IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STARS INDUSTRIES, INC.,

Plaintiff,

v.

PLASTECH ENGINEERED PRODUCTS, INC.,

Defendant.

OPINION AND 0RDER

06-C-0349-C

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This is a civil action for resolution of a dispute arising out of a commercial relationship involving the supply of welded stainless steel tubing. Plaintiff United Stars Industries, Inc. alleges that defendant Plastech Engineered Products, Inc. breached a settlement agreement that was intended to resolve all of the parties' prior disputes and form the basis for a long term supply agreement. Defendant denies that it ever agreed to a settlement. It has counterclaimed for breach of a different contract, alleging that plaintiff overcharged it by at least $892,844. The case is before the court for resolution following a bench trial.

Jurisdiction is premised on diversity of citizenship of the parties and more than

$75,000 in dispute. 28 U.S.C. § 1332.

From the evidence adduced at trial, I find that the parties entered into a binding agreement on August 11, 2005, when defendant's vice president of purchasing told plaintiff that defendant was satisfied with the proposals plaintiff had made to resolve their disputes. If there were any doubt in that respect, it would be resolved by defendant's subsequent acts, demonstrating that defendant was relying on the terms of the agreement for reduced prices and for credits on orders it placed. I find also that defendant breached the parties' oral settlement agreement by not paying plaintiff for product that plaintiff shipped and for not honoring its commitment for a long term supply agreement. Defendant is liable to plaintiff for the amounts invoiced to it, for interest on the still unpaid invoiced amounts, and for plaintiff's losses on the finished products and raw materials plaintiff had on hand when defendant cancelled the parties' supply agreement. Plaintiff would not have ordered the materials or finished the products but for defendant's assurances that it was honoring the oral agreement between the parties. Defendant's claim for reimbursement for alleged overcharges will be denied.

Before setting out the facts in detail, it is necessary to consider plaintiff's motion to strike a section of defendant's post trial brief. Plaintiff contends that defendant has relied on matters that were never adduced at trial or allowed into the record. First, defendant relies on an exhibit (defendant's exh. #619) that was not received in evidence; any argument based on this document will be ignored. Second, defendant argues the evidence of "actual" weight of plaintiff's products; no evidence supports this argument. Third, defendant alleges that plaintiff misstated the weight of its product by 15%. Again, defendant has no evidence to support this allegation. Plaintiff's motion to strike will be granted.

From the evidence adduced at trial and stipulated deposition testimony, I make the following findings of fact.

FACTS

Plaintiff United Stars Industries, Inc. is a Delaware corporation with its principal place of business in Wisconsin. Defendant Plastech Engineered Products, Inc. is a Michigan corporation with its principal place of business in Michigan. Plaintiff is a manufacturer of stainless steel tubing, which it supplies to the automotive industry for bed rails and exhaust pipes, to the food, dairy and pharmaceutical industries for food and medicine production and to other industries for use in products such as boats, swimming pool ladders, truck mirrors, high efficiency furnace tubing and heat exchangers. Defendant is primarily a manufacturer of plastic injection mold parts for the automotive industry.

The parties' business relationship began in late 1999 or early 2000, when Elizabeth Pypa, then defendant's vice president of purchasing, asked Paul Kleinsmith, plaintiff's director of sales, for price quotes for supplying stainless steel defendant needed for fabricating extenders for the beds of Ford trucks. Plaintiff won the supply contract from defendant after Pypa and a Ford representative visited plaintiff's facility in Wisconsin. Pypa believed that plaintiff had a better quality control system than its current supplier; plaintiff was accustomed to putting its tubes into paper sleeves to protect them in transit and during the bending process; it was capable of producing the volume that defendant needed; and its price was reasonable.

After the plant tour, defendant sent blanket purchase orders to plaintiff, listing the the three kinds of tubing defendant would be ordering. The parties used a blanket order because of the twelve-week lead time that the steel mills need to deliver steel. If it was to meet defendant's needs, plaintiff had to have steel on hand. With the blanket order in place, defendant sent release schedules for product as needed, showing the quantities and delivery dates. Defendant did not ask for quotes for each order; it relied on the base pricing plaintiff had given defendant's representatives during the plant visit and on updates plaintiff supplied when base prices and alloy surcharges changed. Approximately once a week, defendant would send plaintiff a release schedule with a twelve-week forecast specifying how much of each of the three parts defendant needed and the shipping dates for the parts. Plaintiff produced tubing according to the release schedules and shipped the product to defendant, along an invoice. Each invoice specified that payment was due within 45 days and that plaintiff retained the option of charging defendant interest at 1% a month on any balance not paid within the stated time.

Initially, defendant bought 304 grade stainless steel tubing from plaintiff in various lengths. Later, it added 316L grade tubing, which is more expensive than the 304 grade and is used for installations in which potential corrosion makes higher grade steel advantageous. The 316L steel contains both nickel and molybdenum for additional corrosion resistance.

Plaintiff obtains stainless steel from one of the three major steel mills. The steel arrives in large coils, which plaintiff cuts to the size required to meet its customers' needs. Of necessity, the process results in at least four kinds of production scrap; slitter scrap, side-shear; head-tail loss and tube scrap. Slitter scrap refers to the quarter-inch of steel that the slitter cuts off the edge of the coil to make sure that when the first cut is made, the edge is perfectly straight. Side-shear is the leftover steel that results if a slitter is cutting 10" wide pieces from a 48" wide piece. Head-tail loss refers to the loss of use of the head of the coil (the first one or two laps of the coil on the outer side of the material) because it has been damaged in the course of transportation from the mill and the loss of the inside or tail of the coil because it has been wrapped up so tightly for so long that it cannot be made smooth enough for proper processing. Tube scrap refers to the steel lost in the production process as the coils are feeding into the mills and undergoing adjustment to achieve the correct outside dimensions or length. Just as a homeowner must pay for all the carpet she purchases even though a good portion may not be usable because of the shape and size of her room, plaintiff must pay the mill for all the material it receives, even though some of it will be scrap.

When plaintiff orders stainless steel, it specifies a particular minimum thickness of .033, plus .006 minus zero. Thicker steel weighs more and increases plaintiff's cost, but plaintiff is struck with it unless it exceeds .039 thickness.

Because plaintiff does not weigh each piece of tubing it produces, it establishes a theoretical or approximated weight for each piece. It then divides this "calculated weight" by .95, to take into consideration the scrap loss. The result is the "surcharge weight." For the tubes it produced for defendant, the surcharge weight was .623 pounds per foot. In addition, plaintiff divides the published mill surcharge by a factor of .9 to account for gauge variations to obtain "surcharge dollars." Plaintiff multiplies the surcharge weight by the surcharge dollars to obtain the surcharge per foot. Next, it calculates the "surcharge per piece" by dividing the surcharge per foot by 12 inches and multiplying the result by the length of the piece in inches. At last, it arrives at the final surcharge amount for each invoice by multiplying the listed number of pieces of stainless steel tubing by the surcharge per piece.

Thus, if the published mill surcharge for the month is $1.2286, the length of the piece of tubing ordered is 99 7/8 inches and the order is for 10,000 pieces:

1. Surcharge Weight: .623 lbs/foot (calculated Weight X formula divided by .95)
2. Surcharge Dollars: 1.2286 divided by .9 = $1.3651 dollars per pound (published mill charge divided by factor of .9)

3. Surcharge per foot: .623 x $1.3651 = $.85/foot (surcharge weight x surcharge dollars)
4. Surcharge per piece $.85/foot divided by 12 x 99 7/8 = $7.08 per piece (surcharge per foot divided by 12 inches per foot multiplied by the length of the tubing)
5. Surcharge: 10,000 pieces invoiced x $7.08 = $70,800

The producing mills announce a surcharge on a monthly basis, basing it on the pricing of the metals market, primarily the prices of chrome, nickel and molybdenum. The mills calculate the surcharge by the amounts of the average pricing of elements up to and above what they determine is the "trigger point," that is, the price at which the cost of the alloy is not included in the base price. Because 316L grade steel contains more alloy, it carries a higher surcharge than 304 grade steel.

In quoting prices to customers, plaintiff obtains the product specifications (outer diameter, wall thickness of tubing, steel alloy, length and finish), puts the information into its quote form and submits it to the director of sales for pricing. Plaintiff's computer system lists the weight and adjusts it upward to cover gauge variation and scrap factors particular to the fabrication of the particular product. Once the pricing is done, the sales representative fills out the pricing quote sheet and sends it to the customer. This quote sheet contains the base pricing, the current lead times and the FOB information. The bottom of the quote sheet states that applicable surcharges will apply, although the exact surcharge is not always included on the quote sheet. Plaintiff makes an effort to include the surcharges when it has the necessary information to do so.

In May 2000, Liz Pypa, defendant's vice president of purchasing, asked plaintiff how surcharges were factored. Paul Kleinsmith, then plaintiff's sales director, responded in a fax dated May 8, 2000, explaining that the surcharge amounts were based on the average price of ferrochrome, nickel and molybdenum from two months before the effective month. At the time Kleinsmith sent the fax, the trigger price for nickel was $2.00 a pound and ferrochrome was $.35 a pound. Any price higher than the trigger price at the end of the month would result in a surcharge.

Kleinsmith explained to Pypa that factoring the nickel surcharge began with the average January price of $3.771 less the trigger price of $2.00 or $1.771 times 1.20 (the internal scrap factor used by the mills) for a surcharge cost of $2.1252 a pound. This amount times the amount of nickel in 304 stainless (8%) was $0.1700. Kleinsmith explained other calculations for chrome and for 316L stainless. Plt.'s exh. #84. He did not say in the fax that plaintiff applied a scrap factor of its own in its calculations or that it increased the surcharge to account for for gauge variation

Plaintiff kept its customers informed of the mill surcharges by monthly letters that showed the following month's surcharges for tubing based on the mill surcharge plus the scrap factors. Whenever the mills increased the base price for stainless, plaintiff generated a quote sheet to inform defendant of the new pricing. When defendant changed one of the parts it was ordering to 316L stainless, plaintiff generated a new quote sheet to show the difference between the cost of 304 and 316L stainless. Each time that plaintiff informed defendant of a base price increase, defendant forwarded a purchase order showing the new pricing. Plaintiff warns all customers that pricing is valid for only a certain period of time and can be changed after the customer is given a 30-day advance notice of any price increases.

Defendant advised plaintiff of material releases by printed form with information of dates on which to ship product. Usually the releases were "four weeks firm with an 8-week forecast." On a number of occasions, however, defendant would call to change quantities or shipping dates or both, depending on the flow of product that Ford needed. At such times, Ron Solar, controller at defendant's Strongsville plant, would discuss the changes with Sharon Bruun, plaintiff's sales representative for defendant's account. Sometimes, defendant issued a new material release; on other occasions, Bruun would just modify the existing release and advise the sales administrator and product manager of the changes.

When defendant first started purchasing 316L stainless at Ford's request, Bruun quoted prices on all three of the parts defendant was ordering so that it would be aware of the difference in both the base pricing and the surcharges because of the significantly higher prices for 316L. Once plaintiff had defendant's requirements and knew defendant's history, it ordered steel in reliance on defendant's ordering history.

On October 29, 2001, Pypa emailed Bruun to ask again how plaintiff calculated its surcharge and to urge that plaintiff provide defendant with a price reduction so that defendant could respond to a "cost down" program that Ford was implementing. Pypa told Bruun that Paul Kleinsmith had given her the formula originally but she had misplaced it. Bruun responded the same day with the surcharge and the weight used for the surcharge so that Pypa would know how to calculate her monthly surcharge rate. Subsequently, plaintiff offered defendant the additional 1% discount it wanted.

On February 11, 2002, Scott Ryan emailed Bruun on behalf of defendant, attaching an analysis of nickel surcharges that he had done and asking why there was a disparity in rates. Plt.'s exh. #173.4. Bruun responded by telling Ryan that plaintiff

> takes the raw mill surcharge and adds sparingly to the base number a small percentage for
> -head/tail loss on raw coil (the mills do not guarantee 100% usage of coils)
> -side shear loss for converting coil into tube strip
> -tube mill scrap loss.
>
> This adds up to about 9% and does not cover any absorption for S.G. & A. cost, plant overhead, collection cost, etc.

Plt.'s exhs. ##173.4, 173.5. Ryan emailed back, saying that he had been led to believe that plaintiff's surcharge was a straight pass through charge and, if so, why was plaintiff "upping the surcharge" by about 9% a month. If this was happening, he asked, "wouldn't the difference between the two rates be some what [sic] consistent from month to month?" Plt.'s exh. #173.4. Bruun responded the next day, saying that plaintiff's practice of applying the surcharge had been in effect "since the earliest days of our business relationship," and explaining why the later months did not show a difference between raw mill data and plaintiff's applicable surcharge. "The levels in the later month become less visible as the surcharge drifts down. You will notice that the delta becomes minuscule in the later months, but there is a difference, accounting for the head/tail loss, side shear loss, and production scrap." Plt.'s exh. #173.7. She attached a table to show how this worked in each month. Plt.'s exh. #173.8.

On May 28, 2003, Bruun sent defendant a quote sheet showing the parts that defendant had ordered in both 304 and 316L grades, along with the base pricing and surcharge structuring. Plt.'s exh. #95. The quote showed the difference between the base pricing and surcharges for 304 stainless and 316L stainless. Bruun sent a copy of the quote to Ron Solar on May 29, 2003, plt.'s exh. #33, and another copy to Rodney Turton, defendant's vice president of purchasing, on June 27, 2003. Plt.'s exh. #1.

On June 28, 2004, Bruun sent Solar a history of surcharge information for both 304 and 316L stainless going back to January 2003. The sheet that Bruun sent showed the pounds per foot of tubing weight that plaintiff used for surcharge calculations. Plt.s' exh. #63.

In February 2005, Becky Chewning, plaintiff's chief financial officer, discovered that plaintiff had been underbilling defendant by charging the 304 surcharge rate for purchases of 316L. Chewning and Bruun called Solar; he directed them to controller Scott Ryan. Chewning sent Ryan a spreadsheet showing the underbilling.

On May 2, 2005, Kleinsmith (then plaintiff's president) wrote Rodney Turton to advise him that plaintiff had been underbilling defendant for approximately eighteen months. Kleinsmith attached documentation explaining the nature of the underbilling and reminded Turton that defendant had agreed by contract to pay the price agreed upon and was liable for that amount despite plaintiff's billing error. He asked defendant to pay the underbilled amount within 30 days. On June 9, 2005, Kleinsmith wrote to Turton, saying that plaintiff had made many unsuccessful attempts to reach Turton and that defendant had made no attempts to resolve the underbilling issue.

In July 2005, John Robb began his tenure as plaintiff's president. His first contact with any representative of defendant came on July 13, 2005, when he received an email indicating that Craig Howell, an employee of defendant, was upset with plaintiff. Robb called Howell and learned that an unnamed vendor employed a surcharge for tubing that was less than plaintiff's. Howell asked for a rebate. After the call, Robb looked into the surcharge mechanism before calling Howell back on July 15. Howell told Robb, "The gravy train is over. I want my 10 percent retroactive credit, and I want it now."

Robb suggested to Howell that he travel to defendant's corporate offices to try to resolve the matter. A meeting was set for July 20. On July 19, Robb wrote to defendant, offering to reduce the weight used in plaintiff's price calculation and attached an extensive spreadsheet applying the proposed new formula. He said that the new formula would be the subject of discussion at the planned meeting on July 20. Plt.'s exh. #49.

Robb, Bruun and Chewning went to defendant's headquarters in Dearborn, where they met with Howell, Turton and Terry Reul. Robb's intent was to discuss the issue of surcharges and their history and also to explain the billing error and why plaintiff was submitting a request for payment of the underbilled amount, but he was unable to discuss these matters at the meeting. Instead, defendant wanted to discuss lower prices to compete with prices defendant had been quoted by other suppliers. It told plaintiff it was refusing to pay plaintiff's surcharges; it wanted future surcharges capped; and it wanted a 10% retroactive credit amounting to $300,000. Defendant asked plaintiff about its work in process, the status of its raw material supply and the lead time plaintiff needed to obtain material from its vendors. Robb said he would take defendant's concerns about surcharges and pricing under advisement and see whether plaintiff could do something to meet defendant's objections. The meeting lasted approximately 45 minutes to an hour.

Bruun sent defendant a letter the day after the meeting, proposing the following:

- A long term purchase and supply agreement with defendant
- A revised price proposal for four different kinds of stainless steel tubing for defendant's bed extender program, with lower base prices going into effect immediately and continuing to decline through June of 2009 and no increase

in the base metal cost unless plaintiff incurred increases in the cost;

- Surcharges calculated using the average of the mill announced surcharge for the previous three months on weight calculating according to the American Stainless Tubing, Inc. weight per piece published on the ASTI website, with the surcharge changing quarterly rather than monthly.

- Plaintiff's abandoning any additional efforts at collecting the surcharge underbilling that had occurred before July 2005 and amounted to $716,458.23.

Also included was a table of finished goods and raw material that had been procured for defendant's requirements. The table showed that plaintiff had on hand 14,700 pieces of 304 stainless and 84,000 pieces of 316L stainless.

On Friday, July 22, Robb called Turton to see whether the letter proposal satisfied defendant's objections. On July 22, 2005, Turton emailed Bruun, saying, "This is not what we agreed to in pincipal [sic]. You guys stated in the meeting prior to leaving that your proposal would be along the lines of a $300k reimbursement and pricing in line with what we had shared with you. If you are not going to honor that, we need to take alternative action." Plt.'s exh. #5. In response, Bruun sent another proposal on July 25, adding a provision for a credit to defendant for the difference between the revised base price and the respective average quarterly surcharge versus the original invoice for all invoices originating between May 11, 2005 and the date of the letter, amounting to $155,829.86. Plt.'s exh. #6. Aside from this provision, the proposal was identical to the one submitted on July 21.

On August 8, 2005, defendant faxed a blanket purchase order with one item showing the new price and the other two showing incorrect prices. Bruun emailed Howell to ask him to correct the other two to reflect the agreement pricing, to note the surcharge pricing and delete obsolete parts that plaintiff was no longer making for defendant. Before sending him the document, she drew a line through the obsolete parts and changed the pricing on the active parts to reflect the new, lower prices in the oral agreement. Defendant returned the blanket order with all of the changes made.

On August 11, 2005, Robb and Bruun called Turton to obtain some assurances from him that he agreed with the proposals in the July 25 letter before plaintiff purchased raw materials to defendant's specifications. Turton said that defendant did not sign long term agreements because it would have to have a full floor of attorneys if that were the case. He said that plaintiff's prices were the best, that defendant would incur costs in bringing on another supplier and that plaintiff would not lose the business so long as it continued to perform. Robb asked several times whether everything was okay and whether Turton had any objections to anything. Turton said the terms in the July 25th letter were "as he desired," which led Robb to believe that plaintiff had accomplished its goal of retaining defendant as a customer. Robb hung up and immediately called Lianne Rabehl, plaintiff's purchasing manager, to make sure plaintiff had enough steel to cover defendant's requirements. As of July 2005, defendant was plaintiff's only customer for 1.5 inch diameter

316L tubing with a gauge thickness of .035.

Thereafter, plaintiff made no additional efforts to seek reimbursement of the $700,000 in underbilled surcharges. Plaintiff purchased additional 316L material that it would not have bought had it known that defendant did not intend to continue the supply agreement with plaintiff.

On August 17, Bruun sent Howell a spreadsheet showing the surcharges plaintiff proposed to charge defendant on a quarterly averaging system. On August 22, Brunn sent Howell a different spreadsheet showing the credits plaintiff was going to provide defendant under their agreement and asking about the amended purchase order Howell was to provide. She sent a copy of the email to Turton and received a reply from him that same day, asking what amended purchase order she was waiting for and saying that he wanted to go through the credit calculation in more detail. He asked Bruun to confirm that plaintiff was ordering and manufacturing product in line with defendant's purchase order and plant releases.

When defendant paid the invoices that plaintiff had sent it on July 20 and August 4, it paid less than the full amount. In response to an inquiry from plaintiff's accounts receivable administrator, Turton emailed plaintiff on August 26 to say that defendant was paying a lesser amount in line with "the agreed revised surcharge." Plt.'s exh. #155.2. On August 28, Howell wrote to say that the surcharge spreadsheet Bruun had sent was acceptable.

On August 29, 2005, plaintiff received an amended purchase order, with a few errors still in it. Bruun redid the erroneous prices to conform to the agreed upon prices and faxed it back to Howell to make the additional changes. On August 30, 2005, she received another amended order with all of the changes made.

Also on August 29, Brunn advised Ron Solar of the steel plaintiff either had in the system or on order for the 316L parts defendant would have to use up if it wanted to switch production to 304 stainless. According to Brunn, plaintiff had enough 316L steel to meet defendant's requirements through the week of December 12, 2005.

On September 12, 2005, Robb received a call from Turton, saying that he was not aware of any problems, that he wanted to obtain the status of the credit plaintiff was providing and he wanted to have a conference call on that issue on September 15. Bruun and Robb took part in the September 15 call. They advised Turton that the credit had grown from $155,000 to $197,000. Turton asked Robb to meet with him in Dearborn at Robb's earliest convenience.

On September 23, Robb went to Dearborn, At that time, Turton produced a letter saying that defendant was not satisfied with the agreement to provide $197,000 in credit and wanted a credit of $892,000 instead. The statement caught Robb by surprise because he thought the agreement was working well. Turton continued to try to convince Robb to reopen the discussions.

As of September 23, 2005, defendant was telling plaintiff to plan for material to be shipped on October 21 and October 28, 2005.

After Robb returned to Wisconsin, plaintiff responded to Turton that the parties had reached an agreement on August 11, in which plaintiff had provided a credit of $197,000 and that plaintiff was not going to accept defendant's offer to increase the credit to $892,000. On October 5, 2005, Robb wrote Turton to say that defendant had accepted plaintiff's July 25 proposal on August 11 and that its apparent dissatisfaction with the proposal did not obligate plaintiff to make any further response. Robb advised Turton that shipment of any further orders would be subject to receipt of written confirmation of defendant's unconditional acceptance and agreement that the credit in the amount of $197,874.41 resolves all of defendant's "outstanding differences related to the prices and surcharges for products shipped prior to August 11, 2005." Plt.'s exh. #122, at 1. Robb reminded Turton that defendant's account was on payment hold, that its account was past due and that a payment of $432,565.06 would be necessary to bring the account current.

Plaintiff shipped product to defendant in early October. It stopped shipping after October 5 after defendant's account had exceeded its credit limit and was more than 45 days old. On October 19, 2005, Solar emailed Brunn to say that he had to cancel all of the ordered releases "until this issue with United and our purchasing is settled." Def.'s exh. #662. When Brunn called Solar to ask about the email, he told her he had been told by "corporate" to cancel the order and he did not have any explanation for the cancellation. Tr. at 2-A-46.

Unbeknownst to plaintiff, when it advised defendant that it had underbilled defendant by more than $700,000, defendant took a closer look at the prices in the industry and learned that there were suppliers that could provide the steel tubing less expensively than plaintiff. In June 2005, defendant obtained a quote for tubing work from American Stainless. On June 28, 2005, defendant's sourcing committee determined that defendant would realize a "total cost avoidance" if it changed suppliers from plaintiff to American Stainless. Defendant amended its purchase orders for plaintiff in August 2005 and Turton signed the amendments on August 23, 2005, in line with plaintiff's settlement proposal. On the same day, it sent a blanket purchase order to American Stainless.

After August 11, when plaintiff believed that it had an agreement with defendant, it started purchasing steel again according to its normal procedures. It placed orders for steel at the end of August and the end of September for the releases in the system for defendant's tubing needs. When plaintiff learned in early October that defendant was canceling orders, plaintiff was able to cancel all but about 80,000 pounds of 316L material, which was delivered at the end of October or early November. It had on hand 10,507 finished pieces of tubing ready for release to defendant that it would have sold for $160,337 at the prices agreed to in the oral agreement. Plaintiff scrapped the finished pieces in February 2007 for approximately $85,000.

In September 2005, plaintiff had on hand 4,740 pounds of 304 grade slit coil that had been purchased in anticipation of defendant's orders. It valued this coil at $6,162, which was the weighted average value of the material at the time of delivery. Plaintiff was able to slit some of the coil down and sell it to another customer, reducing its loss on the coil to approximately $2000.

Plaintiff also had a loss disposing of 316L and 304 material, which it valued at its delivery price to plaintiff. It was able to sell the 316L product in three batches to a secondary steel distributor, but had to sell the 304 slit coil to a scrap dealer. Its total loss for the raw material was $187,337.

Plaintiff's total loss on materials and product on hand at cancellation was $264,674.

Between August 10 and October 6, 2005, plaintiff submitted invoices to defendant for shipped tubing in the amount of $811,993, which were never paid. Interest was due on late payments on the invoices in the amount of 1% a month unless defendant paid in full within 45 days. Plaintiff would have invoiced defendant $76,272.89 more for tubing than it actually did and would not have given defendant a credit of $35,163.49 had plaintiff not believed it had an agreement with defendant. Plaintiff calculated the amount by which it underbilled defendant as $716,458.23.

OPINION

Although the parties are citizens of different states, with different laws, they have not identified any conflict between Michigan's law and Wisconsin's on the issues in dispute in this lawsuit. Therefore, I will apply Wisconsin law. Wilcox v. Wilcox, 26 Wis. 2d 617, 634, 133 N.W.2d 408 (1965) (under Wisconsin law, law of forum applies presumptively in dispute involving citizens of different states).

In its complaint, plaintiff alleged breach of a written contract, specifically, the quote sheets, purchase orders and invoices for products that constituted the parties' contract for the sale of tubing. In the alternative, plaintiff alleged that it was entitled to the reasonable value of the services rendered and product provided to defendant. In its answer, defendant alleged that plaintiff had billed defendant for charges that were never part of the written contract between the parties for the period from September 2003 to June 2005 and contended that the overbilling was a breach of the parties' contract.

On January 24, 2007, almost three months after the deadline for amending the complaint had passed, plaintiff filed a motion to amend to assert new claims of fraud and breach of the settlement agreement. Defendant opposed the motion as untimely and prejudicial; I agreed and denied plaintiff leave to amend.

At trial, plaintiff raised the issue of amendment again, arguing that defendant had been aware of the factual basis for plaintiff's claim of breach of the settlement agreement from the early days of the lawsuit and that both sides had understood that it was the settlement agreement on which plaintiff was relying. Because the evidence at trial supported plaintiff's claim and because I was persuaded that allowing amendment would not prejudice defendant, I allowed plaintiff to amend to conform to the evidence. At the same time, I agreed with defendant that it should be able to assert a statute of frauds defense to the claim of an oral settlement agreement, because plaintiff would not be prejudiced by the late assertion of this defense and defendant would not have known earlier that plaintiff would be allowed to proceed on its oral agreement claim.

Turning to the merits of the dispute, I begin by considering whether plaintiff has shown that it had a valid agreement with defendant. The answer is yes. The agreement had the three essential elements: offer, acceptance and consideration.

In its effort to resolve the parties' dispute, plaintiff made an order incorporating significant concessions on its part: lower base prices for four different kinds of stainless steel tubing, with the lower prices continuing to decline for the next four years; no increase in base prices for metal unless plaintiff incurred increases in the price it had to pay; lower surcharges computed using the American Stainless Tubing, Inc. weight per piece; surcharges changing quarterly rather than monthly; no efforts by plaintiff to try to collect the underbilling that had occurred before July 2005 ($716,458.23); and a credit to defendant of at least $155,000. In return, defendant would not ask for any additional credit and would continue doing business with plaintiff so long as plaintiff was able to produce the products defendant wanted.

Defendant accepted the offer, through Rodney Turton, defendant's vice president of purchasing. He denies now that he did, but plaintiff's version of events is more credible than Turton's. The testimony of plaintiff's president, John Robb, is corroborated by Robb's nearly contemporaneous notes, by the testimony of the two representatives of plaintiff that were with him and what is most significant, by the changes in both parties' behavior following plaintiff's second proposal. This proposal was sent to defendant on July 25 and contained the credit for invoices originating between May 11 and the day of the letter. Plaintiff changed its pricing to conform to its understanding of the agreement and defendant did the same. Even before defendant made it clear that it was accepting the offer, it was submitting purchase orders to plaintiff with at least some prices consistent with plaintiff's proposal. Plaintiff stopped any efforts at collecting the underbilled surcharges and Sharon Bruun checked over defendant's purchase orders to insure that they conformed to the new pricing under plaintiff's proposal. Plaintiff purchased additional 316L grade stainless that it would not have bought had it entertained any doubts about defendant's agreement to the settlement.

Although it is evident now that defendant did not intend to be bound by the agreement it entered, its undisclosed lack of intent does not makes its assent any less binding. It is the party's apparent intention and not its actual intention that governs. Skycom Corp. v. Telstar Corp., 813 F2d 810, 814 (7th Cir. 1987) ("Wisconsin takes an objective view of 'intent.') (citing Household Utilities, Inc. v. Andrews Co., 71 Wis. 2d 17, 28-29, 236 N.W.2d 663, 669 (1974)). "If unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power. The ability to fix the consequences with certainty is especially important in commercial transactions that are planned with care in advance." Id. at 815. Skycom Corp. involved a written document, but the principle holds just as true for agreements that are part oral and part written. See, e.g., Laserage Technology Corp. v. Laserage Laboratories, Inc., 972 F.2d 799, 802 (7th Cir. 1992). Farnsworth adds that "Under the objective theory, the offeree's undisclosed intention is irrelevant, as long as the offeree's conduct gives the offeror reason to believe that the offeree intends to accept by making a promise." H. Allan Farnsworth, I Farnsworth on Contracts at 270 (2004).

Turton gave his promise that the parties would continue to do business, Tr., 2-P-93, and that defendant would not seek credit for the alleged overbilling beyond the amount plaintiff had proposed to give it. That he appears to have changed his mind about the credit amount does not change the fact that he evinced his acceptance of plaintiff's revised proposal on August 11.

Defendant breached the parties' agreement when it stopped making payments on the invoices for shipments and when it canceled further orders from plaintiff. Defendant denies this, contending that it was plaintiff that breached the parties' agreement to pass through the mill surcharges without adding any factor to them. Defendant has argued vigorously that it never knew that plaintiff was applying a percentage to the mill surcharges to account for either gauge variation or scrap loss. It contends that plaintiff's act was a breach of the parties' original agreement in 2000. It contends also that it never knew of the differential surcharge plaintiff applied to the 316L stainless and that it never agreed to pay a surcharge for anything but nickel.

Conspicuously missing from defendant's argument is any reference to evidence confirming defendant's view of how the surcharges were to be calculated. Defendant refers to "the parties' original agreement in 2000," but does not refer to a specific document containing the purported agreement. It does not deny that it received numbers of quote sheets and a multitude of invoices containing surcharges and that it accepted them as charged. Each time defendant paid for a shipment, it knew the amount it was paying for each length of tubing. On what basis does it argue that it was misled about the prices plaintiff was charging? It does not say. Certainly, it had enough information at any time to any comparison shopping it wished.

Although defendant professes ignorance about the way plaintiff calculated its surcharges, it is indisputable that as of February 2002, after Sharon Bruun sent Scott Ryan an analysis of surcharges, defendant knew that plaintiff was applying a percentage factor to the mills' surcharges and not simply passing through the surcharges. Despite this knowledge, plaintiff never raised any questions about the surcharge billing until plaintiff asked for reimbursement for its underbilling error. It is fair to assume that if in 2002, defendant had found the surcharge calculation as surprising and shocking as it says now that it does, it would have brought the matter to plaintiff's attention immediately after receiving Bruun's February 12, 2002 response to Ryan.

Finally, defendant has never explained, either to plaintiff in the summer of 2005 or to the court during trial, how it calculates the alleged surcharge overbilling or why it considers the charges improper. It adduced no evidence at trial to show that plaintiff's billing process was illegal or outside the accepted practices in the metal tubing business.

Defendant asserts that it never knew about the difference in surcharges between the 304 and 316L grades or knew that the surcharge could extend to alloys other than nickel. This assertion is rebutted convincingly by the evidence of plaintiff's extensive efforts to alert defendant to the difference in surcharges, beginning as soon as defendant started talking about ordering 316L for tubing. Plaintiff continued to show the differential on quote forms whenever it had surcharge information in hand before sending out the form.

In summary, there is no merit to defendant's claim for breach of the written contract made up of purchase orders and invoices. However, defendant has an affirmative defense, which is that the statute of frauds bars plaintiff from recovering on defendant's breach of an oral agreement claim. Plaintiff disputes this, arguing that the agreement it seeks to enforce is not a contract for a sale of goods but a settlement of past disagreements. Alternatively, plaintiff argues, if the court finds that the agreement is covered by the statute of frauds, it escapes the statute's bar because the agreement was performed in part.

Wisconsin recognizes that agreements may relate to more than one topic, one of which is covered by the statute of frauds. E.g., Micro-Managers, Inc. v. Gregory, 147 Wis. 2d 500, 434 N.W.2d 97 (Ct. App. 1988) (analyzing contract for service and sale of goods to determine whether it was for rendition of services or sale). In such a situation, Wisconsin law holds that the court must determine the "contract's predominant factor, thrust and purpose." Id. at 508, 434 N.W.2d at 100. See also Akrosil Division of Intern. Paper Co. v. Ritrama Duramark, Inc., 847 F. Supp. 623, 627 (E.D. Wis. 1994) (same).

An objective look at the parties' agreement reveals that it is predominantly a contract for the sale of goods. Although its genesis was a desire by plaintiff to settle its past disputes with defendant, it lays the groundwork for a long term purchase and supply agreement. It confirms reduced prices for the stainless tubing, reduced surcharges and the credit applicable to defendant's purchases and it includes a table of the finished goods and raw materials on hand for defendant's requirements. The only element of the agreement that does not relate to future sales is plaintiff's agreement to forgo any further efforts to collect its underbilling.

As a contract for the sale of goods, the parties' agreement is covered by Wis. Stat. § 402.201, Wisconsin's version of § 2-201 of the Uniform Commercial Code, which is identical in all but two respects to § 2-201. (UCC § 2-201 provides that a contract for the sale of goods in excess of $5000 is not enforceable unless there is some writing sufficient to indicate that the parties have made a contract and the contract is signed by the person against whom enforcement is sought; the Wisconsin statute requires that contracts for the sale of goods for $500 or more be in writing. Also, the UCC version contains a provision missing from the Wisconsin version, specifying that a contract "enforceable under the section is not unenforceable merely because it is not capable of being performed within a year or any other period after its making."). In subsection (3), both the code provision and the Wisconsin statute set out three exceptions for contracts that do not satisfy the requirements of § 2-201(1) but are otherwise valid. One of these applies to contracts for goods that "are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement." § 402.201(3)(a). Another applies to "goods for which payment has made and accepted or which have been received and accepted." § 402.201(3)(c).

The agreement at issue falls under both of these subsections and therefore escapes the statute of frauds' bar to enforcement. Plaintiff produced specialty 304 and 316L grade tubing for defendant. It made a commitment to procure the raw materials for that product and produced goods not suitable for sale to others, 2-201((3)(a), and it shipped goods that defendant received and accepted. § 2-201(3)(c). The parties entered into an oral contract that would be enforceable if it were in writing; defendant received and accepted goods shipped by plaintiff at prices set by the oral agreement *and* plaintiff manufactured goods specially for defendant that are not suitable for sale to others in the ordinary course of plaintiff's business; therefore, the oral agreement is enforceable.

It is undisputed that defendant breached the oral agreement by failing to comply with its commitment for a long term supply agreement with plaintiff and by failing to pay for the product that it received and accepted. Defendant makes some references to a default by plaintiff that relieved defendant of any obligation to continue the agreement, but there is no evidence of any default. Stopping shipping for non-payment by the buyer is not a default by the seller but a legitimate means of heading off potentially greater losses. U.C.C. § 2-703(2)(a) and(4) (breach of contract includes buyer's failure to make a payment when due; if buyer is in breach of contract, seller may withhold delivery of goods); Wis. Stat. § 402.703(1) (same).

To the extent that defendant thinks it can setoff the value of the product it received against what it believes was overcharging, it is wrong. Even assuming that defendant had the right to setoff under its purchase orders, defendant has failed to show there was such an overcharge.

In the face of an enforceable agreement for a long term supply agreement, defendant is obligated to pay plaintiff not only for the product it accepted but for the raw materials and finished goods that plaintiff had on hand at the time of cancellation. It was entirely foreseeable to defendant that plaintiff would place orders for steel deliveries to be made twelve weeks or more after the agreement was signed. Indeed, defendant made sure that this was happening. It was to this end that it assured plaintiff that the parties would be continuing their long term supply relationship. Thus, defendant is liable for plaintiff's losses incurred when it was unable to sell tubing to defendant or any other customer. Plaintiff's losses include its losses on the unusable raw materials it had ordered for making product for defendant and the finished products defendant refused to purchase.

Plaintiff is entitled to interest under UCC § 2-709 (Wis. Stat. § 402.709), which provides that if the buyer fails to pay the price as it becomes due, the seller may recover the price of goods accepted and goods identified to the contract, "together with any incidental or consequential damages under § 2-710 [Wis. Stat. § 402.710]." Section 2-710 defines incidental damages as "any commercially reasonable charges, expenses or commissions incurred in stopping delivery . . . or otherwise resulting from the breach." Interest is recoverable as incidental damages. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1369 (7th Cir. 1985) (awarding interest under Wisconsin law and holding that "it is obvious to the buyer and unavoidable by the seller that the seller will incur an interest cost . . . in the interval between the breach of the contract and the cover sale; and the party who is better able to avoid this expense and who therefore should bear the risk of its occurrence is the contract-breaking buyer, not the seller.")

Plaintiff has asked for additional damages over and above payment for the products it delivered plus interest and the raw materials it could not use for their intended purpose. It wants the amount of the underbilling, which it says it gave up when it entered into the contract, the credit it gave defendant under the agreement, and the difference between the prices it charged defendant under the oral agreement and the amount it would have charged but for the agreement.

As to these items of damages, plaintiff cannot have it both ways. It cannot seek damages for the breach of a particular agreement and then seek damages for matters it gave up in the agreement. Thus, it cannot recover on its claims for recovery of the amount of the underbilling, for the money it deducted from defendant's invoices as credit or for the difference between the prices it charged for tubing under the agreement and what it would have charged had it not entered into the agreement. Unfair as this holding may seem to plaintiff, which changed its position to its detriment after thinking it had reached an agreement with defendant that would preserve the parties' long term supply agreement, plaintiff is master of its claims. It chose to frame its claim as one for breach of the oral agreement and it has not argued any legal basis for extending its damages beyond those available to it for breach of that agreement.

Under the U.C.C, plaintiff is to "be put in as good a position as if [defendant] had fully performed." § 1-305; Wis. Stat. § 401.106. Plaintiff bargained for a long term supply agreement. To gain the position for which it bargained, this court would have to order specific performance of the agreement. However, the U.C.C. does not provide such a remedy for sellers and plaintiff has not requested it.

ORDER

IT IS ORDERED that plaintiff United Stars Industries, Inc. is entitled to judgment in its favor and to damages in the amount of $811,993 for invoices that have not been paid, plus interest at the rate of 1% per month on the unpaid invoices as sent, and $264,574 for its losses on the finished products and raw materials it had on hand at the time of breach. Because it is not clear that the interest figure that plaintiff has provided the court is limited to the amounts of the invoices only, plaintiff may have until June 12, 2007 in which to advise the court of the correct amount of interest through June 1, 2007.

Entered this 5th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge