

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CITY BLUE, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL NEWS, INC.	:	
d/b/a MECCA USA,	:	
Defendant.	:	NO. 99-4445
	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

YOHN, J. July , 2000

The plaintiff, City Blue, Inc. (“City Blue”), seeks to recover damages from the defendant, International News, Inc. d/b/a Mecca USA (“Mecca”), for breach of contract resulting from Mecca’s failure to ship goods to City Blue in the spring of 1999. Mecca contends that it was justified in suspending performance (and therefore, failing to deliver the goods to City Blue) because it had reasonable grounds for insecurity with respect to the performance of City Blue and it had requested, but did not receive, adequate assurance of performance from City Blue. Accordingly, Mecca argues that its suspension of performance under the contract was commercially reasonable and City Blue is not entitled to recover damages. In addition, Mecca has brought its own counterclaim to recover payment allegedly still owed by City Blue for merchandise delivered to City Blue by Mecca.

The court conducted a two-day bench trial to resolve these issues. Having considered all of the testimony and exhibits offered at trial, I now, pursuant to Fed. R. Civ. P. 52(a), make the

following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. The plaintiff, City Blue, is a Pennsylvania corporation and a merchant in the business of retail sale of casual and fashion merchandise. See Plaintiff and Defendant’s Stipulated Findings of Fact (“Stipulated Findings”) (Doc. No. 23) ¶ A-1. City Blue’s principal place of business is in the Commonwealth of Pennsylvania. See id. at ¶ B-3.
2. The defendant, Mecca, is a corporation in the business of designing, importing, and shipping clothing. See id. at ¶ B-2. Mecca is a “corporation organized under the laws of the State of Washington with a principal place of business in the State of Washington.” Id. at ¶ B-1. Mecca conducts business in the Commonwealth of Pennsylvania. See id. at ¶ A-2.
3. Mecca and Congress Talcott Corporation (“Congress Talcott”) entered into a Collection Factoring Agreement on January 31, 1997. See id. at ¶ B-31. Pursuant to this agreement, Congress Talcott was responsible for collecting Mecca’s accounts receivable. See Trial Testimony of Anthony Staulcup (“Staulcup Test.”), June 28, 2000. In the event that a customer remitted payment for less than the amount due, however, Congress Talcott would pass on the responsibility for collection to Mecca. See id. Thus, although Congress Talcott handled the ordinary collection of payments, Mecca was itself responsible for collecting claims disputed by customers. See id.
4. Mecca conducts business by presenting its line of merchandise at two trade shows. See

Stipulated Findings ¶ B-5. These trade shows usually occur in February and August of every year. See id. Following each trade show, Mecca takes orders for merchandise from customers. See id. at ¶ B-6.

5. City Blue and Mecca's business relationship began in 1995. See id. at ¶¶ A-4, B-7. At that time, City Blue began purchasing merchandise from Mecca for resale. See id.
6. City Blue became one of Mecca's largest customers. See Staulcup Test., June 27, 2000.
7. Mecca had a written return policy titled "Mecca USA–Return Policy." See Stipulated Findings ¶ A-29; see also Ex. P-1. This return policy did not include a time deadline for a retailer to return merchandise. See Stipulated Findings ¶ A-30; see also Ex. P-1.
8. With each shipment of merchandise, Mecca included an invoice which set forth the wholesale price for the merchandise delivered from Mecca to City Blue. See Stipulated Findings ¶ B-8. These invoices also set forth the prices which City Blue agreed to pay for the merchandise. See id.

PLAINTIFF'S CLAIM:

9. In the Fall of 1998, problems began to develop in the relationship between Mecca and City Blue. See Trial Testimony of Peter Mintz ("Mintz Test."), June 27, 2000.
10. City Blue repeatedly refused to follow Mecca's corporate policies for ordering and returning merchandise. See Mintz Test., June 27, 2000; Staulcup Test., June 27, 2000. For example, City Blue repeatedly returned merchandise without first receiving written authorization, refused to accept shipments ordered by it, refused to pay the full amount of invoices, and demanded deductions and discounts on merchandise which had not been previously authorized or agreed to by Mecca's corporate office. See Mintz Test., June 27,

2000; Staulcup Test., June 27, 2000.

11. City Blue also insisted on discussing issues such as chargebacks and discounts with Mintz. See Staulcup Test., June 27, 2000; Nadav Test., June 27, 2000. Mintz was a sales representative for Mecca and had no authority to authorize such chargebacks and discounts. See Mintz Test., June 27, 2000; Staulcup Test., June 27, 2000.
12. On October 14, 1998, City Blue placed the following orders with Mecca:
 - a. Pursuant to purchase order WS-1862, City Blue ordered merchandise worth a wholesale value of \$2,520. See Stipulated Findings ¶¶ A-5, A-6.
 - b. Pursuant to purchase order WS-1863, City Blue ordered merchandise worth a wholesale value of \$6,162. See id. at ¶¶ A-7, A-8.
 - c. Pursuant to purchase order WS-1864, City Blue ordered merchandise worth a wholesale value of \$9,372. See id. at ¶¶ A-9, A-10.
 - d. Pursuant to purchase order WS-1864A, City Blue ordered merchandise worth a wholesale value of \$6,000. See id. at ¶¶ A-11, A-12.
 - e. Pursuant to purchase order WS-1865, City Blue ordered merchandise worth a wholesale value of \$79,342. See id. at ¶¶ A-13, A-14.
 - f. Pursuant to purchase order WS-1866, City Blue ordered merchandise worth a wholesale value of \$16,992. See id. at ¶¶ A-15, A-16.
 - g. Pursuant to purchase order M-18752, City Blue ordered merchandise worth a wholesale value of \$10,596. See id. at ¶¶ A-17, A-18.
 - h. Pursuant to purchase order M-18753, City Blue ordered merchandise worth a wholesale value of \$3,240. See id. at ¶¶ A-19, A-20.

- i. Pursuant to purchase order WS-1906, City Blue ordered merchandise worth a wholesale value of \$7,200. See id. at ¶¶ A-21, A-22.
13. On November 4, 1998, Laffon Glymph, an employee in the credit department at Mecca, sent a letter to City Blue regarding a short shipment report received by Mecca from City Blue. See Stipulated Findings ¶ B-9; see also Ex. P-2. In that letter, Mecca informed City Blue that the entire order had been shipped. See id. at ¶ B-10. Mecca also requested copies of City Blue’s receiving reports and a pilferage claim¹ from the carrier for that shipment. See id. Mecca further informed City Blue that if Mecca did not receive the proper documents or payment, all City Blue orders would be placed on hold. See id. at ¶ B-12; see also Ex. P-2 (stating that if City Blue does not send proper documents or payment to Mecca within the specified time frame, “all orders will be placed on hold until situation is cleared up”).
14. Joseph Nadav, the president of City Blue, reviewed the November 4, 1998, letter from Mecca. See Stipulated Findings ¶ B-13. City Blue did not pay the \$789 to Mecca as requested in the letter of November 4, 1998. See id. at ¶ B-14.
15. On November 11, 1998, Glymph sent another letter to City Blue on behalf of Mecca concerning an order for which City Blue alleged a billing error and for which it had deducted \$1120 from the invoice price. See Stipulated Findings ¶ B-15; see also Ex. P-4. In that letter, Mecca stated that it had reviewed the order and that the original bill was correct. See Stipulated Findings ¶ B-15. Accordingly, Mecca requested that City Blue

¹A pilferage claim is a claim made against the carrier of the merchandise, in this case, Roadway Express. See Mintz Test., June 27, 2000.

- reimburse it for the \$1120 City Blue had deducted from the payment. See id. at ¶ B-16; see also Ex. P-4. Mecca stated that City Blue had to pay \$1120.00 within 15 days of receiving the letter to avoid having a delay on its next shipment. See Ex. P-4.
16. Nadav reviewed the November 11, 1998, letter from Mecca. See Stipulated Findings at ¶ B-17. City Blue did not submit payment of \$1120 as requested in Mecca's letter of November 11, 1998. See id. at ¶ B-18.
 17. In December, 1998, Nadav and Staulcup had a series of telephone conversations. See Staulcup Test., June 27, 2000. In these conversations, Staulcup explained that Mecca had problems with the City Blue account and that the problems had to be solved in order for Mecca to continue the business relationship with City Blue. See id.
 18. Following the series of conversations with Nadav, Staulcup felt assured that the relationship could continue and so, he permitted the release of some orders to City Blue. See id.
 19. On December 23, 1998, a shipment of merchandise from Mecca arrived at the City Blue warehouse. See Mintz Test., June 27, 2000; Staulcup Test., June 27, 2000. This was referred to at trial as the "Christmas shipment." See id. City Blue refused to accept the Christmas shipment because it claimed that it had arrived late. See Mintz Test., June 27, 2000.
 20. In late January or early February, Staulcup learned about City Blue's refusal to accept the Christmas shipment. See Staulcup Test., June 27, 2000.
 21. In response to the "bounced" Christmas shipment, Staulcup authored a letter to Nadav on February 11, 2000. See Staulcup Test., June 27, 2000; see also Ex. P-7. In the letter,

Staulcup explained that City Blue's refusal to accept the Christmas shipment violated Mecca's policies and procedures. See id. Accordingly, Mecca requested that City Blue reimburse it for the freight and warehousing charges of \$2,819. See id. Staulcup also stated in the letter: "When you have sent this payment, please call me and we can discuss future relations between City Blue and Mecca USA." See Ex. P-7.

22. On February 19, 1999, City Blue placed the following orders with Mecca:
 - a. Pursuant to purchase order WS-2864, City Blue ordered merchandise worth a wholesale value of \$9,192. See Stipulated Findings ¶¶ A-23, A-24.
 - b. Pursuant to purchase order WS-2865, City Blue ordered merchandise worth a wholesale value of \$13,740. See id. at ¶¶ A-25, A-26.
 - c. Pursuant to purchase order WS-2866, City Blue ordered merchandise worth a wholesale value of \$8,098.50. See id. at ¶¶ A-27, A-28.
23. At the end of February, 1999, representatives from Mecca attended the Mecca USA trade show. See, e.g., Staulcup Test., June 27, 2000.
24. At the Mecca USA trade Show, Nadav met with Mintz, Mecca's sales representative. See Mintz Test., June 27, 2000; Nadav Test., June 27, 2000. During this meeting, Nadav and Mintz discussed fabric samples for the next season. See Mintz Test., June 27, 2000. At no point during this conversation did Mintz inform Nadav that City Blue's account was on hold, or that City Blue would not be receiving its spring orders. See id. Mintz did explain to Nadav that Mecca was having problems with the account and he should speak with Staulcup about these issues. See Mintz Test., June 27, 2000.
25. In April, 1999, Mecca sent City Blue a proposal outlining terms and conditions for the

- reopening of the City Blue account. See Nadav Test., June 27, 2000; Staulcup Test., June 27, 2000; see also Ex. P-12. Among the terms, the proposed agreement provided that City Blue would be limited to \$35,000 in purchases per month. See Ex. P-12. The agreement also required Nadav to provide a personal guarantee for all City Blue purchases. See id.
26. Nadav objected to several of the provisions of the proposed agreement. See Nadav Test., June 27, 2000. Nadav told Mecca he was concerned about some of the provisions. See id.
27. On April 7, 1999, Mecca sent Nadav a revised proposal which incorporated some, but not all, of the changes suggested by Nadav. See Nadav Test., June 27, 2000; see also Ex. P-13.
28. On April 21, 1999, Nadav handwritten changes onto the latest version of the proposed agreement. See Nadav Test., June 27, 2000; see also Ex. P-14. Nadav then signed, dated, and returned the document to Mecca. See id. After Nadav sent this document to Mecca, he did not hear back again from Mecca concerning this agreement. See Nadav Test., June 27, 2000.
29. On April 29, 1999, Nadav wrote to Mecca. See Nadav Test., June 27, 2000; see also Ex. P-16. In this letter, Nadav stated that he was writing “concerning [his] open orders that should have been shipped by now.” See Ex. P-16. Nadav explained that he had signed the proposed agreement with Mecca in order to allow the orders to be released. See id. Nadav also reported that Mintz had told him that the ordered goods were on their way. See id.

30. On May 20, 1999, Nadav again wrote to Mecca. See Nadav Test., June 27, 2000; see also Ex. P-17. In this letter, Nadav explained that City Blue had not received any of its orders that had been scheduled for delivery in March, April, or May. See Ex. P-17. In this correspondence, Nadav stated that he could not get a “straight answer” from Mintz concerning these orders. See id.
31. At no point during this relevant time period did Mecca ever make a written demand for assurance of due performance.
32. Furthermore, at no point during this relevant time did Mecca ever clearly communicate orally that it was demanding adequate assurance of City Blue’s future performance under the contract.
33. Because the demand for adequate assurance was never clearly communicated to City Blue, City Blue made no attempt to cover through the purchase of similar merchandise from another vendor. See Nadav Test., June 27, 2000.
34. City Blue never received its spring orders from Mecca. Specifically, City Blue did not receive the following orders:
 - a. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1862, which was scheduled for delivery in January, 1999. See Stipulated Findings ¶¶ A-5, A-6. This merchandise had a wholesale value of \$2,250. See id. at ¶ A-6.
 - b. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1863, which was scheduled for delivery in February, 1999. See id. at ¶ A-7. This merchandise had a wholesale value of \$6,162. See id. at ¶ A-8.

- c. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1864, which was scheduled for delivery in March-April, 1999. See id. at ¶ A-9. This merchandise had a wholesale value of \$9,372. See id. at ¶ A-10.
- d. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1864A, which was scheduled for delivery in May, 1999. See id. at ¶ A-11. This merchandise had a wholesale value of \$6,000. See id. at ¶ A-12.
- e. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1865, which was scheduled for delivery in March, 1999. See id. at ¶ A-13. This merchandise had a wholesale value of \$79,342. See id. at ¶ A-14.
- f. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1866, which was scheduled for delivery in March-April, 1999. See id. at ¶ A-15. This merchandise had a wholesale value of \$16,992. See id. at ¶ A-16.
- g. City Blue did not receive the merchandise ordered pursuant to purchase order M-18752, which was scheduled for delivery in March-April, 1999. See id. at ¶ A-17. This merchandise had a wholesale value of \$10,596. See id. at ¶ A-18.
- h. City Blue did not receive the merchandise ordered pursuant to purchase order M-18753, which was scheduled for delivery in April-May, 1999. See id. at ¶ A-19. This merchandise had a wholesale value of \$3,240. See id. at ¶ A-20.
- i. City Blue did not receive the merchandise ordered pursuant to purchase order WS-1906, which was scheduled for delivery in March-April, 1999. See id. at ¶ A-21. This merchandise had a wholesale value of \$7,200. See id. at ¶ A-22.
- j. Pursuant to purchase order WS-2864, City Blue ordered merchandise for delivery

to City Blue in April, 1999. See id. at ¶ A-23. The merchandise, which had a wholesale value of \$9,192, was not shipped or delivered by Mecca. See id. at ¶ A-24.

k. City Blue did not receive the merchandise ordered pursuant to purchase order WS-2865, which was scheduled for delivery in April, 1999. See id. at ¶ A-25. This merchandise had a wholesale value of \$13,740. See id. at ¶ A-26.

l. City Blue did not receive the merchandise ordered pursuant to purchase order WS-2866, which was scheduled for delivery in May, 1999. See id. at ¶ A-27. This merchandise had a wholesale value of \$8,098.50 See id. at ¶ A-28.

35. In total, therefore, Mecca failed to deliver to City Blue merchandise worth a wholesale value of \$172,454.50.

36. At trial, City Blue claimed that its damages were equal to approximately 100% of the mark-up rate on the goods less expenses saved. See Nadav Test., June 27, 2000. City Blue submitted insufficient evidence to support its contention that this calculation represents the damages it suffered as a result of this breach of contract. For example, City Blue made no effort to account for unsold goods, goods sold at a discount, stolen goods, returned goods, and expenses saved. Accordingly, I am unable to accept City Blue's computation of damages.

37. Instead, I find that the best measure of damages is achieved by examining the plaintiff's 1999 tax return. Pursuant to that tax return, the difference between the cost of goods sold and the sale price of the goods was \$2,918,111. See Ex. D-CC; see also Nadav Test., June 27, 2000. I find that this difference amounts to 21% over the cost of goods sold.

38. I further find that the cost of credit card purchases for City Blue is approximately 1.2%.
See Nadav Test., June 27, 2000.
39. Therefore, I find that the profit over costs of goods sold is approximately 20%.
40. Accordingly, I find that the approximate amount owed to the plaintiff from the defendant is 20% of the value of the merchandise that was not delivered. In this case, 20% of \$172,454.50 (the value of the merchandise not delivered by Mecca) is \$34,491.

DEFENDANT’S COUNTERCLAIM:

41. Pursuant to invoice number 81-47288, Mecca shipped merchandise to City Blue and billed City Blue \$31,600. See Stipulated Findings ¶ A-31; see also Ex. D-L. City Blue informed Mecca that the merchandise shipped pursuant to invoice 81-47288 was short 10 pieces of merchandise. See Stipulated Findings ¶ A-32. City Blue completed a short shipment/lost carton report for this missing merchandise. See id. at ¶ A-33. After an investigation, Mecca determined that there was no merit to City Blue’s chargeback of \$228. See Staulcup Test., June 28, 2000. City Blue has refused to pay Mecca the \$228 owed on this invoice. See id. I find, therefore, that City Blue owes Mecca \$228.
42. Pursuant to invoice number 81-48804, Mecca shipped merchandise to City Blue and billed City Blue \$16,880. See Stipulated Findings ¶ A-34. Mecca claims that City Blue owes \$2,430 on this invoice because of an unauthorized deduction taken by City Blue for a return of merchandise. See Staulcup Test., June 28, 2000; see also Ex. D-AA. I find, however, that Mecca failed to prove by a preponderance of the evidence that it was owed \$2,430 on this invoice by City Blue.
43. Pursuant to invoice number 81-49476, Mecca shipped merchandise to City Blue and

billed City Blue \$3,293.13. See Stipulated Findings ¶ A-35. City Blue claimed that the merchandise shipped in this order was 36 pieces short. See Staulcup Test., June 27, 2000. As a result, City Blue refused to pay \$823.28 of the invoice. See id.; see also Ex. D-N. Mecca requested documentation from City Blue concerning this shortage, which City Blue did not provide. See Staulcup Test., June 27, 2000. Accordingly, I find that City Blue owes Mecca \$823.28 on this invoice.

44. Pursuant to invoice number 81-51462, Mecca shipped merchandise to City Blue and billed City Blue \$24,000. See Stipulated Findings ¶ A-37. City Blue claimed that 12 pieces of merchandise were missing from this shipment and therefore, it deducted \$288 from its payment on the invoice. See Staulcup Test., June 28, 2000; see also Ex. D-O. Mecca requested documentation from City Blue in support of this deduction. See Staulcup Test., June 28, 2000. City Blue did not provide this documentation and I find, therefore, that City Blue owes Mecca the \$288 outstanding on this invoice.
45. Pursuant to invoice number 82-53647, Mecca shipped merchandise to City Blue and billed City Blue \$16,512. See Stipulated Findings ¶ A-38; see also Ex. D-P. City Blue claimed that 2 pieces of merchandise were missing from this shipment and thus, it deducted \$45 from its payment on the invoice. See Staulcup Test., June 28, 2000; see also Ex. D-P. Mecca requested documentation supporting this short-shipment claim. See Staulcup Test., June 28, 2000. City Blue did not provide this documentation and therefore, I find that City Blue owes Mecca the amount of \$45, which is still outstanding on the invoice.
46. Pursuant to invoice number 82-54817, Mecca shipped merchandise to City Blue and

billed City Blue \$5,250. See Stipulated Findings ¶ A-39. City Blue responded by paying \$4,218 of the invoice because City Blue claimed that they had reached an agreement with Mintz whereby City Blue was to receive a 20% discount on the merchandise. See Ex. D-Q. Mecca argued at trial that this deduction was unauthorized and therefore, City Blue owed it the outstanding balance on the invoice (\$1,032). See Staulcup Test., June 28, 2000. I find that City Blue did not receive an authorized discount on this merchandise and thus, owes Mecca the amount of \$1,032, which is still outstanding on this invoice.

47. Pursuant to invoice number 82-55096, Mecca shipped merchandise to City Blue and billed City Blue \$12,325.50. See Stipulated Findings ¶ A-40. City Blue claimed that 6 pieces of merchandise were missing and remitted payment for \$12,259.50 as a result, leaving \$66 as the outstanding balance. See Staulcup Test., June 28, 2000; see also Ex. D-R. Mecca requested documentation concerning this alleged short shipment. See Staulcup Test., June 28, 2000. City Blue did not provide this documentation. See id. I find, therefore, that City Blue owes \$66 to Mecca.

48. Pursuant to invoice number 83-55578, Mecca shipped merchandise to City Blue and billed City Blue \$10,620. See Stipulated Findings ¶ A-41. City Blue claimed that 6 pieces of merchandise were missing and therefore, City Blue deducted \$132 from the payment made on the invoice. See Staulcup Test., June 28, 2000; see also Ex. D-S. Despite Mecca's request, City Blue did not provide documentation to support this alleged shortage. See Staulcup Test., June 28, 2000. Accordingly, I find that City Blue owes \$132 to Mecca on this invoice.

49. Pursuant to invoice number 83-56076, Mecca shipped merchandise to City Blue and

billed City Blue \$23,665.50. See Stipulated Findings ¶ A-42. This shipment was received by City Blue with twelve pieces of merchandise missing. See id. Pursuant to a letter dated November 11, 1998, Mecca acknowledged that the merchandise shipped pursuant to invoice number 83-56076 was shipped with a shortage of 12 pieces of merchandise. See id. at ¶ A-43. In addition, City Blue claimed that it was entitled to a discount on this merchandise and accordingly, it refused to pay \$1,120 of the invoiced amount. See Staulcup Test., June 28, 2000; see also Ex. D-T. Mecca presented testimony that it did not authorize this discount and therefore, this was an unauthorized deduction taken by City Blue. See Staulcup Test., June 28, 2000. I accept Mecca's account of the events and find, therefore, that City Blue owes Mecca \$1,120 that is still outstanding on this invoice.

50. Pursuant to invoice number 83-60005, Mecca shipped merchandise to City Blue and billed City Blue \$108,101. See Stipulated Findings ¶ A-44. City Blue claimed that 12 pieces of merchandise were missing from this shipment and thus, deducted \$336 from the amount paid to Mecca. See Staulcup Test., June 28, 2000; see also Ex. D-U. Mecca requested documentation concerning this alleged short shipment. See Staulcup Test., June 28, 2000. City Blue never provided this documentation and therefore, I find that City Blue owes Mecca \$336 on this invoice.

51. Pursuant to invoice number 83-61388, Mecca shipped merchandise to City Blue and billed City Blue \$26,772. See Stipulated Findings ¶ A-45. City Blue claimed that 6 pieces of merchandise were missing from this shipment. See Staulcup Test., June 28, 2000; see also Ex. D-W. Accordingly, City Blue refused to pay \$789 owed on the

- invoice. See Staulcup Test., June 28, 2000; see also Ex. D-W. Mecca requested documents, including receiving reports and a pilferage claim, from City Blue concerning this shipment. See id. City Blue did not provide these documents and thus, I find that City Blue owes Mecca \$789 on this invoice.
52. Pursuant to invoice number 83-61386, Mecca shipped merchandise to City Blue and billed City Blue \$48,704. See Stipulated Findings ¶ A-46. Mecca provided a return authorization for 144 pieces of merchandise shipped pursuant to this order. See id. at ¶ A-47. At trial, Mecca contended that City Blue had taken an unauthorized deduction of \$2,304 for the remaining amount due on the invoice. See Staulcup Test., June 28, 2000. I find, however, that Mecca presented insufficient evidence at trial to support this claim. Therefore, I find that City Blue does not owe Mecca the \$2,304 it claims it is owed on this invoice.
53. Pursuant to invoice number 84-62685, Mecca shipped merchandise to City Blue and billed City Blue \$34,590. See Stipulated Findings ¶ A-48. On October 30, 1998, City Blue sent Mecca a letter requesting a return authorization for 1,350 pieces of merchandise shipped pursuant to invoice number 84-62685. See id. at ¶ A-49. City Blue claimed that it was requesting this return authorization because the merchandise was shipped after the cancellation date of September 30, 1998. See id. City Blue then remitted payment for \$21,510 (leaving an outstanding balance of \$13,080). See Staulcup Test., June 28, 2000; see also Ex. D-X. I find that Mecca demonstrated at trial that this deduction taken by City Blue was unauthorized and therefore, I find that City Blue owes \$13,080 to Mecca.
54. Pursuant to invoice number 83-65948, Mecca shipped merchandise to City Blue and

billed City Blue \$21,900. See Stipulated Findings ¶ A-50. City Blue refused to accept this merchandise because it claimed that it was shipped after the cancel date and received, therefore, too late for use by City Blue. See Staulcup Test., June 28, 2000; see also Ex. P-8. Mecca then sent City Blue a bill of \$2819 for the shipping and handling of this bounced shipment. See Ex. P-8. City Blue has refused to pay this charge. See Staulcup Test., June 28, 2000. I find that City Blue owes Mecca \$2,819 for the shipping and handling of the merchandise sent pursuant to invoice number 83-65948.

55. Pursuant to invoice number 84-66448, Mecca shipped merchandise to City Blue and billed City Blue \$3,978. See Stipulated Findings ¶ A-51. City Blue requested, and Mecca provided, a return authorization for 54 pieces of merchandise shipped pursuant to this order. See id. at ¶¶ A-52, A-53. Nonetheless, City Blue only returned 34 pieces of merchandise and Mecca demanded payment for the remaining 20 pieces of merchandise in the amount of \$340. See Staulcup Test., June 28, 2000; see also Ex. D-Z. City Blue has refused to pay Mecca the \$340 owed for this merchandise. See Staulcup Test., June 28, 2000. I find that City Blue owes Mecca \$340 for the 20 pieces of merchandise that were never properly returned to Mecca.

56. I further find that City Blue owes Mecca \$408 pursuant to invoice 91-66935. See Ex. P-19.

57. I find that, in total, with respect to the claims against City Blue brought by Mecca in its counterclaim, City Blue is liable to Mecca for a total of \$21,506.

B. CONCLUSIONS OF LAW

1. The agreement between City Blue and Mecca was a contract for the sale of goods between merchants and therefore, was governed by Article 2 of the Uniform Commercial Code. See 13 Pa.C.S.A. § 2101-02; 2104-05.
2. Pursuant to 14 Pa.C.S.A. § 2103(a), a “[b]uyer” is a “person who buys or contracts to buy goods.”
3. A “[s]eller is a “person who sells or contracts to sell goods.” See 14 Pa.C.S.A. § 2103(a).
4. According to the Uniform Commercial Code, the “obligation of the seller is to transfer and that of the buyer is to accept and pay in accordance with the contract.” See Pa.C.S.A. § 2301.
5. 13 Pa.C.S.A. § 2609 provides that “[a] contract for sale imposes an obligation on each party that the expectation of the other of receiving due performance will not be impaired.” See Pa.C.S.A. § 2609.
6. Accordingly, “[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.” See 13 Pa.C.S.A. § 2609(a).
7. Based on Findings 9 through 11, I conclude that Mecca had reasonable grounds for insecurity with respect to the performance of City Blue under the contract.
8. Therefore, I conclude that Mecca would have been justified in demanding adequate

assurance of City Blue's performance.

9. Because I have found, however, that Mecca did not clearly communicate its demand for adequate assurance from City Blue either orally or in writing, see Findings 31-33, I conclude that Mecca was not justified in suspending performance under the contract.
10. Accordingly, I conclude that Mecca breached its contract with City Blue and City Blue is entitled to recover damages as a result.
11. The proper measure of damages in this case is set forth in 13 Pa.C.S.A. § 2713, which provides that: "Subject to the provisions of this division with respect to proof of market price (section 2723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages provided in this division (section 2715), but less expenses saved in consequence of the breach by the seller." 13 Pa.C.S.A. § 2713.
12. Pursuant to Pennsylvania law, a plaintiff may recover consequential damages resulting from a breach of contract by a seller. See National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 495 (3d Cir. 1987) (citing 13 Pa.C.S.A. § 2714(c)).
13. The recovery of consequential damages may include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not be reasonably be prevented by cover or otherwise." 13 Pa.C.S.A. § 2715(b)(1).
14. Furthermore, a plaintiff may recover lost profits as consequential damages in a proper case, "such as where a seller knows or has reason to know that a buyer is purchasing a

good for resale.” See National Controls, 833 F.2d at 495 (citing Kunststoffwerk Alfred Huber v. R.J. Dick, 621 F.2d 560 (3d Cir. 1980)).

15. In this case, I conclude that the best measure of damages is derived from an examination of the plaintiff’s tax return submitted in 1999.

16. I conclude that Mecca is liable to City Blue for \$34,491 in damages for its original claim. I further conclude that City Blue is liable to Mecca for \$21,506 in damages for Mecca’s counterclaim. Thus, the net result requires judgment to be entered in favor of the plaintiff and against the defendant in the amount of \$12,985.

C. CONCLUSION

For the reasons stated above, I will enter judgment in favor of the plaintiff, City Blue, and against the defendant, Mecca, in the amount of \$34,491. I also conclude that Mecca is entitled to recover \$21,506 in damages from City Blue in accordance with its counterclaim.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CITY BLUE, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL NEWS, INC.	:	
d/b/a MECCA USA,	:	
Defendant.	:	NO. 99-4445
	:	

ORDER

AND NOW, this day of July, 2000, after upon consideration of the plaintiff's complaint, the defendant's answer, and after trial, and in accordance with the aforesaid findings of fact and conclusions of law, IT IS HEREBY ORDERED that, in reference to the claim brought by City Blue, Inc. ("City Blue") against International News, Inc. d/b/a Mecca USA ("Mecca"), judgment is entered in favor of the plaintiff, City Blue, and against the defendant, Mecca, in the amount of thirty four thousand, four hundred and ninety-one dollars (\$34,491.00).

In reference to the counterclaim brought by Mecca against City Blue, IT IS HEREBY ORDERED that judgment is entered in favor of the defendant/counter-claim plaintiff, Mecca, and against the plaintiff/counter-claim defendant, City Blue, in the amount of twenty one thousand, five hundred and six dollars (\$21,506.00).

William H. Yohn, Jr., J.