

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

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BOUMATIC, LLC,

Plaintiff,

v.

IDENTO OPERATIONS BV,

Defendant.

OPINION AND ORDER

11-cv-822-wmc

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In this civil diversity action, plaintiff BouMatic, LLC (“BouMatic”) is suing defendant Idento Operations BV (“Idento”) for breach of contract, alleging Idento sold products directly to BouMatic dealers, failed to provide replacement and spare parts, and failed to honor its warranty obligations. Diversity jurisdiction is present because the parties are of diverse citizenship and the amount in controversy exceeds \$75,000. 28 U.S.C. §1332(a)(1). Presently before the court is Idento’s motion to dismiss for lack of personal jurisdiction, improper venue, and insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b) (dkt #4) and BouMatic’s motion for leave to file a surreply in opposition to Idento’s motion to dismiss (dkt. #18).

As the plaintiff, BouMatic bears the burden of establishing personal jurisdiction. *Purdue Research Found. v. Sanofi-Synthelabo*, 338 F.3d 773, 782 (7th Cir. 2003). Because the court has not held an evidentiary hearing, BouMatic “need only make out a *prima facie* case of personal jurisdiction” and it “is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record.” *Id.* (quotation and citation omitted). The court will grant BouMatic’s motion for leave to file its surreply. After

reviewing the briefs, declarations and exhibits submitted by the parties, however, the court concludes that BouMatic has failed to make out a prima facie case of personal jurisdiction. Therefore, the court will grant Identó's motion to dismiss for lack of personal jurisdiction and deny its remaining motions as moot.

## ALLEGATIONS OF FACT

### **A. The Parties**

BouMatic is a limited liability company organized under the laws of the state of Nevada with its principal place of business in Madison, Wisconsin. BouMatic's sole member is Madison One Holdings, LLC. The members of Madison One Holding are Gaston Corp., which is a citizen of Texas and Nevada, and Kotts Capital Holdings Limited Partnership. Kotts Capital Holdings' partners are John and Colleen Kotts, who are citizens of Texas, and the 2007 Jacqueline Kotts Trust. The trustee of the 2007 Jacqueline Kotts Trust is a Louisiana citizen and its sole beneficiary is a Texas citizen.

BouMatic sells dairy farm products and equipment throughout the world. Identó is a citizen of the Netherlands whose principal place of business is located in Marknesse, Netherlands. Identó manufactures and sells dairy equipment throughout the world, including robotic milking systems.

### **B. Demonstration Robot**

Identó sold two demonstration models of its robotic milking system to BouMatic Gascigne Melotte SPRL, BouMatic's subsidiary in Belgium. In September 2008, Identó

shipped one of these milking robots, called a Proflex robot, to BouMatic in Wisconsin. Idento sent this robot to Wisconsin at BouMatic's request and charged BouMatic for the shipping. In September 2008, it issued two invoices to BouMatic seeking payment for the sale and delivery of the Proflex robot. On October 4, 2011, the Proflex milking robot was displayed at the World Dairy Expo in Madison, Wisconsin. The Chief Executive Officer of Idento, Edwin Kolsteeg, attended the Dairy Expo in order to be present at a media conference on automatic milking systems.

### **C. The 2008 Purchase Agreement**

In August and September of 2008, BouMatic and Idento exchanged emails concerning an agreement for BouMatic to purchase units for BouMatic's Belgium subsidiary. (Email Correspondence, Ex. F (dkt. #13-6).) In the fall of 2008, BouMatic and Idento negotiated a purchase agreement for additional robots that Idento would send to BouMatic's subsidiary in Belgium. Kolsteeg came to Texas for the negotiations. The negotiations then moved to Madison, Wisconsin, where the parties reached an agreement. The agreement was reduced to a written purchase agreement, which the parties separately signed on or about November 16, 2008. (Compl., Ex. A (dkt. #1-1).)

In the written purchase agreement, BouMatic promises to purchase certain quantities of milk robots from Idento each year between 2008 and 2012. The contract specified the yearly prices and quantity, but anticipated that BouMatic would send quarterly purchase orders to cover the expected sales. Idento further promised that it would not "expand its distribution network through direct sales, with any of the dealers

that purchase robotic milking units . . . [or] do business directly, with any of the dealers, that purchase the BouMatic branded robotic units, supplied from Idento Operations BV.” (*Id.* at ¶ 12.) The parties also agreed that a standard one year warranty would apply to all units purchased by BouMatic. (*Id.* at ¶ 7.)

The written purchase agreement lacks many specific terms, such as a forum selection clause, a confidentiality clause, risk of loss or insurance provisions. Instead, the purchase agreement includes ¶ 13, which states:

BouMatic standard (purchase) terms and conditions will be sent with each of the quarterly purchase orders. Idento Operations BV standard (sales) terms and conditions will be sent with each of the quarterly sales orders.

(Compl., Ex. A (dkt. #1) ¶ 13.) The contract also contains no integration clause.

According to BouMatic, the parties orally agreed during the negotiations that Wisconsin state or federal courts would provide the forum for resolving any disputes arising out of the contract. BouMatic supports this assertion with a declaration of its General Counsel, Mickey Mills. (Mickey Mills Decl. (dkt. #13).) Mills further alleges that Kolsteeg agreed that Idento would follow BouMatic’s terms and conditions in each transaction, and this agreement was repeated in conversations following the execution of the purchase agreement. For its part, Idento submitted a declaration from Edwin Kolsteeg, averring that Idento did not agree that Wisconsin courts would provide the forum for dispute resolution. (E.G. “Edwin” Kolsteeg Decl. (dkt. #16).) Despite these opposing recollections, the parties agree that Mills and Kolsteeg represented BouMatic and Idento during the negotiations.

#### **D. Strategic Alliance**

Around this same period, the parties also began negotiating a “strategic alliance” which envisioned an expanded contractual relationship between Idento and BouMatic in the United States. Although the parties exchanged a draft document entitled “Strategic Alliance Agreement” (dkt. #13-5), the negotiations failed. The parties have not provided the court with the specific dates for these negotiations, but the draft agreement covers sales in 2008 and 2009. (*Id.* at 11.)

#### **E. Purchase Orders and Terms and Conditions Forms**

After entering the purchase agreement, BouMatic purchased some robots from Idento (the record does not indicate how many). Along with its quarterly purchase orders, BouMatic sent Idento a copy of BouMatic’s General Terms and Conditions form. (Decl. of Mickey Mills (dkt. #13) at ¶ 8.) Paragraph 1 provides, in part:

Acceptance shall be limited solely to the terms of this offer. This Order shall be deemed to have been accepted by the Seller upon receipt by BouMatic of any writing . . . indicating acceptance, or by any of the following: (i) shipment of the Products or any portion thereof, or (ii) commencement of the Services.

(Compl., Ex. B (dkt. #1) at ¶ 11.) This form covers a variety of subjects not included in the purchase agreement, including timing, risk of loss, inspections, insurance, warranties, indemnification, and confidentiality.

With respect to jurisdiction, BouMatic’s General Terms and Conditions form states in relevant part:

This Order is governed by the laws of the State of Wisconsin . . . In the event of any litigation between the parties to this Order, the parties agree that the only forum in which such litigation may be filed and adjudicated is in the state or federal courts located in Wisconsin and both parties consent to personal jurisdiction.

(*Id.* at ¶ 11.)

According to Idento, its terms and conditions are contained in a document entitled General Trade Conditions Agricultural Machinery and Equipment.<sup>1</sup> (Decl. Richard Lowes (dkt. #7).) This form was in effect at the time of the contract until July 2009. (*Id.*) In relevant part, this form states:

[These terms] in their entirety are applicable unless they are deviated from, in which case, under the penalty of being null and void this deviation from the agreement must be established in writing . . . For agreements entered into under [these terms] the Dutch legal code is in force.

(General Trade Conditions (dkt. #7-1) at § 3, ¶ 3-4). With respect to dispute resolution procedures, the General Trade Conditions state: “[a]ll disputes . . . in regard to an agreement where [this agreement] applies and the related agreements, will be settled by means of arbitration according to the arbitration regulations of the General Trade Conditions Farm Machinery and Equipment.” (*Id.* at § 18).

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<sup>1</sup> In its surreply brief, BouMatic argues that “Idento is unable to provide this Court with a single ‘quarterly sales order’ that it ‘sent’ to BouMatic with a copy of its terms and conditions.” (Pl.’s Sur-Reply Br. (dkt. #18-1) at 3.) The court concludes that BouMatic waived this argument, because BouMatic did not raise this issue in its reply and, even in the surreply, lacks an assertion that it never received Idento’s terms and conditions.

In July 2009, Idento replaced the General Trade Conditions with a form entitled General Delivery and Payment Terms and Conditions. (Idento Terms and Conditions (dkt. #7-2).) This document remained in force at least through 2011. In addition to stating that Dutch law is applicable to all disputes, it further provides:

Only the Dutch civil court competent in the place of domicile of the contractor can take cognizance of disputes unless this is in violation of imperative rules of law. The contractor can deviate from this rule governing jurisdiction and apply the statutory rules governing jurisdiction.

(*Id.* at § 20.1-20.3.)

Between September 2009 and September 2010, Idento directed several invoices to BouMatic in Madison, Wisconsin. BouMatic submitted four invoices to the court, but does not explain what charges they represent. Two of the invoices are for past due charges relating to the shipping fees for the demonstration robot. (Dkt. #13-4 at 2-3.) The remaining two invoices, dated March and September 2010, are for quarterly prepayments and the balance of past quarterly payments. (*Id.* at 5-6.) While neither the invoices, nor the parties, clarify what these charges represent, the only product that Idento sold or delivered to BouMatic's office in Wisconsin was the demonstration robot; the only products sold under the purchase agreement were sent to a BouMatic's subsidiary in Belgium. (Lowes Decl. (dkt. #7) at ¶¶ 4, 6.) Therefore, the court concludes that these remaining two invoices are prepayments for robots ordered and sent to BouMatic's Belgian subsidiary.

## F. Allegations of Breach and Suit in the Netherlands

On October 18, 2011, Idento sent a letter to BouMatic Chief Executive Officer Robert Luna in Madison, Wisconsin. The letter lists Idento's grievances and purports to terminate the purchase agreement. Idento asserts that BouMatic breached the purchase agreement by developing a competitive product and by failing to purchase the minimum quantities specified in the purchase agreement. In October 2011, Idento commenced legal action in the Netherlands for breach of contract.

After sending the letter, Idento sold products directly to Wouperis, a BouMatic dealer. On December 9, 2011, BouMatic filed the instant litigation in this court, alleging that Idento breached ¶ 12 of the purchase agreement by selling products directly to Wouperis and breached ¶ 7 by failing to honor its warranty obligation and to provide replacement and spare parts.

### OPINION

Idento has moved to dismiss BouMatic's claims for lack of personal jurisdiction, improper venue, and insufficient service of process pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(4). The court need not address the motions to dismiss for improper venue or insufficient service of process because it lacks personal jurisdiction over Idento.

"A district court sitting in diversity has personal jurisdiction over a nonresident defendant only if a court of the state in which it sits would have jurisdiction." *Purdue Research Found.*, 338 F.3d at 779. To determine whether a Wisconsin state court would

have jurisdiction over the individual defendants requires a two-step process. First, the court determines whether Wisconsin's long arm statute, Wis. Stat. § 801.05, subjects the individual defendant to personal jurisdiction. If it does, the court must then determine whether exercising jurisdiction over the defendant would comport with the federal Due Process Clause. *Id.* at 780. Even if BouMatic fails to establish personal jurisdiction through the long arm statute and the Due Process clause, the court may have specific personal jurisdiction over Idento if it consented to the court's jurisdiction. 3 Jay E. Grenig, *Wisconsin Practice, Civil Procedure* § 104.3 (4th ed. 2011).

BouMatic contends that this court has specific personal jurisdiction over Idento through Wisconsin's long arm statute and the Due Process clause. In addition, BouMatic contends that Idento consented to the jurisdiction of this court through a prior oral agreement and by accepting the forum selection clause in BouMatic's form.

## I. Wisconsin's Long Arm Statute

BouMatic alleges that it was injured by Idento's actions in Europe in breach of their contract, including selling products to Wouperis, not providing parts and not honoring its warranty obligations. Plaintiff relies on § 801.05(4), which provides that:

**(4) Local injury; foreign act.** In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

Wis. Stat. § 801.05(4).

Unfortunately for BouMatic, the Wisconsin Supreme Court has held that Wis. Stat. § 801.05(4) “deal[s] with tortious injuries, and [is] inapplicable to a case involving an alleged breach of contract.” *Nagel v. Crain Cutter Co.*, 50 Wis.2d 638, 643, 184 N.W.2d 876, 878 (Wis. 1971) (discussing Wis. Stat. § 262.05 (1973), which was renumbered § 801.05 in 1976). *See also Kinetic Co., Inc. v. BDO EOS Svetovanje, d.o.o.*, 361 F. Supp. 2d 878, 883 (E.D. Wis. 2005) (citing *Nagel* for the proposition that § 801.05(4) applies to tort and not contract claims); *Morris v. Keough*, 1981 WL 138639, 3 (Wis. App. 1981) (same). The court in *Nagel* reasoned that, “[t]o hold that subs. (3) and (4) apply to contract actions as well as tort actions would make sub. (5) unnecessary and redundant.” *Id.* Because the claims in BouMatic’s complaint sound in contract, not tort, § 801.05(4) does not provide a basis for exercising personal jurisdiction over Identio.

BouMatic’s attempt to stretch Wis. Stat. § 801.05(4) to cover its breach of contract claims is predictable, since it cannot establish jurisdiction under the natural provision, Wis. Stat. § 801.05(5), entitled “local services, goods, or contracts.” Only § 801.05(5)(a) or (5)(c) even arguably apply to BouMatic’s claims. Section 801.05(5)(a) provides that Wisconsin courts will have personal jurisdiction over a defendant for any action that

Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff’s benefit, by the defendant

to perform services within this state or to pay for services to be performed in this state by the plaintiff.

Wis. Stat. § 801.05(a). Section 801.05(5)(c) states that the Wisconsin courts will have personal jurisdiction over a defendant for any action that:

Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value.

Wis. Stat. § 801.05(c).

Under the contract, neither Idento nor BouMatic promises to perform services in Wisconsin or to deliver, receive or ship goods from or within Wisconsin. Instead, Idento promised to sell milking robots manufactured in the Netherlands and to ship them to BouMatic's subsidiary in Belgium. The only robot that Idento shipped to Wisconsin was the single demonstration Proflex robot, which was shipped before the instant contract. BouMatic is not alleging that Idento breached contractual obligations relating to the demonstration robot. BouMatic has identified two invoices which Idento sent to Wisconsin, but these invoices were for products shipped to Belgium. Accordingly, BouMatic has failed to allege any facts sufficient to bring its contract dispute with Idento under Wisconsin's long arm statute.<sup>2</sup>

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<sup>2</sup> BouMatic having failed to establish that Idento's contacts with Wisconsin satisfy Wisconsin's long arm statute, the court need not evaluate whether exercising jurisdiction over Idento would comport with the Due Process Clause.

## II. Consent

As noted, personal jurisdiction can also be conferred by either express or implied consent, which contractual parties can give in advance by agreeing to submit their controversies for resolution within a particular jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *Heller Fin., Inc. v. Midwhey Power Co., Inc.* 883 F.2d 1286, 1290 (7th Cir. 1989). A forum selection clause electing a particular forum establishes a defendant's consent to that forum. *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1292 (7th Cir. 1989) (“[A] valid forum-selection clause, even standing alone, can confer personal jurisdiction.”); *See also* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1064 (3d ed. 1988). “A contract's forum-selection clause is presumptively valid in Wisconsin.” *Pietroske, Inc. v. Globalcom, Inc.*, 2004 WI App 142, ¶ 1, 275 Wis.2d 444, 685 N.W.2d 884.

BouMatic contends that before the execution of the written purchase agreement, the parties orally agreed to jurisdiction in Wisconsin in the event of a contractual dispute. Idento denies that this oral agreement occurred.<sup>3</sup> BouMatic argues further that its choice of forum provision was incorporated into the purchase agreement when Idento shipped the robots, because BouMatic's purchase orders expressly limited acceptance to

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<sup>3</sup> BouMatic's assertion of a prior oral agreement is doubtful. If Idento agreed to jurisdiction in Wisconsin, then why did the parties not incorporate this term in the written purchase agreement, rather than expressly contemplating that both parties' would submit their respective terms and conditions? At most, the parties appear to have deferred the question of the proper forum to resolve any disputes, just as they did numerous other details regarding their contemplated relationship.

its terms, which confirmed the prior oral agreement consenting to jurisdiction in Wisconsin. Idento denies that it accepted BouMatic's terms and conditions.

BouMatic argues that whether Idento consented to jurisdiction in Wisconsin is governed by federal law, which follows § 2-207 of the Uniform Commercial Code. Idento argues that state law governs this issue and Wis. Stat. §§ 401.108 and 402.207 adopt the "mirror-image rule." Neither statute supports Idento's contention. Section 401.108 was a severability provision, entirely unrelated to the mirror-image rule or contract interpretation generally.<sup>4</sup> Section 402.207 is identical to U.C.C. § 2-207. The Wisconsin Supreme Court expressly held that § 402.207 abandons the mirror-image rule. *Air Prod. & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 209-10, 206 N.W.2d 414, 422 (1973) ("[C]onfirmations need not mirror each other in order to find contract."). *See also Converting/Biophile Lab., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, 296 Wis. 2d 273, 283, 722 N.W.2d 633, 638 ("Section 402.207 altered the common law mirror-image rule under which the terms of an acceptance had to exactly mirror those of the offer."). Therefore, whether state or federal law governs, U.C.C. § 2-207 determines whether Idento's alleged oral agreement to resolve disputes in Wisconsin became part of the contract.

Both Wis. Stat. § 402.207 and U.C.C. § 2-207 provide:

(1) A definite and seasonable expression of acceptance or a

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<sup>4</sup> Wis. Stat. § 401.108 was repealed by 2009 Act 320, § 8, effective Aug. 1, 2010.

written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it;

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207 (2010).<sup>5</sup>

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<sup>5</sup> In 2003, U.C.C. § 2-207 was amended to provide, “[I]f . . . a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are: (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of this Act.” U.C.C. §2-207 (2010). However, the court will analyze the forum selection clauses under the pre-amended version of U.C.C. § 2-207, because (1) no state has adopted the amended § 2-207 (1 White & Summers, Uniform Commercial Code § 1-4 (5th ed. 2006)), (2)

Although the parties dispute whether Idento gave oral consent for personal jurisdiction in Wisconsin during their negotiations in September 2008, it is not necessary to resolve this factual dispute. Regardless whether Idento consented to jurisdiction in Wisconsin at some point during the negotiations of the purchase agreement, the parties' subsequent writings and actions fail to establish that Idento consented to jurisdiction in Wisconsin courts.

#### **A. Assuming a Prior Oral Agreement**

Assuming the parties had a prior oral agreement about jurisdiction, the parties' contract would consist of that oral agreement along with the purchase agreement. According to ¶ 13, the purchase agreement also incorporates both parties' terms and conditions. When BouMatic's sent its terms, it included a forum selection clause and this clause might be construed as a written confirmation of the parties' prior oral agreement under U.C.C. § 2-207.

Under U.C.C. § 2-207(1), a written confirmation operates as an acceptance "*unless* acceptance is expressly made conditional on assent to the additional or different terms." (italics added). Paragraph 1 of BouMatic's General Terms and Conditions form made acceptance expressly conditional on Idento's assent to all of BouMatic's additional terms, including many clauses not included in the purchase agreement or any alleged prior oral agreement. Therefore, BouMatic's putative confirmation does not "operate as an

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neither party cited the amended version, and (3) the amended provision does not change the result.

acceptance” under § 2-207(1). As a result, the parties failed to reach an agreement on the listed terms and conditions, including the forum selection clause. *See C. Itoh & Co. Inc. v. Jordan Intern. Co.*, 552 F.2d 1228, 1237 (7th Cir. 1997) (“[T]he consequence of a clause conditioning acceptance on assent to the additional or different terms is that, as of the exchanged writings, there is no contract.”).

In *C. Itoh*, the buyer submitted a purchase order for steel coils and the seller sent an acknowledgment form that included an arbitration clause and made its acceptance conditional on the buyer’s assent to the additional terms. *Id.* at 1235. The court found that the buyer did not assent to the new terms, even though he performed under the contract. *Id.* at 1236. Under § 2-207(3), however, a contract was formed based on performance. Since the court found the parties’ contract consisted of the terms on the acknowledgment form, except where the purchase order and acknowledgment conflicted, any disputed terms, including the arbitration clause, dropped out of the agreement and supplementary terms replaced them. *Id.* at 1236-37. Since the Uniform Commercial Code contains no gap-filler term for arbitration, the court found that there was no agreement to arbitrate in the contract. *Id.*

Similarly, BouMatic and Idento did not reach an agreement on terms and conditions. BouMatic expressly conditioned acceptance on assent to its additional terms and Idento responded with different terms. Idento and BouMatic performed without objection, which establishes a contract “consist[ing] of those terms on which the writings of the parties agree, together with any supplementary terms.” U.C.C. § 2-207(3). Their

writings do not agree about forum selection and jurisdiction. BouMatic also failed to establish a “course of dealing” that would demonstrate that Idento implicitly agreed to BouMatic’s forum selection clause. *See In re CFLC, Inc.*, 166 F.3d 1012, 1017 (9th Cir. 1999) (“Course of dealing analysis is not proper in an instance where the only action taken has been the repeated delivery of a particular form by one of the parties.”). As a result, both parties’ forum selection clauses drop out. The Uniform Commercial Code does not include a supplementary term for forum selection. Therefore, BouMatic has not established that Idento orally agreed to personal jurisdiction in this court, nor that it confirmed this oral agreement by fulfilling the purchase orders.

#### **B. Assuming no Prior Agreement**

In the more likely event that the parties did not reach a prior oral agreement about forum selection, BouMatic fairs no better. As an initial matter, the purchase agreement contains sufficiently clear price and quantity terms to establish a contract. Under ¶ 13, the purchase agreement also incorporates both parties’ terms and conditions. However, the parties’ respective forms do not establish an agreement on forum selection, because they exchanged conflicting forum selection clauses. Thus, U.C.C. § 2-207(3) governs and the terms of the contract consist of terms on which the writings of the parties agree plus any supplementary terms, with all other terms dropping out. Again, applying § 2-207(3), Idento has not consented to jurisdiction and personal jurisdiction lies only where the court would otherwise have it.

BouMatic argues that its form was an offer, which Idento accepted by fulfilling the

purchase orders and sending its invoices. According to BouMatic, Identó's form was an attempt to accept BouMatic's terms with additional or different terms under U.C.C. § 2-207(1). Accordingly, Identó's non-confirming acceptance was effective despite additional terms and the terms of their contract should be determined under § 2-207(2) instead of § 2-207(3).

Under §2-207(2), because both parties are merchants, Identó's additional terms would ordinarily become part of the contract. However, in this case, the additional terms remain only proposals for addition to the contract because (1) BouMatic's offer expressly limited acceptance to its terms and (2) Identó's forum selection clause was a material alteration of the parties' agreement. U.C.C. § 2-207(2)(a), (b). According to BouMatic, that means that Identó's forum selection was simply a proposal and BouMatic's forum selection clause became part of the contract.

But BouMatic mischaracterizes the legal effect of its General Terms and Conditions form and misinterprets U.C.C. § 2-207. The parties agreed in ¶ 13 of the purchase agreement to exchange terms and conditions. Paragraph 13 does not give priority to either party's terms. The court will not disregard that undisputed fact in order to treat BouMatic's form as a new offer and Identó's form as non-confirming acceptance.

In any event, BouMatic misinterprets the effect of a non-confirming acceptance under U.C.C. § 2-207. Even if BouMatic's General Terms and Conditions form was an offer, the offer was conditioned on assent to all of BouMatic's additional terms. Identó's non-confirming acceptance establishes acceptance sufficient to create a contract, but it

does not establish assent to all of BouMatic's terms and conditions. When an offer and acceptance conflict on peripheral terms, U.C.C. § 2-207(3) applies and provides that an agreement is not established on the conflicting terms and those conflicting terms drop out of the contract. *C. Itoh*, 552 F.2d at 1237.

BouMatic has failed to establish that Idento consented to this court's jurisdiction, either by a prior oral agreement or by accepting BouMatic's choice of forum provision, so the court will dismiss this case for lack of personal jurisdiction over Idento.

#### ORDER

IT IS ORDERED that

- 1) Plaintiff BouMatic LLC's motion for leave to file surreply (dkt. #18) is GRANTED;
- 2) Defendant Idento Operations BV's motion to dismiss for lack of personal jurisdiction (dkt. #4) is GRANTED;
- 3) Idento's motions to dismiss for improper venue and insufficient service of process (dkt. #4) are DENIED as moot; and
- 4) The clerk of the court is directed to enter judgment in favor of defendant and close this case.

Entered this 4th day of June, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge