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

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GLOBAL DAIRY SOLUTIONS PTY. LTD.

Plaintiff,

v.

BOUMATIC, LLC.,

Defendant.

OPINION AND ORDER

10-cv-237-slc

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From a Hobbesian business relationship[1] this lawsuit was born. Plaintiff Global Dairy Solutions Pty LTD (GDS) claims that defendant BouMatic, LLC has breached the parties' short-lived agreements relating to GDS's distribution of BouMatic's commercial dairy equipment in Australia and New Zealand. GDS alleges that BouMatic, acting in bad faith, terminated the agreements without the required good cause and failed to give GDS an opportunity to cure any alleged material breaches. BouMatic has counterclaimed for unpaid invoices totaling $89,816.86 for equipment that it provided to GDS, and it seeks payment of the unpaid invoices, attorney fees and costs. Dkt. 7. GDS disputes three of the invoices but acknowledges that it has not paid the others, asserting 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 allowed 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

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[1] Nasty, brutish and short.

execution of the contracts, they are barred by the parole evidence rule. GDS 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. There is no doubt that GDS's demise was machinated by BouMatic executives at the behest of Daviesway, GDS's competitor in Australia; the operative question at this point is whether this was an allowable termination pursuant to the terms of the contract or a botched hatchet job that entitles GDS to be heard at trial.

BouMatic's sharp practices do not appear to have breached the parties' contracts. 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 for the purpose of determining GDS's performance. Because BouMatic has shown that GDS failed to achieve a minimum percentage of its sales forecasts, the express terms of the distribution agreements permitted BouMatic to terminate the agreements with good cause. So long as the termination complied with the terms of the agreements, GDS has no claim against BouMatic for breach of its duty to deal fairly and in good faith. In short, GDS's poor performance during the global recession gave its detractors at BouMatic enough ammunition to kill the contracts.

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, GDS 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. Prologue to the Distribution Agreements

Defendant BouMatic manufactures and sells commercial dairy equipment. In March 2008, BouMatic was concerned with the unsatisfactory performance of its sole Australian distributor, Daviesway, and concerned that it did not have a distributor in New Zealand. To address both concerns, BouMatic encouraged one of its Australian-based employees, Christopher Nisbet, to partner with the owner (Tim Larsen) and an employee (Greg Kinross) of Larsen Engineering, an Australian dairy equipment company, to form a new company–plaintiff Global Dairy Solutions (GDS)–that would be a BouMatic distributor in Australia and New Zealand. This plan did not eliminate Daviesway as a BouMatic distributor in Australia.

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 a springboard 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 would extract milk from the cow and transfer it to the cooling tank. (This focus on complete dairy installation changed when declining milk prices wounded the Australian dairy industry. More on this below).

## II. The Distribution Agreements

On June 30, 2008, GDS and BouMatic executed identical but separate international distribution agreements for the Australia and the New Zealand territories. *See* dkt. 1, Exhs. A & B. Michael Pawlak, Executive Vice President of Sales and Marketing for BouMatic at the time, executed the agreements on behalf of BouMatic. BouMatic fired Pawlak 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 12 of the distribution agreements provide that:

> Distributor shall . . .
>
> d. Participate in the forecasting process when and as requested by BouMatic who will determine a final forecast for Distributor on at least an annual basis. Distributor shall agree with BouMatic's reasonable forecast. This forecast will be used to evaluate GDS's performance.
>
> f. Meet or exceed the mutually agreed forecast.

The distribution agreements did not expire on a specified date (*i.e.*, there was no term). Instead, paragraph 14 provides that:

> BouMatic may terminate this Agreement for good cause. The term "good cause" means Distributor's failure to comply substantially with essential and reasonable requirements imposed upon Distributor by BouMatic, or 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.[2]

Paragraph 18 of each distribution agreement states that the agreement constitutes the entire agreement between BouMatic and GDS and there are "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 its distributors: in November or December of each year, BouMatic's regional and district sales managers review with their distributors the sales totals for the prior year and put together a sales forecast for the upcoming year. All of these sales forecasts are forwarded to Prieto, who then forwards them to the financial department. These forecasts become the goals for the distributors for the year. According to Prieto, an annual sales forecast was not developed in this fashion for GDS in 2008 because one already had been presented before GDS had become a distributor.

[2] Each agreement has two paragraphs numbered "14." This language is from the second.

Specifically, on June 3, 2008, Prieto emailed Tim Larsen at GDS seeking 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 email with "GDS BUDGET 2008-2010" as the subject line and stating:

> 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 titled "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 email or in the attachments.

Although Prieto now avers that these projections were 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 had not participated in any discussion or agreement indicating that the "sales projections" or other components of any of the budgets were "sales forecasts" under the GDS/BouMatic distribution agreements, or that GDS could be terminated if it did not reach a threshold percentage of those particular sales 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 titled "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 were $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 $923,758.16.

**IV. Daviesway Enters the Fray**

In March 2009, John Paetz had replaced Prieto as BouMatic's regional sales manager for Australia and New Zealand. Paetz had known John Davies, the owner of Daviesway, when Paetz had worked at a BouMatic subsidiary in Australia; when this subsidiary had declared bankruptcy in the early 2000s, Davies had agreed to take on BouMatic's orphaned customers, staff and product. Prieto suspects that Davies and Paetz may have influenced BouMatic's

decision to replace him with Paetz as regional sales manager for Australia and New Zealand. In June 2009, Paetz visited GDS and announced that GDS never should have been named a BouMatic distributor in Australia and should focus its attention on New Zealand.

When milk prices had declined in late 2008, GDS turned its attention from providing complete dairies 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, which still was authorized to sell BouMatic products.

On October 27, 2009, Daviesway sent an email to BouMatic complaining that GDS was undercutting its business, and announcing that Daviesway was considering whether to disassociate from BouMatic if GDS was not terminated.

On October 30, 2009, Chris Berning and Steve Brown (BouMatic's Vice President of Sales and Marketing) exchanged emails in which Berning announced that "I need to find a way to terminate GDS. They have started paying again and I am not sure of next steps. Was your fall back with GDS the payment issue? If so is there anything else to get them on. If we have some specific, albeit weak ones, I do not mind supporting the decision."

On November 24, 2009, after several emails and phone calls between Paetz and Daviesway, John Davies sent an email to Berning at BouMatic (with a copy to Paetz) in which he complained about GDS's prices and the dual distributorship situation in Australia, threatened to cease distribution of BouMatic products and demanded that BouMatic advise Daviesway within seven days how BouMatic intended to "rectify this debacle of dual distribution."

## V. BouMatic's Termination of the Agreements

The next day, November 25, 2009, BouMatic emailed a letter to GDS in which it terminated its distribution agreements with GDS. 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 that 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.)

This second termination letter stated 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. The letter did not explain why, it did not identify which of the alleged breaches were incurable and it did not indicate whether the alleged breaches were of the Australian distribution agreement, the New Zealand agreement, or both. The letter did not state that GDS failed to meet 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 distributer a week after sending them.) GDS did not pay these invoices on the ground that the unpaid amount serves as compensation for GDS's damages caused by the improper 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 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th 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 (7th 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 (7th Cir. 2009); *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 these agreements without proper notice, without good cause and without providing GDS an opportunity to cure any of its alleged material breaches. In its second termination letter to GDS, BouMatic alleged a set of incurable, material breaches; in support of its motion for summary judgment, however, BouMatic alleges 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 titled "2008-2010 Projections." BouMatic claims that these figures constituted GDS's sales forecasts for those years.

GDS demurs, 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 who were involved in forming the agreements shows that the projections were developed for budgeting purposes and were not intended to be GDS's sales forecasts. GDS argues that the agreements were prospective, calling for annual forecasting, and cannot by their terms rely on figures developed 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 then fabricated trumped-up charges to justify its decision.

**A. Parole Evidence**

The Wisconsin Supreme Court has explained that the parol evidence rule is not a rule of evidence at all, but rather 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–indeed, require–that the parties will undertake a separate and distinct process to forecast GDS's annual sales. Evidence concerning *how* this forecasting may have occurred in 2008 and 2009 does not alter or contradict the terms of the agreements. True, the agreements state that BouMatic *will determine* the forecasts, implying a future process, but nothing in the terms of the contracts states that the forecasting process *must* occur after the effective date of the contracts, or that BouMatic cannot rely on figures generated before the contracts were signed. Therefore, I find that the parole evidence rule does not prevent BouMatic from relying on the parties' pre-contractual discussions and communications in BouMatic's attempt to establish that these were 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. But what the parties initially intended when developing those figures or what they called them does not matter because under the distribution agreements, BouMatic had the sole and final say on the sales forecasts, provided that they were reasonable and were developed on at least an annual basis. GDS only got to participate if BouMatic asked it to participate.

It is undisputed that at the time, Prieto had the authority to set GDS's sales forecasts, and Prieto 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; all of these sales forecasts are forwarded to Prieto, who then forwards them to the financial department. Again, however, nothing in the GDS contracts requires Prieto to follow this procedure. As BouMatic points out, GDS has not argued that the June 2008 figures were unreasonable. In fact, GDS would be hard pressed to do so, given that its own employee, Larsen, sent the figures to BouMatic in the first place and stated that he believed these 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 six-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).[3] 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 (0.4% of projected sales). Although GDS arguably

[3] 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.

hit one mark in 2008, it missed all the rest, including the yearly projections. Pursuant to the agreements, this constituted good cause for BouMatic to terminate them, and is entitled to summary judgment on GDS's breach of contract claims.

### C. Good Faith and Fair Dealing

For the first time on summary judgment, 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. 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 (7th 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 (7th 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 (7th 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 GDS might have 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. *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 its claim that BouMatic breached the termination provision of the distribution agreements. Further, GDS claims that it only learned of BouMatic's "true" motivation and the alleged cover-up during discovery.

In the end, it doesn't matter: even if GDS did not waive its bad faith claim, it cannot 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 (7th 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, BouMatic could not have acted in "bad faith." Regardless of BouMatic's actual motivation 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. Pursuant to the express terms of the agreements, GDS knew that failure to sell enough product left it vulnerable to termination if BouMatic chose to exercise its rights. Therefore, it is irrelevant that GDS's competitor secretly cajoled BouMatic into pulling the trigger. Therefore, to the extent that GDS still may claim that BouMatic breached an implied covenant of good faith and fair dealing, BouMatic is entitled to 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 distributer just before sending them to GDS. Given that only $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 are the sole issue remaining for trial.[4] 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

[4] Earlier today I granted the parties' joint motion to postpone trial one week, although this order might diminish the need to empanel a jury in this case.

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 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;
>
> (2) The motion is DENIED with respect to BouMatic's counterclaims for unpaid invoice numbers 2383486, 2383487 and 2383488, each totaling $629.61;
>
> (3) A decision on BouMatic's request for attorneys' fees is STAYED pending final resolution of this case.

Entered this 19th day of April, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge