IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ELECTRONIC TECHNOLOGIES INTERNATIONAL, LLC,

OPINION AND ORDER

Plaintiff,

01-C-0553-C

v.

BENNETT PUMP COMPANY,

Defendant.

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This is a civil suit for money damages, in which plaintiff Electronic Technologies International, LLC, is suing defendant Bennett Pump Company for cancellation charges in the amount of $287,455.01 for circuit boards that defendant ordered and then cancelled. Defendant denies that it owes such charges. The case is before the court on defendant's motion for partial summary judgment. Jurisdiction is present by virtue of diversity of citizenship and more than $75,000 in controversy.

I conclude that the parties' exchange of price quotations and purchase orders created a binding contract pursuant to Wis. Stat. § 402.207 (UCC § 2-207), that defendant did not make its acceptance of plaintiff's offer to supply circuit boards conditional within the

meaning of § 2-207(1) when it included an inconspicuous preprinted provision in its purchase order to the effect that it would accept shipments "solely under the conditions herein stated" and that plaintiff's inclusion in its offer of a provision requiring defendant to pay for any custom built circuit boards not cancelled within 90 days after they were ordered is part of the parties' agreement. Alternatively, I conclude that if the parties' exchange of forms did not create a contract, the parties' conduct created one within the meaning of § 2-207(3) and that the terms of that contract include any applicable "usage of trade," as defined in UCC § 1-205, which could include a 100% cancellation charge. Under this alternative holding, if the jury finds that cancellation charges for custom built products are observed so regularly in the circuit board market as to justify the parties' expectation that they would be applicable to their transactions, plaintiff will be entitled to cancellation charges for the products defendant ordered and then cancelled. (This assumes, of course, that the cancelled product met the requirements of the parties' contract, an issue that is not before the court at this time.) Accordingly, defendant's motion will be denied.

From the proposed findings of fact and exhibits submitted by the parties, I find that the following material facts are not in dispute.

UNDISPUTED FACTS

Plaintiff Electronic Technologies International, LLC, is a Wisconsin limited liability

company with its principal place of business in Wisconsin. It manufactures built-to-order electronic circuit boards to customer specifications and maintains no retained inventory. Defendant Bennett Pump Company is a Michigan corporation with its principal place of business in Michigan. It manufactures pump assemblies for use in gasoline pumps.

When defendant's previous supplier stopped supplying circuit boards for use in pump assemblies, defendant began looking for another supplier and ultimately decided to buy from plaintiff. On or about August 23, 2000, plaintiff sent defendant a detailed quote showing specific products to be supplied, quantities, prices and delivery times. The quotation was set out on a preprinted form that included a provision on the back stating that a cancellation charge of 100% would be imposed in the event defendant cancelled orders within 90 days of delivery, with charges for more recent orders negotiable, and another provision on the front stating that residual inventory is the responsibility of the buyer. On or about October 16, 2000, defendant issued four purchase orders for 4,250 circuit boards. Each purchase order included the following provision on the back of the preprinted form at the end of the first of 13 paragraphs of small print under the overall title, "Purchase Order Terms and Conditions":

> This purchase order shall not constitute a contract until the acceptance copy, signed by the Vendor, is received by Purchaser. Notwithstanding any qualified acceptance, if the goods are shipped, the Vendor thereby waives such qualification and agrees to be bound thereby. Shipments will be received solely under the conditions herein stated and no addition thereto or modification thereof shall be binding upon

> Purchaser unless the same is in writing and approved by the signature of Purchaser's authorized representative.

The provision is in the same small type size as the rest of the page. Nothing on the page calls it to the reader's attention. It is not in bold type or in a different color. It is not set out by a box. The paragraph in which it is included is headed "General." The front page of the purchase order includes the preprinted words: "Please accept our order and furnish the following subjects [sic] to conditions below." There is no other reference to any of the terms on the reverse side of the form.

No representative of defendant ever indicated to any representative of plaintiff that defendant's acceptance of plaintiff's August 23, 2000 price quote was conditioned expressly on plaintiff's agreeing to additional or different terms contained in defendant's October 16, 2000 purchase order or in any other purchase order sent in 2000 or 2001. Defendant's purchase order contains no language stating that defendant's acceptance of plaintiff's offer is made expressly conditional on plaintiff's assent to any terms included in defendant's purchase order.

Plaintiff responded to defendant's purchase order with an acknowledgment that contains on its reverse side preprinted terms relating to cancellation that are identical to those on the reverse side of the price quote it sent defendant. Plaintiff continued to fill defendant's purchase orders after October 16, 2000. It acknowledged each purchase order

in a form that included the same cancellation term as in its price quotation. In total, plaintiff filled 23 purchase orders from defendant without any objection by defendant to the cancellation term.

In early May 2001, defendant's purchasing agent called plaintiff, asking it to stop all shipments. (The parties dispute the reason for the request and whether defendant asked plaintiff to stop manufacturing circuit boards altogether because of manufacturing defects or whether defendant asked plaintiff to stop because defendant was closing its plant for several weeks.) Plaintiff continued to manufacture the circuit boards defendant had ordered and stored them at its facility. Plaintiff resumed shipments to defendant on June 4, 2001. On June 6, 2001, defendant called to cancel all but seven shipments from ten of its purchase orders. Plaintiff filed this lawsuit on September 19, 2001.

OPINION

Neither party has raised the possibility of a conflict of law despite the fact that the contract involves a seller in Wisconsin and a buyer in Michigan. They agree that the case is governed by Wis. Stat. § 402.207, a part of Wisconsin's codification of the Uniform Commercial Code.

The initial question in this case is whether a contract was formed. Plaintiff contends that its price quote was an offer that defendant accepted when it sent plaintiff a purchase

order for circuit boards; defendant contends that its purchase order did not constitute a "definite and seasonable expression of acceptance" but that it was a counteroffer because it was "expressly made conditional on [plaintiff's] assent to [] additional or different terms."

Wis. Stat. § 402.207 (UCC § 2-207) is a provision intended to reflect the realities of the widespread use of preprinted forms in the market place. It recognizes that buyers and sellers rarely read the fine print in price quotations, purchase orders or acceptances but focus instead on the filled in portions that specify quantity, quality, shipping dates, price, etc. See Stuart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 58-59 (1963) ("Typically, the terms and conditions of [sales and purchases] are lengthy and printed in small type on the back of the forms . . . [S]alesmen and purchasing agents, the operating personnel, typically are unaware of what is said in the fine print on the back of the forms they use.") quoted in Caroline N. Brown, Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work, 901-02 n.29, 69 N.C. L. Rev. 893 (1991).

Before the adoption of the UCC, a party who found any discrepancy between the offer and the acceptance could claim that no contract had been formed because the acceptance was not the mirror image of the offer. This could be a bonanza for a buyer who chose to renege on an agreement after the seller had shipped valuable commodities in reliance on a purchase order. (Whether such bonanzas occurred with any frequency is

debatable. See Douglas G. Baird & Robert Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207, 68 Va. L. Rev. 1217, 1234-35 (1982) (asserting that courts did not apply mirror-image rule mechanically to permit welshing).) To avoid rewarding the "welsher" and to reflect the realities of the widespread use of preprinted forms in the market place, the drafters of § 2-207 provided in subsection (1) that "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." In this section, the drafters codified market practices and made it clear to courts that a perfect match of offer to acceptance was not required in sales contracts. If one party's printed form included special provisions for arbitration or warranties or limitation of liability and the other's had different provisions on the same topics or additional provisions on other topics, the forms would still constitute a contract so long as the parties agreed on the critical terms of goods, price, quantity, delivery date, etc. See, e.g., Northrop Corp. v. Litronic Inds., 29 F.3d 1173, 1176 (7th Cir. 1994) (90-day warranty offered by seller did not match unlimited warranty specified by buyer; contract formed nevertheless).

Up to the comma, subsection (1) is straightforward. It complements § 2-204, which provides that "[a] contract for sale of goods may be made in any manner sufficient to show

agreement, including conduct by both parties which recognizes the existence of such a contract" and § 2-207, which provides that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." The proviso after the comma is the source of difficulty: "unless acceptance is expressly made conditional on assent to the additional or different terms." Not only is it contradictory (an acceptance can hardly be definite as set out in the first clause if it is conditional within the meaning of the second clause) but it raises problems of interpretation and application that courts have struggled with since the code's adoption.

In this case, the parties dispute whether the language of defendant's provision is equivalent to other language that has been found to make acceptance "expressly conditional." Parsing the language in this way does not advance the purpose of § 2-207(1). It is essentially immaterial what words defendant used because it buried them in the fine print on the back of the purchase order. A condition must be explicit if it is to make the offeree's responsive form a counteroffer rather than an acceptance. Defendant did not put its condition into bold type, larger type size or different colored ink; it did not call attention to the provision on the front on the contract where plaintiff was likely to be looking; and it has proposed no facts suggesting that it had a practice of following up receipt of the acceptance in any way, such as with a telephone call reminding plaintiff of the need to assent either to the formation of the contract or to defendant's requirement that no conditions

imposed by plaintiff would be binding on defendant unless they were approved by defendant's authorized representative. No one looking at defendant's form could conclude that it gave the offeror a realistic opportunity to be aware of it or its significance. Moreover, despite defendant's preprinted proviso that the purchase order was not a contract until plaintiff had signed an acceptance copy and sent it to defendant, defendant repeatedly ordered, re-ordered and paid plaintiff for circuit boards, using the same preprinted purchase order forms. Its course of dealing and course of performance undercut any force its preprinted provision might have had. In short, defendant did not make it express to plaintiff that it was not willing to proceed with the purchase unless plaintiff obtained defendant's written approval of plaintiff's terms. Dorton v. Collins & Aikman, 453 F.2d 1161, 1168 (6th Cir. 1972) (§ 2-207(1) intended to apply only to acceptance that clearly reveals that offeree is unwilling to proceed with transaction unless assured of offeror's assent to additional or different terms in acceptance). See also Northrop Corp., 29 F.3d at 1176 (court found contract formed despite seller's failure to sign acknowledgment of purchase as required in order; buyer did not have practice of following up on requirement); Reaction Molding Technologies, 588 F. Supp. 1280, 1288 (E.D. Pa. 1984) (clause preprinted on form contract did not qualify as express contract; qualifying language "'must be stated in such a place, manner and language that the offeror will understand in the commercial setting of the transaction that no acceptance has occurred'") (quoting 2 W. Hawkland, UCC Series § 2-

207:02 at 103); Brown, Restoring Peace, 69 N.C. L. Rev. at 921 ("If the offeror is not expected to read the preprinted terms of the form, it seems ridiculous to allow the offeree to avoid the acceptance-effect of the form's dispatch merely by including proviso language in the preprinted form itself, no matter how unambiguous that language may be . . . If an offeree is serious about making a counter offer rather than an acceptance, it is comparatively easy and inexpensive to communicate this intention without ambiguity."). Cf. Ralph Shrader, Inc. v. Diamond International Co., 833 F.2d 1210, 1214-15 (6th Cir. 1987) (seller had term on front page of its acknowledgment stating, "The terms set forth on the reverse side are the *only ones upon which we will accept* orders"; court found that this was clear indication that seller was unwilling to proceed unless assured of offeror's assent to additional or different terms).

Defendant's inconspicuous "condition" was not an express condition. It did not prevent the formation of a contract between the parties for the sale of circuit boards that included plaintiff's cancellation charge. It is not significant that plaintiff's notice of its cancellation charge was not in large type or otherwise conspicuous. Ordinarily, the offeror controls the terms of the contract, so long as the terms are within the expectations of an offeree. Brown, Restoring Peace, 69 N.C. L. Rev. at 937. See id. at 928 ("Once a contract is recognized as having been formed under section 2-207(1), the terms are determined primarily by reference to common-law principles. Except for those terms that are excluded

as unconscionable or bad faith attempts of the offeror to take undue advantage through the use of a preprinted offer form, the primary terms of the contract are those contained in the offer.") (internal citations omitted). James J. White & Robert S. Summers, Uniform Commercial Code § 1-3 at 16 (4th ed. 1995) ("terms contained in buyer-offeror's document which are not contradicted by the acceptance become part of the contract"); see also Earl M. Jorgensen Co. v. Mark Construction, Inc., 56 Haw. 466, 540 P.2d 978 (1975) (limitations of remedies provision in seller's form held accepted by buyer whose form was silent on subject).

Plaintiff's price quotation was an offer to which defendant responded with a purchase order that served as an acceptance. Plaintiff was not simply advertising its wares at particular prices but responding to defendant's need for a new supplier. The quotation plaintiff sent defendant was detailed and complete. Wisconsin law recognizes that the question whether certain acts constitute a definite proposal that forms the basis for a binding contract is dependent upon "the nature of the particular acts or conduct in question and the circumstances attending the transaction." Nickel v. Theresa Farmers Coop. Assn., 247 Wis. 412, 416, 20 N.W.2d 117 (1945). Plaintiff's act of sending a specific and detailed quotation under circumstances in which defendant had sought out plaintiff as a supplier demonstrates that the price quotation was a definite proposal so as to constitute an offer. See also White Consolidated Industries v. McGill Manufacturing Co., 165 F.3d 1185, 1190

(8th Cir. 1999) (seller's detailed price quotation that provided that offer was subject to immediate acceptance by buyer was offer); Northrop Corp., 29 F.3d at 1175, (price quotations submitted in response to request for offers to produce printed wire boards for defense systems were offers within meaning of UCC): Rich Products Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 955-58 (E.D. Wis. 1999) (quote for conveyors designed to be used in specialized blending room application that was prepared for one specific customer held to be offer); Reaction Molding Technologies, 585 F. Supp. at 1292 ("Plaintiff's quotations constitute the offer because they describe the property to be sold, the price and the delivery terms.").

Because defendant did not propose any additional terms when it sent plaintiff its purchase orders, there is no need to consider subsection (2) of § 2-207, which addresses the treatment of terms in the offeree's form that do not match those in the offeror's:

> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Plaintiff made an offer to defendant in the form of a detailed price quotation; defendant did not respond with any new terms. Defendant's purchase order was not a counteroffer. It did not add new terms and it was not "expressly conditional" (because it was

buried in fine print; it was never brought specifically to plaintiff's attention and defendant's ensuing conduct demonstrated its lack of concern for securing a signed acceptance copy). Therefore, plaintiff's cancellation charge is part of the contract unless it is unconscionable or a bad faith effort to take undue advantage of defendant. It is neither. To the contrary, it is a standard provision that any buyer, whether merchant or consumer, would expect to find in a contract to purchase custom manufactured goods. However, defendant will be given an opportunity at trial to prove that a charge amounting to the full purchase price is unreasonable under all the circumstances existing at the time of execution of the contract.

I am persuaded that the parties formed a contract and that it includes a cancellation charge. Alternatively, I am persuaded that if the Supreme Court of Wisconsin were to find that no contract had been formed, it would look to subsection (3) of § 2-207, which addresses the situation in which no contract is formed by the exchange of forms but the parties' conduct establishes one. "In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act." (Wisconsin's version of the subsection uses the words, "incorporated under any other provision of chs. 401 to 411." Wis. Stat. § 402.207(3).) That the parties agreed on the terms of goods, price, quantity and delivery is evident from their continued dealing with each other from August 2000 until May 2001.

If defendant's purchase order is read as supplying a "different" term to which the parties did not agree because it provides that the conditions in the purchase order will be the only terms governing the parties' transactions, plaintiff's cancellation charge would become part of the contract as a supplementary term, so long as plaintiff could prove that it reflected the "usage of the trade." UCC § 1-205 (2) defines usage of trade as

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.

Although some courts limit supplementary terms to the "gap-filling" provisions of the UCC, the Court of Appeals for the Seventh Circuit has held that under Wisconsin law, all of the UCC's provisions should be used in discerning terms of contract under § 2-207(3), including those that may be implied from parties' course of performance, course of dealing and usage of trade. Dresser Industries v. Gradall Co., 965 F.2d 1442, 1450-52 (7th Cir. 1992). The court distinguished this result from that in C. Itoh & Co. v. Jordan International Co., 552 F.2d 1228 (7th Cir. 1977), where it had held that supplementary terms could not be imported into a contract unless they came from the UCC's "gap-filling" provisions. C. Itoh is different, the court concluded, because in that case, no party had raised the question of using course of performance, course of dealing or trade usage as supplementary terms; the case had been decided under New York's version of § 2-207(3); and the case involved a provision of the Federal Arbitration Act requiring that arbitration clauses be in writing. In

Dresser, the court gave weight to the fact that Wisconsin's version of the same subsection provided that the terms of a contract formed through conduct could be supplemented with "any supplementary terms incorporated under any other provision of chs. 401 to 411," indicating to the court that the Wisconsin courts would include terms relating to matters such as course of performance.

It is not surprising that a manufacturer supplying custom built components would impose a charge for orders that were not cancelled until manufacture had begun. I am prepared to find as a matter of law that it is customary in the trade. However, at trial, I will ask the jury to decide whether plaintiff would be entitled to the full purchase price as a cancellation charge or whether such a charge would constitute an improper penalty within the meaning of Wis. Stat. § 402.718(1) ("Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.")

ORDER

IT IS ORDERED that the motion of defendant Barnett Pump Company for partial summary judgment is DENIED with respect to its assertion that plaintiff Electronic

Technologies International Inc.'s cancellation charge in its price quotation is not part of the contract between the parties; however, defendant will be allowed an opportunity at trial to prove that the requirement of paying the full purchase price as a cancellation charge makes the charge an impermissible penalty.

Entered this 15th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge