is not sufficient as a matter of law to support Treibacher's promissory fraud claim. *See Goodyear Tire*, 719 So. 2d at 776.

2. <u>The Circumstantial Evidence Proffered by Treibacher Is Not Sufficient to Support the Conclusion that TDY Intended Not To Perform its Promise or Intended To Deceive Treibacher</u>.

Even assuming that post-promise circumstantial evidence could satisfy Treibacher's burden of proof on its promissory fraud claim, the evidence here is

still insufficient. Examining the evidence most favorably to Treibacher as required on appeal of a trial judgment, and assuming that the November and December transactions were agreements to purchase TaC, Treibacher's evidence shows that (1) TDY's agent, Atchley, promised to buy from Treibacher, then denied doing so, and (2) TDY "secretly" sought to purchase TaC from other sources while negotiating with Treibacher.

a. The Conduct of Atchley Is Not Probative of Fraud.

Assuming that Atchley agreed to purchase materials from Treibacher in both November and December 2000, TDY's subsequent denial of this obligation has no relevance to a claim for promissory fraud. Indeed, facing substantively indistinguishable facts the Alabama Supreme Court held that such evidence "tends to prove that [the defendant's agent] recklessly made statements beyond his authority, but not that he intended that [the plaintiff] not receive the loan or that he intended to deceive [the plaintiff]. Reckless misrepresentation will not support a charge of promissory fraud." *Graham Foods, Inc. v. First Alabama Bank*, 567 So. 2d 859, 862 (Ala. 1990) (citing *Benetton Servs. Corp. v. Benedot, Inc.*, 551 So. 2d 295 (Ala. 1989); *Kennedy Electric Co. v. Moore-Handley, Inc.*, 437 So. 2d 76 (Ala. 1983)). Here, in fact, there was specific evidence that Atchley, the agent who allegedly agreed to purchase over $5,000,000 worth of TaC, had no authority to

enter into a purchase agreement. Doc 78 – Pgs 5-8. Moreover, there was nothing in the record to suggest he entertained a secret reservation about performance.

b. TDY's Efforts to Secure TaC from Sources other than Treibacher Was Prudent, Not Fraudulent.

The District Court also relied on the fact that while negotiating with Treibacher to consign certain materials, TDY also sought TaC from other sources without telling Treibacher. Doc 84 – Pg 24. However, the only reasonable inference from the uncontroverted evidence was that TDY acted prudently to ensure that it would have sufficient access to TaC in the face of Treibacher's stated uncertainty regarding future availability of TaC. Thus, there is no evidence that TDY did not intend to use and pay for all consigned materials in its regular course of business. Even if TDY altered its plans *after* it reached agreement with Treibacher, that alteration is not probative of its intent at the time of the transactions.

The uncontroverted evidence showed that on October 10, 2000, Treibacher advised TDY that it was unable to locate a supply of TaC to consign to TDY. Pl. Ex. 22; Doc 78 – Pgs 125-126. On October 20, 2000, Treibacher's agent visited TDY's facility but refused to make an offer of TaC to TDY because Treibacher did not have access to the necessary raw materials. Pl. Ex. 64; Doc 78 – Pgs 147. Faced with the distinct possibility that Treibacher would not be able to supply

TDY's full requirement of TaC (or, for that matter, any TaC), TDY prudently sought TaC from other sources beginning on November 7, 2000. PX 55. On November 10, 2000, Plaintiff reversed course and offered a limited amount of TaC to TDY. PX 30.

Given the difficulty in securing TaC and the limited amount being offered by Treibacher, it would have been unreasonable for TDY to rely on Treibacher to supply its entire needs and thus terminate its efforts to secure additional quantities from other sources. There is no evidence that Treibacher's offer of TaC satisfied all of TDY's requirements, and no evidence that TDY did not intend to use both the TaC supplied by Treibacher and any additional it could secure elsewhere.[27]

Ultimately, the District Court's conclusion that *at the time of the November and December transactions* TDY's intent to use Treibacher's materials was subject to an "undisclosed contingency" is supported only by the fact that TDY subsequently decided not to use or buy all of the material covered by those transactions. However, "a plaintiff cannot convert the mere failure to perform or to fulfill a contractual promise into a fraud claim . . . ." *See Dickinson v. Land Developers Const. Co.*, 882 So. 2d 291, 303 (Ala. 2003) (Houston, J. concurring).

[27] TDY's failure "to disclose to Treibacher the facts that it was seeking to purchase raw materials elsewhere" adds nothing probative to the evidentiary record. There is nothing in the record to suggest TDY had a duty to notify Treibacher that it was looking for other supplies.

That is what Treibacher has done here. There is no evidence in the record of deceptive or fraudulent intent at the time of the transactions, and the District Court's conclusion to the contrary should be reversed.

V. TDY IS ENTITLED TO A REDUCTION IN DAMAGES BECAUSE THE CISG REQUIRED TREIBACHER TO TAKE REASONABLE MEASURES IN MITIGATION.

CISG Article 77 provides in part that "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach."

The price of the TaC covered by the November and December 2000 communications was $925/kg and $1100/kg, respectively. The undisputed evidence at trial established that Treibacher would have suffered no losses on the materials held at TDY's facility had those materials been sold to another buyer as late as June 27, 2001. Doc 78 – Pg 576. The price of TaC dropped precipitously after June 27, 2001, so that by the time Treibacher actually began to mitigate its damages in October and November 2001, it received only $919,345.04 for the materials at issue. Indeed, even during the period that Treibacher made its mitigation sales, the price of TaC continued to drop such that Treibacher was able to sell some of the materials in October 2001 for $475 to $490/kg, but received only approximately $200/kg for additional sales of the materials in November 2001.

Under the CISG, "once it is clear that [the] Buyer breached the contract," the seller is obligated timely to commence mitigation. *Asian Sesame Seed Case,* China International Economic & Trade Commission (CIETAC), 9 January 1993, at 8 (Section II.3) (translation available at http://cisgw3.law.pace.edu/cases/930109cl.html); *see also R.GmbH v. O. AG*, Canton Court (Kantonsgericht) Zug, Case No. A3 2001 34, 12 December 2002, at 6 (Section 3.2) (measuring reasonableness of mitigation from the date "seller knew with certainty that buyer would not take delivery of the goods.") (translation available at http://cisgw3.law.pace.edu/cases/021212s1.html).

Here, Treibacher knew with certainty no later than early July 2001 that TDY would not accept or pay for the disputed materials. By that time, TDY had clearly limited its proposals for using material to the material that had already been shipped to TDY. PX 48, 49, 50. By July 9, Treibacher was referring to TDY's "non performance." PX 51. By July 24, 2001, Treibacher had secured legal counsel and threatened this lawsuit. Doc 77 – Pg 3. Indeed, the District Court found that any possibility that TDY might accept and use the materials at issue was foreclosed by July 2001. Doc 84 – Pg 18. Nevertheless, the District Court credited Treibacher with having mitigated its losses through sales which "did not occur, in part, until well into 2002." Doc 84 – Pg 18.

However, pursuant to CISG Article 77, Treibacher is entitled to damages only for the losses that could not have been avoided "through measures that are reasonable under the circumstances." The District Court did not address the reasonableness of Treibacher's delay between July, when it definitively knew that TDY had repudiated any obligation to take or use the Treibacher product, and late 2001, when it began its mitigation sales. In light of the volatile TaC market, as evidenced by the sharp decline in the value of the materials between June 27, 2001 and October 2001 (and continuing between October and November 2001), it was not reasonable for Treibacher to have delayed mitigation until "well into 2002." *See* Larry A. DiMatteo, et al., *The Intrpretative Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 Northwestern Journal of International Law and Business 299, 423 (Winter 2004) ("The timing of the non-breaching party's mitigation efforts is crucial to the ultimate calculation of damages owed. . . . [A] two month timeframe for mitigation would be deemed, under most circumstances, to be unreasonable."). Thus, even assuming the District Court's liability finding is affirmed, TDY is entitled to remand on the question of damages.

CONCLUSION

Based on the foregoing, TDY respectfully requests:

1. That the judgment below on Treibacher's contract claims be

a) Reversed, and judgment entered in favor of TDY; or

b) In the alternative, reversed and remanded with instructions to enter judgment in favor of TDY on the December 2000 Claim and to conduct a new trial on the remaining contract claims; or

c) In the alternative, reversed and remanded for a new trial; or

d) In the alternative, reversed and remanded with instructions to modify the judgment by eliminating any damages relating to the December 2000 Claim; and

2. That the judgment below on Treibacher's tort claim be reversed, and judgment entered in favor of TDY; or

3. In the alternative, or in addition, as the case may be, that the contract and tort judgments be reversed and remanded for a new trial on the issue of mitigation of damages.

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(s) ______________________________

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Dated: July 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the following counsel of record by Federal Express on this the 6th day of July, 2005, addressed as follows:

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