

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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GLOBAL DAIRY SOLUTIONS  
PTY. LTD.,

Plaintiff,

v.

OPINION AND ORDER

10-cv-237-slc

BOUMATIC, LLC.,

Defendant.

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In this civil action for money damages, plaintiff Global Dairy Solutions Pty LTD (GDS) has brought breach of contract claims against defendant BouMatic, LLC for terminating the parties' international distribution agreements related to commercial dairy equipment. GDS alleges that BouMatic terminated the agreements without the required good cause and failed to give GDS an opportunity to cure any alleged material breaches. BouMatic filed a counterclaim for unpaid invoices totaling \$89,816.86 for equipment that it provided to GDS and seeks payment of the unpaid invoices, attorney fees and costs. Dkt. 7. GDS disputes 3 of the invoices and admits that it has not paid the other invoices on the ground that it believes that it is entitled to a setoff or recoupment of damages resulting from BouMatic's alleged breach of the distribution agreements. Dkt. 18.

Before the court is BouMatic's motion for summary judgment, in which it asserts that it terminated the agreements with good cause because GDS failed to achieve the required minimum percentage of its sales forecast. Dkt. 18. Although the distribution agreements allow BouMatic to terminate for this reason, GDS challenges the figures used by BouMatic to develop the sales forecasts. Specifically, GDS argues that because the figures predated the execution of

the contracts, they are barred by the parole evidence rule. It also contends that the figures were merely developed for budget and business planning purposes and never were intended to be used as GDS's sales forecasts.

I conclude that the parole evidence rule does not apply in this case and that nothing in the contract prevented BouMatic from using the pre-contractual figures as GDS's sales forecasts. Because BouMatic has shown that GDS failed to achieve a minimum percentage of its sales forecast, the express terms of the distribution agreements permitted it to terminate the agreements with good cause. With respect to BouMatic's counterclaim, it is undisputed that GDS owes BouMatic \$87,928.03 for all but three of the unpaid invoices. Invoice numbers 2383486, 2383487 and 2383488, totaling \$1,888.83, remain in dispute. Because GDS suffered no damages as a result of BouMatic's termination of the distribution agreements, it is not entitled to either a setoff or recoupment for the \$87,928.03 owed to BouMatic. BouMatic is entitled to summary judgment on GDS's breach of contract claims and on its counterclaim with respect to all but three of the unpaid invoices. Upon final resolution of this case, BouMatic may file a motion renewing its request for attorney fees and costs pursuant to Fed. R. Civ. P. 54.

## FACTS

### **I. The Parties and Background**

Defendant BouMatic manufactures and sells commercial dairy equipment. In March 2008, BouMatic's management expressed its dissatisfaction with the performance of its Australian distributor, Daviesway. It also did not have a New Zealand distributor at the time. To address these concerns, BouMatic encouraged one of its Australian-based employees,

Christopher Nisbet, to partner with the owner (Tim Larsen) and an employee (Greg Kinross) of an Australian dairy equipment company, Larsen Engineering, to form plaintiff Global Dairy Solutions as a distributor for Australia and New Zealand.

Larsen Engineering manufactured and sold rotary milking platforms upon which dairy equipment manufactured by BouMatic and other companies could be installed. GDS's proposed business plan was to use Larsen Engineering's established reputation in the Australian and New Zealand dairy markets as an avenue for selling BouMatic equipment in those markets.

GDS's initial focus was on installing complete dairies, including cattle pens, milking equipment and sheds housing the dairy. BouMatic was to supply the milking equipment that extracts the milk from the cow and transfers it to the cooling tank.

## **II. The Distribution Agreements**

On June 30, 2008, GDS and BouMatic executed identical but separate international distribution agreements for the Australia and New Zealand territories. Michael Pawlak, Executive Vice President of Sales and Marketing for BouMatic at the time, executed the agreements on behalf of BouMatic. (Pawlak was terminated by BouMatic on July 30, 2008.)

Paragraph 1 of the agreements states that GDS could not "directly or indirectly manufacture equipment competitive with the BouMatic Products within the Assigned Territory during the life of this Agreement, with the exception of those products that are agreed to be sourced or manufactured locally with the approval of BouMatic."

Paragraph 12d of the distribution agreements provide that GDS will "participate in the forecasting process when and as requested by BouMatic who will determine a final forecast . . .

. on at least an annual basis.” GDS also was required to “agree with BouMatic's reasonable forecast,” which “will be used to evaluate” GDS’s performance. There is no reference to any sales forecast created prior to execution of the agreement.

The distribution agreements do not expire on a specified date (i.e., there is no term). Instead, paragraph 14 provides that BouMatic may terminate the distributorship only for “good cause.” Good cause is defined in the agreements to include “Distributor’s material breach of this Agreement, which breach cannot be cured or remains uncured for 30 days after written notice to Distributor by BouMatic.” “Good cause shall expressly include, but not be limited to, a failure to achieve a minimum of 35% of sales forecast by the end of six months of a sales period, or 70% of the sales forecast by the end of a twelve month sales period.”

Paragraph 18 of the distribution agreements state that the agreement constitutes the entire agreement between BouMatic and GDS and there were “no oral or other written contracts, agreements, promises or representations that have not been included herein.” Paragraph 19 of the agreements provide that the substantive law of Wisconsin governs if GDS “commences any legal action relating in any way” to the distribution agreements. In the event of a lawsuit concerning the agreements, paragraph 20 states that the prevailing party shall be reimbursed for all reasonable costs, expenses and attorneys’ fees.

### **III. Sales Forecasts**

Jorge Prieto was BouMatic’s regional sales manager for Australia and New Zealand in 2008 and the beginning of 2009. According to Prieto, BouMatic has an annual sales forecasting process for distributors. In November or December of each year, BouMatic’s regional and

district sales managers review sales totals for the prior year with their distributors and put together a sales forecast for the upcoming year. The sales forecasts are then all forwarded to Prieto, who then forwards them to the financial department. Those forecasts then become the goals for the distributors for the year. According to Prieto, an annual sales forecast was not developed for GDS in 2008 because one already had been presented before it had become a distributor.

On June 3, 2008, Prieto e-mailed Tim Larsen at GDS for input on a spreadsheet containing “figures” “for all of us to have a clear understanding on where we stand concerning the distribution agreement process.” The next day, Larsen sent Prieto an e-mail with “GDS BUDGET 2008-2010” in the subject line and stated the following:

Find figures for NZ and Australia for BouMatic. We have revised the sales based on our current knowledge such as sales in Aust/NZ for Larsen Engineering (existing) and success we have had with Systems etc to date.

I believe these figures are achievable in the market place with the correct setup and support.

Attached to that e-mail was a spreadsheet entitled “2008-2010 Projections,” which contained figures for projected sales of BouMatic goods in Australia and New Zealand and GDS projected purchases of BouMatic goods for resale in Australia and New Zealand. The term “forecast” does not appear in either e-mail or the attachments. Although Prieto avers that these projections are a “sales forecast” under the distribution agreements, he admitted during his deposition that he does not remember referring to the figures as a sales forecast before signing his declaration.

Nisbet and Pawlak testified that they were not part of any discussion or agreement that the “sales projections” or other components of any of the budgets would be considered “sales forecasts” under the GDS/BouMatic distribution agreements or that GDS could be terminated

if it did not meet a certain percentage of those particular numbers. To show that GDS would be a viable business, GDS provided Prieto and Pawlak with draft company budgets from time to time, including in May and June 2008. The budgets were in Australian dollars, as GDS would be an Australian company, and were for Australian fiscal years 2008-2010. The Australian fiscal year runs from July 1 to June 30. The budgets included a worksheet entitled “sales projections” that showed projected sales in terms of the retail price to the customer.

The 2008 projection for GDS purchases from BouMatic for resale was \$1,108,400 in Australia and \$1,044,000 in New Zealand (the parties dispute whether this is in U.S. or Australian dollars). GDS stated that the 2008 figures “were based on a full six months of trading.” GDS’ actual purchases from BouMatic in 2008 was \$484,824 for resale in Australia and \$38,163 for resale in New Zealand.

The 2009 projection for GDS purchases from BouMatic was \$2,135,580 for resale in Australia and \$1,775,520 for resale in New Zealand (the parties dispute whether this is in U.S. or Australian dollars). GDS’s actual purchases from BouMatic in 2009 was \$393,149 for resale in Australia and \$7,621 for resale in New Zealand.

During GDS’s first 12 months (July 2008 through June 2009), BouMatic sold \$758,815.34 worth of equipment to GDS for resale in both Australia and New Zealand. In GDS’s entire 17-month history, the grand total of all sales from BouMatic to GDS amounted to only \$923,758.16.

#### **IV. Daviesway**

Because of the decline in milk prices in late 2008, GDS turned its attention to providing

existing BouMatic equipment owners with spare parts and servicing, either directly or through dealers. In August 2009, GDS was contacted by several dealers and farmers upset about the prices and services offered by Daviesway. Daviesway complained to BouMatic that GDS was undercutting its business and threatened to disassociate with BouMatic if GDS was not terminated.

In March 2009, John Paetz replaced Prieto as BouMatic's regional sales manager for Australia and New Zealand. Paetz had known John Davies, the owner of Daviesway, when Paetz was working at a BouMatic subsidiary in Australia. When the subsidiary declared bankruptcy in the early 2000s, Davies agreed to take on the customers, staff and product left behind. Prieto believes that Davies and Paetz may have influenced BouMatic's decision to replace him with Paetz as the regional sales manager for Australia and New Zealand.

In June 2009, Paetz visited GDS and told them that they should never have been named a distributor in Australia and should focus their attention on New Zealand. On October 30, 2009, Chris Berning of BouMatic and Steve Brown exchanged emails in which Brown encouraged Berning to find any reason to terminate GDS even if the reasons were "weak." On November 24, 2009, after several emails and phone calls between Paetz and Daviesway, John Davies sent BouMatic an email complaining about GDS's prices and the dual distributorship and requested that BouMatic advise Daviesway how BouMatic intended to "rectify" the situation within seven days.

## **V. Termination of Agreements**

BouMatic terminated the distribution agreements in a letter e-mailed to GDS on

November 25, 2009. The letter simply stated that GDS “materially failed to comply” with the distribution agreements and offered no explanation. The next day, GDS’s Australian solicitor sent BouMatic a letter pointing out the distribution agreements required BouMatic to give GDS 30 days notice and an opportunity to cure any termination because of an alleged material breach of the contracts.

On December 3, 2009, BouMatic’s counsel sent a second termination letter, claiming in part that GDS was in material breach of the distribution agreements for the following:

1. Selling non-BouMatic products, including Larsen platforms and Panazoo automation equipment, in violation of paragraph 1 of the agreements without BouMatic’s approval;
2. Failing to service the Madden dairy and other GDS customers properly in violation of paragraph 12.a;
3. Failing to keep current on its account with BouMatic; and
4. Failing to advise customers that non-BouMatic components were not covered by the BouMatic warranty. (During depositions BouMatic abandoned its claim that GDS mislead its customers regarding BouMatic’s warranty.)

The letter states that “some or all” of the alleged breaches were not curable “as a matter of law or fact” within 30 days, and that the 30-day notice period thus did not apply. It did not explain why or identify which of the alleged breaches were incurable and did not indicate whether the alleged breaches were of the Australian, the New Zealand or both distribution agreements. The letter did not state that GDS failed to hit certain sales forecasts.

## **VI. Unpaid Invoices**

At the time of GDS’s termination, GDS owed BouMatic \$89,816.86 in unpaid

equipment invoices. Three of the invoices (#2383486, 2383487 and 2383488), each totaling \$629.61, were for software licensing passwords. (GDS disputes these 3 invoices, claiming that the passwords were useless because BouMatic terminated GDS as a distributor a week after sending them.) GDS did not pay the invoices on the ground that they are compensation for the damages caused by the termination.

## OPINION

### I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.” *Sides v. City of Champaign*, 496 F.3d 820, 826 (7<sup>th</sup> Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7<sup>th</sup> Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7<sup>th</sup> Cir. 2007). Even so, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party that bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Hunter v. Amin*, 538 F.3d 486, 489 (7<sup>th</sup> Cir. 2009) (internal quotation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

## II. Breach of Contract

GDS has alleged that BouMatic breached the distribution agreements when it terminated them without proper notice, good cause or providing GDS an opportunity to cure any of its alleged material breaches. BouMatic identified what it believed to be incurable, material breaches in its December termination letter to GDS. However, on summary judgment, BouMatic has alleged only one ground for terminating the agreements with good cause: GDS's alleged failure to achieve 35% of its sales forecast in a 6-month period and 70% of its sales forecast in a 12-month period, as required under the agreements. At issue in this case are the sales forecasts that BouMatic claims it used in assessing GDS's performance in 2008 and 2009.

BouMatic contends that three weeks before the agreements were executed, GDS e-mailed "figures" for Australia and New Zealand to Prieto at BouMatic. The figures were included in an attached spreadsheet entitled "2008-2010 Projections." BouMatic claims that these figures constituted GDS's sales forecasts for those years. GDS objects, arguing that the parole evidence rule bars the incorporation of these documents into the later signed agreements. In the alternative, GDS contends that testimony from witnesses involved in the formation of the agreements shows that the projections were developed for budgeting purposes and never were intended to be GDS's sales forecasts. It points out that the agreements were prospective, calling for annual forecasting, and can not by their terms rely on figures develop before their execution. Finally, in a newly asserted claim, GDS alleges that BouMatic violated the implied covenant of good faith and fair dealing because it actually terminated GDS to appease another distributor and asserted trumped up charges to justify its decision after-the-fact.

## A. Parole Evidence

The Wisconsin Supreme Court has explained that the parole evidence rule is not a rule of evidence but a rule of substantive contract law:

When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

*Town Bank v. City Real Estate Development, LLC*, 330 Wis.2d 340, 357-58, 793 N.W.2d 476, 484-85 (Wis. 2010) (citations omitted). The purpose of the rule is to “promote the integrity, reliability, and predictability of written contracts and to reduce the threat of juries being misled or confused by statements or negotiations that may have taken place before a contract was entered into.” *Id.* at 330 Wis. 2d at 358, 793 N.W.2d at 485.

In this case, it is clear from the express terms of the distribution agreements that the parties intended the written agreements to be the final and complete expression of their agreement. Both contracts clearly state that they constitute the parties’ entire agreement and that “no oral or other written contracts, agreements, promises or representations” have been included. *See Town Bank*, 330 Wis. 2d at 361, 793 N.W.2d at 486 (finding similar terms to be unambiguous merger clause that invoked parole evidence rule). However, this does not mean that any document prepared prior to the execution of the distribution agreements is irrelevant to the issue at hand.

The evidence that BouMatic seeks to introduce relates to the purported development of the GDS sales forecasts for 2008 and 2009. The distribution agreements provide that GDS was to participate in the forecasting process “when and as requested by BouMatic,” that BouMatic “will determine a final forecast for [GDS] on at least an annual basis” and that GDS “shall agree

with BouMatic’s reasonable forecast.” Therefore, the agreements anticipate that the parties will enter into a separate and distinct process with respect to the sales forecasts. Evidence concerning how that happened for 2008 and 2009 does not alter or contradict those terms. Although the contracts state that BouMatic *will determine* the forecasts, implying a future process, nothing in the terms of the contracts states that the forecasting process *must* occur after the effective date of the contract. Therefore, I find that the parole evidence rule does not prevent BouMatic from relying on the parties’ pre-contractual discussions and communications in establishing GDS’s sales forecasts.

## **B. Sales Forecasts**

GDS goes to great lengths to show that neither GDS nor BouMatic intended the June 2008 “budget” or “projections” to be used as GDS’s annual sales forecasts. It points out that Nisbet and Pawlak did not think that these figures would be used as “sales forecasts” and never agreed to use them for that purpose. GDS also notes that Prieto never referred to those numbers as forecasts. However, what the parties initially intended in developing those figures or what they called them does not really matter. Under the distribution agreements, BouMatic had the final say on the sales forecasts, provided that they were reasonable and were developed on at least an annual basis. GDS only gets to participate if BouMatic asks it to participate.

It is undisputed that at the time, Prieto had the authority to set GDS’s sales forecast and he has testified that he used the June 2008 figures provided by Larsen to do so. GDS attempts to dispute this assertion by pointing out that BouMatic’s usual process was to have the regional and district sales managers review sales totals for the prior year with their distributors in

November or December of each year and put together a sales forecast for the upcoming year. The sales forecasts are then all forwarded to Prieto, who then forwards them to the financial department. However, nothing in the GDS contracts requires him to follow that process. As BouMatic points out, GDS has not argued that the June 2008 figures were unreasonable. In fact, it would be hard pressed to do so given its own employee, Larsen, sent the figures to BouMatic in the first place and stated that he believed that the figures were achievable in the marketplace. Accordingly, I find that GDS has failed to establish a genuine issue of material fact with regard to its 2008 and 2009 sales forecasts.

The 6-month projection for GDS purchases from BouMatic in 2008 was \$1,108,400 in Australia and \$1,044,000 in New Zealand. GDS' actual purchases from BouMatic in 2008 totaled \$484,824 for in Australia (44% of projected sales) and \$38,163 for New Zealand (3.6% of projected sales).<sup>1</sup> The 2009 projection was \$2,135,580 for Australia and \$1,775,520 for New Zealand. GDS's actual purchases from BouMatic in 2009 was \$393,149 in Australia (18% of projected sales) and \$7,621 in New Zealand (.4% of projected sales). Given it is undisputed that GDS failed to meet 35% of its sales forecast by the end of 6 months or 70% by the end of 12 months in either country, BouMatic had good cause to terminate the distribution agreements and is entitled to summary judgment on GDS's breach of contract claims.

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<sup>1</sup> Although the parties dispute whether the projections were in U.S. or Australian dollars, the difference is insignificant because the average exchange rate for the Australian dollar in June 2008 was 1.05. *See* dkt. 44, Exh. 2; Foreign Exchange Rates, Federal Reserve Statistical release H.10, accessed at <http://www.federalreserve.gov/releases/h10/Hist/>. For example, if the 2008 figures were in Australian dollars, the U.S. equivalent would have been \$1,064,064, making actual sales for that year 46% of the projection.

### C. Good Faith and Fair Dealing

For the first time on summary judgment, GDS has alleged that BouMatic violated the implied covenant of good faith and fair dealing because it actually terminated GDS to appease another distributor and asserted trumped up charges to justify its decision after-the-fact. As this court has explained in previous cases, “[s]ummary judgment is not the time to bring new claims into the case” or to change the grounds upon which a claim rests. *Felton v. Teel Plastics, Inc.*, 724 F. Supp. 2d 941, 951 (W.D. Wis. 2010) (citing *Grayson v. O'Neill*, 308 F.3d 808, 817 (7<sup>th</sup> Cir. 2002) (plaintiff “may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment”)); *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 716 F. Supp. 2d 773, 783 (W.D. Wis. 2010) (“A party may not raise a claim at summary judgment if it did not provide notice of the claim in the pleadings as required by Fed. R. Civ. P. 8.”). A district court may reject claims raised for the first time at summary judgment and consider only those claims for which the defendants had proper notice. *Clancy v. Office of Foreign Assets Control of United States Department of Treasury*, 559 F.3d 595, 606-7 (7<sup>th</sup> Cir. 2009) (district court may reject claim raised for first time in summary judgment); *Conner v. Ill. Dept. of Natural Resources*, 413 F.3d 675, 678-79 (7<sup>th</sup> Cir. 2005) (affirming district court’s decision to strike portion of plaintiff’s summary judgment brief that asserted additional grounds for race discrimination claim).

Although I am inclined to find that GDS has waived a bad faith claim by not raising it earlier, it is arguable that BouMatic had sufficient notice of such a claim. Every contract implies good faith and fair dealing between the parties to it. *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI App 39, ¶ 12, 289 Wis. 2d 795, 714 N.W.2d 582 (citation omitted).

In that sense, GDS's claim that BouMatic violated the covenant of good faith arises out of the same allegations as their claim that BouMatic breached the termination provision of the distribution agreements. Further, GDS claims that it only learned of BouMatic's true motivations and apparent cover-up during discovery.

In any event, even if GDS did not waive its bad faith claim, it could not prevail on it. “[T]here can be no breach of good faith and fair dealing “where the contracting party complains of acts of the other party that are specifically authorized in their agreement.” *M&I Marshall and Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶ 15, 258 Wis. 2d 865, 655 N.W.2d 521 (citing *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988)). “Good faith” is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties. *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 595 (7<sup>th</sup> Cir. 1991) (internal citations omitted). “In sum, a breach of ‘good faith’ involves a willful act that seeks to take advantage of one contracting party by depriving it of the bargained-for benefit.” *CITGO Petroleum Corp. v. Ranger Enterprises, Inc.*, 590 F. Supp. 2d 1064, 1069 (W.D. Wis. 2008).

Because the plain language of the distribution agreements in this case specifically authorized BouMatic to terminate GDS for failing to meet minimum percentages of its sales forecasts, it could not have acted in “bad faith.” Regardless of its true motivations for terminating the agreements, BouMatic did not take opportunistic advantage of GDS in a way that was not contemplated at the time of the drafting of the agreements. BouMatic had every right under the express terms of the agreements to terminate GDS as a distributor. Therefore,

to the extent that GDS has a claim that BouMatic breached an implied covenant of good faith and fair dealing in terminating the distribution agreements, BouMatic will be granted summary judgment on that claim.

### **III. Counterclaim for Unpaid Invoices**

It is undisputed that GDS has failed to pay BouMatic \$89,816.86 in unpaid invoices. In response to BouMatic's proposed findings of fact and in its response brief, GDS asserts that three of the invoices (#2383486, 2383487 and 2383488), each totaling \$629.61, were for software licensing passwords, which it claims were useless because BouMatic terminated GDS as a distributor just before sending them to GDS. Given \$1,888.83 worth of invoices remains in dispute, BouMatic is entitled to summary judgment on its claim for \$87,928.03 in unpaid invoices. The three disputed invoices remain the sole issue for trial. For the sake of completeness, I note that because GDS did not suffer any damages as a result of BouMatic's termination of the distribution agreements, it is not entitled to either a setoff or recoupment for the \$87,928.03 it owes to BouMatic. *See Zweck v. D.P. Way Corp.*, 70 Wis. 2d 426, 433-34, 234 N.W.2d 921, 925 (1975) (set-off is separate claim by breaching party against non-breaching party arising out of an extrinsic transaction; recoupment is reduction in claim by breaching party because of an obligation of non-breaching party arising out of same claim).

### **ORDER**

IT IS ORDERED that defendant BouMatic LLC's motion for summary judgment (dkt. 10) is GRANTED in part and DENIED in part:

(1) The motion is DENIED with respect to BouMatic's counterclaims for unpaid invoice numbers 2383486, 2383487 and 2383488, each totaling \$629.61; and

(2) The motion is GRANTED with respect to the remaining unpaid invoices totaling \$87,928.03 and with respect to GDS's claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Entered this 19<sup>th</sup> day of April, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge