

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

KELVIN CRYOSYSTEMS, INC.,	)	Civil Action
	)	No. 03-CV-00881
Plaintiff	)	
	)	
vs.	)	
	)	
LIGHTNIN, a Division of	)	
SPX Corporation,	)	
	)	
Defendant	)	
	)	
vs.	)	
	)	
JOSE P. ARENCIBIA, JR.,	)	
	)	
Third-Party Defendant	)	

\* \* \*

APPEARANCES:

ERV D. MCLAIN, ESQUIRE  
On behalf of Plaintiff and Third-Party Defendant

BERNARD H. MASTERS, ESQUIRE  
SAMUEL W. SILVER, ESQUIRE  
On behalf of Defendant

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M E M O R A N D U M

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on Defendant Lightnin's Motion for Summary Judgment filed June 7, 2004.<sup>1</sup> Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary

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<sup>1</sup> On July 13, 2004 defendant filed its Motion to Strike, or Alternatively, For Leave to File a Reply. As noted below, defendant asserts that plaintiff's response to the motion for summary judgment was filed untimely. For the reasons set forth in the Preliminary Statement below, we decline to strike plaintiff's response brief. However, we grant defendant's alternative request for leave to file a reply brief, which reply brief is attached to the motion. Thus, we will consider defendant's reply brief.

Judgment was filed June 30, 2004. For the reasons expressed below we grant in part, and deny in part, defendant's motion for summary judgment.

Specifically, we grant defendant's motion for summary judgment on the claims contained in plaintiff's Complaint, and we dismiss plaintiff's Complaint. We grant defendant's counterclaim for breach of contract and for fraud. We award defendant \$77,015.00 representing the contract price for the goods delivered by defendant to plaintiff. We reserve for trial the issues of defendant's entitlement to shipping and handling expenses, attorneys' fees, interest and costs regarding its breach of contract counterclaim, and all damages regarding defendant's counterclaim and third-party claim for fraud. Finally, we deny defendant's claim for quantum meruit as moot.

#### Procedural Background

The facts relied upon by the court are derived from Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment. By Order of the undersigned dated January 22, 2004 any party filing a motion for summary judgment was required to file a brief, together with "a separate short concise statement, in numbered paragraphs, of the material facts about which the moving party contends there is no genuine dispute." The concise statement of facts was required to be supported by citations to the record and where practicable,

relevant portions of the record were to be attached.

In addition, our Order provided that any party opposing a motion for summary judgment was required to file a brief in opposition to the motion and "a separate short concise statement, responding in numbered paragraphs to the moving party's statement of the material facts about which the opposing party contends there is a genuine dispute, with specific citations to the record, and, where practicable, attach copies of the relevant portions of the record."

Moreover, our Order provided that if the moving party failed to provide a concise statement, the motion may be denied on that basis alone. With regard to the opposing party our Order provided: "All factual assertions set forth in the moving party's statement shall be deemed admitted unless specifically denied by the opposing party in the manner set forth [by the court]."

In this case, defendant filed a concise statement of facts in support of its motion. However, plaintiff did not file any concise statement in opposition to defendant's concise statement in the manner set forth in our January 22, 2003 Order. In addition we note that plaintiff untimely filed its brief in opposition to the motion for summary judgment pursuant to Rule 7.1(c) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania. Rule 7.1(c) requires that a response to any motion be filed within 14

days of the filing of the underlying motion. Three days are added to that time period if, as here, the motion was served by mail. Fed.R.Civ.P. 6(e).

Defendant's motion was filed and served on June 7, 2004. Therefore, plaintiff's response was required to be filed by June 24, 2004. Plaintiff did not file its response until June 30, 2004. While it is within our discretion to strike plaintiff's response brief as untimely, we decline to do so and will consider it in our determination. However, we will deem defendant's concise statement of facts admitted pursuant to our Order for plaintiff's failure to respond to them.

We note that this is not the first instance in which plaintiff has failed to abide by the Orders of this court or the requirements of the Federal Rules of Civil Procedure. Rather, many of our prior Orders in this matter have outlined plaintiff and third-party defendant's previous transgressions. In our January 22, 2004 Order we advised plaintiff that any further failure to comply with this court's directives or to adhere to the Federal Rules of Civil Procedure might result in sanctions.

We consider our requirement for a concise statement and a responsive concise statement to be consistent with Federal Rule of Civil Procedure 56. In addition Rule 83(b) of the Federal Rules of Civil Procedure provides:

A judge may regulate practice in any manner consistent with federal law, rules

adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Thus, even if our requirement for a separate concise statement is not consistent with Rule 56, we gave plaintiff actual notice of our requirement, and it was clearly not complied with.

#### Admissions

Defendant sent plaintiff two sets of requests for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure. Rule 36 provides in pertinent part:

#### **Rule 36. Requests for Admission**

(a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

\* \* \*

Each matter of which an admission is requested shall be separately set forth. The matter is deemed admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's

attorney.

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**(b) Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

In this case, plaintiff did not respond to either defendant's first or second requests for admissions. With regard to the first request for admissions, we addressed plaintiff's untimely response to those admissions by Order dated January 22, 2004. In our Order, we explained that defendant's requests for admissions were deemed admitted by operation of Rule 36 and that plaintiff did not show good cause for failing to timely respond to the request for admissions. Thus, we denied plaintiff's request to allow its untimely response to defendant's first request for admissions.

With regard to defendant's second request for admissions, plaintiff neither responded to the requests for admission nor sought court intervention. Thus, defendant's second requests for admission are also deemed admitted for purposes of this Memorandum.

In its brief, plaintiff argues facts contrary to those which are deemed admitted. Because much of plaintiff's brief argues facts not at issue, we find unpersuasive those arguments relating to admitted facts. In addition, as noted above,

plaintiff did not respond to defendant's concise statement of facts as required by our previous Order. Accordingly, we address defendant's motion for summary judgment based upon the facts established in the deemed admissions and the facts as stated by defendant in support of its motion, and we disregard any argument by plaintiff to the contrary.

#### Facts

Based upon the record papers, affidavits, exhibits, depositions, defendant's concise statement of facts, and plaintiff and third-party defendant's deemed admissions, the pertinent facts are as follows:

Plaintiff Kelvin Cryosystems, Inc., ("Kelvin") is a Pennsylvania corporation doing business in Coopersberg, Lehigh County, Pennsylvania. Defendant Lightnin, a division of SPX Corporation, ("Lightnin") is a Delaware corporation, with its principal place of business in Rochester, New York. Lightnin's primary business is the manufacture of industrial mixers.<sup>2</sup>

Third-party defendant Jose P. Arencibia, Jr. is a resident of Lehigh County, Pennsylvania and is part-owner, Vice-President and Chief Technology Officer of Kelvin. The Harrington-Robb Company<sup>3</sup> is one of Lightnin's authorized representatives for the sale of

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<sup>2</sup> The parties do not define the term "industrial mixer". However, other portions of the record indicate that the mixer was purchased from plaintiff by Avecia, Ltd., a pharmaceutical manufacturer.

<sup>3</sup> The record does not indicate where The Harrington-Robb Company is located.

industrial mixers.

Rolf Jacobsen is employed by The Harrington-Robb Company as a sales engineer. He represented Lightnin in its transaction with Kelvin which is the subject matter of this litigation. Kelvin was represented in this transaction by Mr. Arencibia and Kelvin employee Grant Willman.

In Fall 2000 Mr. Willman contacted Mr. Jacobsen to inquire about the purchase of a Lightnin industrial mixer. Lightnin, through Mr. Jacobsen, and Kelvin had discussions regarding the purchase of a mixer and its specifications and requirements. The mixer was to be utilized as a component part of a chemical reactor system that Kelvin was providing to a company called Avecia, Ltd. ("Avecia") in Grangemouth, Scotland.

On October 30, 2000 Mr. Willman wrote Mr. Jacobsen noting that "to finally make this order official", Kelvin would need "[a] certificate from either Lightnin or GE stating very clearly that they warrant and ensure that the motors they are supplying, meet or exceed all of the standards of [an] explosion proof motor meeting the EExdIIBT3<sup>4</sup> requirements that our customer requested."

During negotiations, Kelvin also requested that the

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<sup>4</sup> Neither counsel nor the letter explains what EExdIIBT3 requirements are.

"entire unit" be CE Certified.<sup>5</sup> Mr. Jacobsen informed Kelvin's representatives that it would be impossible to provide CE Certification because the mixer would be manufactured in the United States, not in Europe. On November 15, 2000 Mr. Jacobsen sent a fax to Kelvin, stating in pertinent part:

Grant, Jose [Arencibia] indicated he wished to have CE certification. While we can supply Certificates of Conformance, Material Certs and a copy of LIGHTNIN QA, CE is only available when a unit is manufactured in Europe. If your earlier units were fabricated domestically, they do not have CE Certificates.

On or about December 7, 2000 Mr. Willman, on behalf of Kelvin and at the direction of Mr. Arencibia, submitted Purchase Order Number 001201-2155 ("P.O. 2155") to Mr. Jacobsen. Lightnin did not agree with all the terms and conditions set forth in P.O. 2155 and asked Mr. Jacobsen to negotiate several terms with Kelvin. Thereafter, on December 21, 2000 Kelvin issued revised Purchase Order Number 001201-2155/Addendum No. 1 ("the Revised Purchase Order"). The Revised Purchase Order did not contain all of Lightnin's requested revisions. The Revised Purchase Order was never signed by a Lightnin representative.

In January 2001 Lightnin submitted a final set of plans and specifications for the mixer to Kelvin for approval. On January 11, 2001 Kelvin approved and signed the plans and

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<sup>5</sup> CE Certification refers to certain European Union manufacturing standards.

specifications. The final plans and specifications provided to Kelvin do not refer to CE Certification. Instead, they provide that the motor will meet the explosion proof requirements raised by Mr. Willman in his October 30, 2000 correspondence. The motor is listed as "FCXP" which stands for "Fan Cooled Explosion Proof". No representative from Kelvin ever communicated to Mr. Jacobsen prior to construction of the mixer that Lightnin's proposal was unacceptable. Thereafter, Lightnin began construction of the mixer.

Between March 13 and March 30, 2001 Lightnin issued to Kelvin four Invoices numbered S0121006705, S0121007125, S0121008781 and S0121008959 seeking payment of \$77,015.00 for the contract price plus \$2,011.97 for shipping and handling of the mixer, for a total cost of \$79,026.97. The reverse side of the Invoices contain the "Terms and Conditions of Sale" including but not limited to, certain warranties, a choice of law provision and limitations on liability.<sup>6</sup>

Whenever a Lightnin mixer is shipped to a customer, certain component parts of the mixer (the impellers, hubs and shafts) are shipped separately so that the mixer is not damaged in shipment. A Lightnin customer must negotiate for, and include, start-up assistance language in its purchase order to arrange Lightnin representatives to go on-site and begin

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<sup>6</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit S.

operation of the mixer for the customer.

Neither the plans nor specifications approved by Kelvin nor the Revised Purchase Order submitted by Kelvin to Lightnin mention start-up assistance. Moreover, the need for Kelvin to contract with an entity like Lightnin UK<sup>7</sup> for start-up assistance was communicated to Kelvin early in the process. Specifically, Mr. Jacobsen raised the issue with Kelvin in a facsimile transmission sent to Kelvin as early as November 2, 2000.

That fax provides in pertinent part: "Start Up Assistance: LIGHTNIN U.K. has e-mailed me this service is available. While I have been quoted a number, I have gone back to them and requested what is included in the estimate, (Travel, meals, special equipment.)."<sup>8</sup> Consequently, Kelvin was well aware of the need for, and the need to contract for, start-up assistance prior to delivery of the mixer.

Lightnin delivered, and Kelvin accepted, the mixer. In April 2001, after the mixer was delivered to end-user Avecia, Mr. Willman contacted Mr. Jacobsen regarding start-up assistance for the mixer. Mr. Jacobsen reiterated to Mr. Willman that start-up language and costs were not included in the Revised Purchase Order and that Kelvin would have to contract separately with

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<sup>7</sup> Lightnin U.K. is an entity separate from defendant Lightnin, a Division of SPX, Corporation.

<sup>8</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit J.

either Lightnin U.K. or another third-party contractor for such services. Mr. Willman confirmed that he understood that start-up assistance was not included, stating: "I agree with you that start up service was not covered under the original PO. It made more sense to contact Lightnin in the U.K. directly. I passed this information onto Jose."<sup>9</sup>

After delivery of the mixer, the issue of CE Certification came to the forefront of the dispute between the parties. In response to Kelvin's concerns regarding CE Certification raised after delivery of the mixer, Lightnin undertook a thorough design review of the mixer. In that regard, Lightnin provided Kelvin and Avecia all documentation necessary to establish CE Certification.

Specifically, Lightnin provided a Declaration of Conformity, a "CE" designated nameplate, and an Instruction manual. Consequently, and as admitted by Kelvin, the mixer is CE certified. After commencement of this litigation, Mr. Arencibia revealed that Avecia had demanded that Kelvin provide CE Certification for the entire chemical reactor system after it was installed.

The mixer was placed into service at Avecia, and Avecia paid Kelvin for the mixer. Avecia later acknowledged its receipt of the Declaration of Conformity, and the sufficiency of the

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<sup>9</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit R.

Declaration. Avecia also later twice acknowledged the existence of the nameplate on the mixer. Avecia has never requested that Kelvin remove or replace the mixer.

On October 28, 2002 Kelvin sent an Invoice to Lightnin requesting payment of \$168,914.46. The Invoice includes the signature of Mr. Arencibia. In the accompanying transmittal letter dated November 1, 2002, Mr. Arencibia stated, "please find KCI invoice number 02-0063 for costs associated with KCI's cure of Lightnin's non-compliant equipment . . . ." <sup>10</sup>

In addition, on October 28, 2002, Kelvin issued a backup document referring to KCI Invoice number 02-0063 ("Backup Document"). The Backup Document contains line-item amounts for which Kelvin seeks to recover \$124,202 in costs associated with the replacement of the mixer "with a CE-Certified Agitator." <sup>11</sup> The costs allegedly associated with the procurement of a replacement mixer are listed as "tasks" on the Backup Document. The mixer has never been replaced.

By letter dated November 29, 2002 from Erv D. McLain, Esquire, counsel for plaintiff and third-party defendant, addressed to Jeffrey M. Bales of United Mercantile Agencies, Inc., (defendant's outside collection agency) Attorney McLain

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<sup>10</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit T.

<sup>11</sup> The term "agitator" is synonymous with an industrial mixer like the mixer in this litigation. See Notes of Testimony of the deposition of Jose P. Arencibia, Jr., September 13, 2003, page 99, lines 2 through 17.

advised defendant that "Invoice number 02-0063 is for real, legitimate and we have started legal proceedings to collect on it. It appears that your client has not fully informed you of the work undertaken by Kelvin to procure cover at the lowest possible cost."<sup>12</sup>

Mr. Arencibia personally created the Kelvin Invoice. Kelvin then issued the Invoice to Lightnin. On the day the Invoice was created, Kelvin created the Backup Document, which was signed by Mr. Arencibia in his capacity as a corporate officer of Kelvin. In the cover letter forwarding the Invoice, Mr. Arencibia states that Kelvin is "seeking costs associated with [Kelvin's] cure" of the mixer. However, at the time Kelvin issued the Invoice, Mr. Arencibia knew that Kelvin had not expended \$168,914.46 to "cure" the mixer, that the mixer had not in fact been replaced and that Lightnin owed no such amount.<sup>13</sup>

The \$168,914.46 figure was the amount that Kelvin would have prospectively spent to cure the mixer, if necessary. Both Mr. Arencibia and Kelvin have admitted that the expenses listed on the Invoice were not actually incurred and that they intentionally misrepresented the damages which Kelvin incurred as

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<sup>12</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit Z.

<sup>13</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, number 10; Exhibit B, numbers 17 through 20 and 26; Exhibit C, numbers 15, 19, 23, 39 through 44, 50 and 51.

a result of Lightnin's alleged breach of contract.<sup>14</sup>

Furthermore, Mr. Arencibia has admitted that Kelvin demanded payment from Lightnin for a sum of money that was not due and owing, that Kelvin issued the Invoice in an attempt to recover money that was not due and owing, and that both Mr. Arencibia and Kelvin sent the Invoice with the intent that Lightnin rely on the representations contained therein and pay Kelvin \$168,914.46.

Kelvin issued the Invoice in bad faith. Mr. Arencibia created and approved the Invoice in bad faith in his capacity as a corporate officer, and Mr. Arencibia signed the Backup Document in bad faith in his capacity as a corporate officer.<sup>15</sup> Upon receipt of the Invoice, Lightnin was led to believe, and at first did believe, that the sums contained in the Invoice represented amounts of money expended by Kelvin to cure Lightnin's alleged non-performance.<sup>16</sup>

Lightnin was also misled into believing that Kelvin had actually replaced the mixer at Avecia. In reliance on the Invoice, Lightnin's agent arranged for an outside service technician to travel to Scotland for the specific purpose of

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<sup>14</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, numbers 12 through 19, 24 through 27; Exhibit B, numbers 17 through 20 and 26; Exhibit C, numbers 15, 19, 23, 39 through 44, and 50 through 54.

<sup>15</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit B, numbers 10 through 13 and 66; Exhibit C, numbers 28 through 30, 32 and 33.

<sup>16</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibits H, U and V.

confirming whether Lightnin's mixer had been replaced or not.<sup>17</sup>

On a monthly basis, Kelvin continues to send through Mr. Arencibia "Statement[s] of Accounts" to Lightnin which reflect that the Invoice is past due. In other words, Kelvin continues to seek payment for expenses that Mr. Arencibia and Kelvin admit have never been incurred.

On January 16, 2003 Kelvin filed suit against Lightnin in the Court of Common Pleas of Lehigh County, Pennsylvania alleging breach of contract in connection with the sale of the mixer. Mr. Arencibia executed the verification page of Kelvin's Complaint in his capacity as Vice-President of Kelvin. Attached as Exhibit L to plaintiff's Complaint is the Invoice. The Backup Document is attached as Exhibit G to plaintiff's Complaint. The damages Kelvin seeks in its Complaint are the amounts set forth in the Backup Document totaling \$168,914.46.

Kelvin admits that it has not incurred \$107,962.56 to purchase a replacement CE-certified Agitator as detailed in the Backup Document. Kelvin also admits that it has not incurred the following other costs listed in the Backup Document:

(1) \$1,800 in costs associated with "procurement labor";

(2) \$2,400 in costs associated with "removal of old agitator, labor";

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<sup>17</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit H.

- (3) \$2,700 in costs associated with the "removal of old agitator, engineering";
- (4) \$2,800 in costs associated with the "installation of new agitator";
- (5) \$3,240 in costs associated with the "installation of new agitator, engineering"; and
- (6) \$800 in costs associated with the "shipping of old agitator".

Kelvin continues to assert that it has incurred the costs for the remaining items on the Backup Document. However, Kelvin has produced little or no documentation to support the expenditures as follows:

- (1) \$600 to \$700 in "T&L" costs (originally listed as \$2,500);
- (2) \$31,050 in costs associated with Mr. Arencibia's review of CE directives;<sup>18</sup>
- (3) \$622 in costs associated with replacement of a speed censor on the mixer;
- (4) \$1,200 in costs associated with work performed by a third-party contractor, Scott Secrest, in connection with the mixer on behalf of Kelvin;
- (5) \$540 in costs associated with Mr. Arencibia's alleged loss of time in connection with his oversight of additional drilling on the mixer casings;<sup>19</sup>
- (6) \$720 in costs associated with local labor

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<sup>18</sup> Kelvin has not produced in discovery any of the documents purportedly reviewed by Mr. Arencibia.

<sup>19</sup> \$540 reflects four hours of Mr. Arencibia's time at a rate of \$135 per hour.

performing the drilling work;

(7) \$540 in costs associated with Mr. Arencibia's loss of time in connection with his oversight of the removal and replacement of the mixer motor;

(8) \$540 in costs associated with local labor performing the removal and replacement of the mixer motor;<sup>20</sup> and

(9) \$2,295 in costs associated with Mr. Arencibia's time spent relative to the procurement and specification of a replacement mixer motor.

As reflected in the Backup Document, Kelvin seeks reimbursement from Lightnin for costs in the amount of \$7,204.90 in connection with work performed by Lightnin U.K. (presumably on the mixer). The only description of this expense is set forth in Paragraph 14 of plaintiff's Complaint. It states: "Kelvin contracted with Lightnin U.K. for the partial cure of the breach by Lightnin at a cost of £ 4,648.32 (\$7,204.90) copies of which paid invoices are attached hereto, and made a part hereof, and collectively labeled, Plaintiff's Exhibit E." There is no Exhibit E attached to plaintiff's Complaint, and plaintiff has not sought leave at any time during this litigation to supplement or amend its Complaint to attach this exhibit.

To date, Lightnin has not been paid for the mixer delivered and resold by Kelvin.

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<sup>20</sup> Plaintiff has not provided any documentation to support this expenditure.

### Standard of Review

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in its pleadings, but rather must present competent evidence from which a jury could reasonably find in its favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

### Choice of Law

There is a disparity between the parties regarding which jurisdiction's law is applicable to this dispute. Defendant contends that pursuant to the agreement of the parties and pursuant to its Invoices seeking payment for the mixer, the law of the State of New York applies. On the contrary, while not specifically addressing the question, plaintiff's brief in response to defendant's motion for summary judgment ignores defendant's New York authority and cites Pennsylvania statutory and case law in support of its contentions.

A review of the purchase orders and specifications which allegedly make up the agreement of the parties, reveals no clear indication that the parties agreed to a choice of law as part of their agreement. The original purchase order<sup>21</sup> indicates that any dispute arising under the purchase order would be governed by the law of the Commonwealth of Pennsylvania. Defendant did not agree to the original purchase order and by letter dated December 14, 2000<sup>22</sup> defendant requested a number of terms be changed, including the governing law provision.

On December 21, 2000 plaintiff faxed Mr. Jacobsen a revised purchase order that changed some, but not all of the

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<sup>21</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit L.

<sup>22</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit M.

disputed terms which Lightnin requested be changed. In particular, the revised purchase order completely deleted the "Governing Law" section, and the words "eliminate this article" appear where the former clause existed. Defendant never signed or accepted either the original or revised purchase order. Accordingly, we conclude that there is no meeting of the minds reflected in writings of the parties concerning a choice of law.

In addition, defendant asserts that this action should be governed by the laws of the State of New York because of language contained on the reverse side of its Invoice indicating that the Order is subject to acceptance by buyer, and one of the terms of acceptance is that the agreement between the parties shall be governed by the laws of the State of New York.

Defendant has not cited any authority for the proposition that it may unilaterally impose additional conditions into the agreement of the parties through its Invoice. In the absence of authority, we decline to impose this condition on plaintiff. Accordingly, we conclude that there is no clear agreement by the parties regarding the law applicable in this matter.

In the absence of agreement, a federal court sitting in diversity of citizenship jurisdiction must apply the choice of law rules of the jurisdiction in which it sits. Klaxon Company v. Stentor Electric Manufacturing Co. Inc., 313 U.S. 487, 61

S.Ct. 1020, 85 L. Ed. 1477 (1941). Therefore, we must apply the choice of law rules of the Commonwealth of Pennsylvania.

In Pennsylvania, choice of law analysis first requires a determination whether the laws of the competing jurisdictions actually differ. If there is no conflict then no further analysis is necessary. If there is a conflict, we must apply the Pennsylvania test for resolving a conflict and must "analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law." Ratti v. Wheeling Pittsburgh Steel Corporation, 758 A.2d 695, 702 (Pa. Super. 2000).

In this case, we conclude that there is no conflict present. Specifically, we conclude that this matter is governed by general principles of contract law and because this matter involves the sale of goods, by certain sections of the Uniform Commercial Code, which has been adopted in both jurisdictions.<sup>23</sup> The sections of both state's Uniform Commercial Code that are applicable to this action do not differ in any material way.

Furthermore, the general contract principles involved here are the elements of a contract and breach of contract. Accordingly, we conclude that there is a false conflict present in this case. Hence, because we are a federal court sitting in Pennsylvania, we will apply the laws of this Commonwealth to this

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<sup>23</sup> See 13 Pa.C.S.A §§ 2201 and 2319 and N.Y. UCC §§ 2-201 and 2-319.

action.

Finally, we note that there is no conflict regarding the application of Pennsylvania law to defendant's counterclaim and third-party claim for fraud. In its brief in support of its motion for summary judgment, defendant cites Pennsylvania law in support of all its fraud contentions. Thus, we find no conflict of law therein.

#### Breach of Contract Claim

Defendant seeks summary judgment on plaintiff's sole claim for breach of contract.<sup>24</sup> Specifically, defendant asserts that plaintiff has "no evidence" to support a claim for breach of contract. On the contrary, plaintiff alleges that there is substantial evidence to support its claims and that summary judgment is improper. We disagree.

Plaintiff's complaint seeks \$168,914.46 in damages for an alleged breach of contract. "A critical element of every claim for breach of contract requires a showing of breach of some duty owed." SmithKline Beecham, Corp. v. Continental Insurance Co., No. Civ.A. 04-2252, 2004 U.S. Dist. LEXIS 15751 (E.D. Pa. August 5, 2004) (citing 23 Williston on Contracts § 63:1

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<sup>24</sup> Plaintiff discusses a breach of warranty claim in its brief. However, even under a most liberal reading of plaintiff's Complaint, plaintiff has not set forth a claim for breach of warranty. There are numerous references to the alleged breach of the contract between the parties, but not one reference to warranty, breach of warranty or anything that would put defendant on notice that plaintiff is making a claim for breach of warranty. Therefore, because plaintiff did not include a breach of warranty claim in its Complaint, we will not address it.

(4<sup>th</sup> ed.). The breaches of duty alleged by plaintiff include a claim that the mixer was not CE Certified as required by the contract, which required plaintiff to cure this problem, and an allegation that certain items had to be replaced because of apparent damage cause during shipping.

Plaintiff attempts to enforce a contract provision for CE Certification. Defendant objected to the requirement for CE Certification which plaintiff included in its first purchase order. Defendant never accepted that term. Defendant contends that it never signed and accepted the second purchase order. Thus, defendant contends that the requirement for CE Certification was not made a part of the contract between the parties.

Because this matter involves the sale of goods, we must look to the Pennsylvania Uniform Commercial Code for some of the applicable law. Section 2201 of Pennsylvania's Uniform Commercial Code ("U.C.C.") provides:

**§ 2201. Formal requirements; statute of frauds**

(a) **General rule.**-Except as otherwise provided in this section a contract for sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

13 Pa.C.S.A. § 2201.

In this case, it is clear that there is a contract between the parties for the sale of the mixer. This good was specially manufactured to the specifications agreed to in a document separate and apart from the purchase orders. The only indication by either party that there may not be a contract is the counterclaim by defendant for quantum meruit recovery. However, defendant also has a counterclaim for breach of contract. We conclude that there was a valid contract between the parties. The only disputes relate to the terms of the contract.

Plaintiff asserts that one of the terms of the contract is that the mixer had to be CE certified. However, because defendant did not sign the purchase order upon which plaintiff relies for this contract provision, and pursuant to the statute of frauds, that term may not be included and used as the basis of plaintiff's cause of action.

In addition, even if CE Certification were a requirement of the contract, plaintiff by failing to respond to defendant's requests for admission, is deemed to have admitted that it was responsible for providing CE certification and not defendant. In the alternative, plaintiff is deemed to have admitted that defendant did comply with this requirement to provide CE certification.<sup>25</sup> Accordingly, we conclude that

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<sup>25</sup> Defendant Lightning's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, number 37; Exhibit B, numbers 23, 32 and 33.

plaintiff cannot succeed on its claim for breach of contract as it relates to CE Certification.

Next, we address plaintiff's claim for breach of contract based upon damage to certain parts during shipping. Both purchase orders reflect that the shipping terms regarding the mixer were "F.O.B. Rochester". Defendant's manufacturing facility is located in Rochester, New York.

Section 2319 of the U.C.C. defines the term F.O.B. as follows: "when the term F.O.B. the place of shipment [is used], the seller must at that place ship the goods in the manner provided . . . and bear the risk of putting them into possession of the carrier." 13 Pa.C.S.A. § 2319. In addition, the risk of loss transfers from the seller to the buyer when the F.O.B. term is the place of shipment. Swift Canadian Co. v. Banet, 224 F.2d 36 (3d Cir. 1955).

In this case, plaintiff is deemed to have admitted through the requests for admissions that the shipment term is F.O.B. Rochester, New York; that plaintiff was responsible for shipment of the mixer; that plaintiff was responsible for any damage to the mixer or any components which occurred during shipment; and that the damage which occurred during shipment rendered the mixer inoperable after shipment.<sup>26</sup>

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<sup>26</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, numbers 28 through 34 and 36; Exhibit B, number 34.

Because we conclude that either under the requirements of Section 2319 of the U.C.C. or by operation of the admitted facts, plaintiff was responsible for any damage to the mixer that occurred during shipping, we conclude that plaintiff cannot support a claim for breach of contract by defendant based upon any duty arising from a requirement to fix any damage during shipment.

Finally, because we conclude that all plaintiff's claimed damages derive from either a claim that defendant did not provide CE certification for the mixer or from alleged damage to the mixer that occurred during shipment, we conclude that plaintiff cannot support its claim for breach of contract. Furthermore, we conclude that if any damages alleged by plaintiff include an alleged breach by defendant for start-up costs, those damages are not a part of the contract. Accordingly we grant defendant's motion for summary judgment on plaintiff's Complaint and dismiss the Complaint.

#### Breach of Contract Counterclaim

Defendant's first counterclaim is a claim for breach of contract for plaintiff's failure to pay defendant for the industrial mixer. Defendant contends that it manufactured the mixer to plaintiff's specifications and delivered it to plaintiff pursuant to the contract; that plaintiff delivered the mixer to its customer Avecia; that plaintiff has been paid for the mixer

by Avecia, but that plaintiff has not paid defendant for the mixer. Defendant further contends that it demanded payment by sending Invoices attached as Exhibit S to its statement of facts.

For the following reasons, we grant, in part, defendant's motion for summary judgment on its counterclaim for breach of contract, and deny as moot defendant's motion for summary judgment on its counterclaim for quantum meruit.

The basic element of a breach of contract action is the breach of some duty owed under the contract. SmithKline Beecham, supra. There is no greater duty on the buyer than to pay for the goods. In this case, plaintiff refused to pay for the goods because of an alleged breach of contract by defendant.

As discussed above, we conclude that defendant did not breach its contract with defendant. Hence, plaintiff has no legal basis for its failure to pay for the goods. Accordingly, because defendant has complied with its obligations under the contract, defendant is entitled to the benefit of its bargain. Thus, we grant, in part, defendant's motion for summary judgment on its counterclaim for breach of contract.

Specifically, we grant summary judgment insofar as it relates to the contract price for the goods sold. We award defendant \$77,015, for that contract price. However, defendant has also requested shipping and handling expenses, interest, attorneys' fees and costs, in addition to the contract amount.

We reserve determination on defendant's additional damages until trial, at which time defendant should present evidence in support of its claims for these additional damages.

#### Quantum Meruit Counterclaim

Furthermore, because we have awarded defendant damages for breach of contract, we dismiss defendant's quantum meruit claim as moot. In its counterclaim, defendant pled breach of contract and quantum meruit in the alternative. Quantum meruit is an action to "recover the value of services performed and accepted on the basis of a contract for those services which left unspecified what the compensation would be." Belmont Industries, Inc. v. Bechtel Corporation, 425 F. Supp. 524, 527 (E.D. Pa. 1976). In this case, we do not deal with services rendered. Rather, this case involves the sale of goods.

"A quantum meruit recovery is incompatible with the concept of a contract for the sale of goods." Id. Upon review of defendant's counterclaim, we conclude that what defendant attempted to assert was a quasi-contractual claim for unjust enrichment. In such a claim there must be (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied. See Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593 (1963). Here, defendant asserts that plaintiff received the mixer, was paid by the end-user for the mixer and did not pay defendant for the mixer.

Because we conclude that there was a contract between the parties, awarding defendant damages for both breach of contract and for unjust enrichment or quantum meruit, would constitute an inappropriate double recovery. Accordingly, we deny defendant's motion for summary judgment on its counterclaim for quantum meruit.

#### Fraud Counterclaim

The elements of a cause of action for fraud under Pennsylvania law are:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it was true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and resulting injury was proximately caused by the reliance.

Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994). To prove a claim for fraud, a party must present clear and convincing evidence of such fraud. Snell v. Commonwealth of Pennsylvania, State Examining Board, 490 Pa. 277, 416 A.2d 468 (1980).

In its counterclaim, defendant seeks damages for fraud against plaintiff. In addition, defendant filed a third-party complaint seeking fraud damages against Jose P. Arencibia, Jr., personally and in his role as Vice-President of Kelvin. For the following reasons, we grant defendant's motion for summary judgment on its fraud claims against both plaintiff and third-

party defendant.

Prior to addressing the elements of defendant's fraud action, we must examine Mr. Arencibia's personal liability. Pennsylvania law has long recognized the participation theory as a basis of liability for the individual acts of an officer of a corporation. Under this theory, an officer of a corporation who takes part in the commission of a tort may be personally liable for his tortious acts. Wicks v. Milzoco Builders, Inc., 504 Pa. 614, 470 A.2d 86 (1983).

For purposes of determining personal liability, there is a difference between actions which seek to pierce the corporate veil and get directly to the owner of the corporation and those which seek to hold a corporate officer personally liable for his participation in a corporation's tortious behavior. See Brindley v. Woodland Village Restaurant, Inc., 438 Pa. Super. 385, 652 A.2d 865 (1995). To impose personal liability on a corporate officer under the participation theory, it must be established that the corporate officer engaged in misfeasance (the improper performance of an act), rather than nonfeasance (failing to perform an act which the person ought to perform). Wicks, supra.

There is no dispute that Mr. Arencibia personally generated, composed and approved the Invoice and Backup Document on behalf of Kelvin. In addition, it is admitted by Mr.

Arencibia that both documents were issued in bad faith, with knowledge that the amounts claimed did not reflect the actual costs incurred by Kelvin, and with knowledge that it was likely that those costs would never be incurred because of the admitted fact that Avecia had never requested replacement of the mixer. Moreover, Mr. Arencibia has continued to direct that monthly "Statements of Account" be sent to Lightnin throughout this litigation despite those admitted facts.

Accordingly, we conclude that Mr. Arencibia's conduct constitutes repeated misfeasance, rather than malfeasance, as defined by the Supreme Court of Pennsylvania which subjects him to personal liability for his allegedly tortious actions. Therefore, we specifically address defendant's fraud claims against both Kelvin and its Vice President, Jose Arencibia.

Plaintiff Kelvin has admitted most of the elements of defendant's fraud claims through the deemed admissions. In addition, defendant separately served requests for admissions on Mr. Arencibia, which requests were not responded to.<sup>27</sup> Accordingly, pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant's requests for admissions directed to Mr. Arencibia are also deemed admitted by operation of the rule. In addition, based upon the language of Rule 36(b), the admissions "conclusively" establish the facts admitted. We conclude that

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<sup>27</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit C.

this satisfies the high standard of proof by clear and convincing evidence needed to establish fraud.

In particular, we conclude that the Invoice and Backup Document prepared by Mr. Arencibia on behalf of Kelvin constitute a representation that Kelvin was owed a sum of money by Lightnin. There is no doubt that the Invoice and Backup Document were material to the transaction. Both Kelvin and Mr. Arencibia have admitted that the representations were made falsely and with knowledge that the representation was false.<sup>28</sup>

Mr. Arencibia personally generated, composed, printed and approved the Invoice and Backup Document. In the transmittal letter accompanying the Invoice, Mr. Arencibia wrote: "please find KCI invoice number 02-0063 for the costs associated with KCI's cure of Lightnin's non-compliant equipment ... ." <sup>29</sup> The Backup Document to the Invoice provides specific detail regarding the amounts alleged to be due and owing under the Invoice.<sup>30</sup>

Furthermore, the November 29, 2003 letter from Attorney McLain sent on behalf of Kelvin states that "Invoice number 02-0063 is for real, legitimate and we have started legal

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<sup>28</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit A, numbers 25 through 27; Exhibit B, numbers 9 through 16; Exhibit C, numbers 52 through 54.

<sup>29</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit T.

<sup>30</sup> Defendant Lightnin's Statement of Facts in Support of its Motion for Summary Judgment, Exhibit V.

proceedings to collect on it.”<sup>31</sup> Accordingly, we conclude that there is clear and convincing evidence that plaintiff intended defendant to rely on the admittedly misleading and false representation.

Defendant asserts that it justifiably relied on the admitted misrepresentations contained in plaintiff’s Invoice and Backup Document and that it suffered damages as a result. Specifically, defendant asserts that at first, it did believe that sums contained in the Invoice and Backup Document represented sums of money expended by plaintiff to cure Lightnin’s alleged non-performance. Moreover, defendant contends that it was misled into believing that Kelvin had actually replaced the mixer.<sup>32</sup> Furthermore, defendant asserts that it maintained these beliefs until formal discovery revealed that the mixer had not actually been replaced.

Therefore, we conclude that defendant has proven by clear and convincing evidence that it justifiably relied on the false misrepresentations made by plaintiff. However, this does not end our inquiry. As with any tort action, defendant must prove that it suffered injury proximately caused by its reliance. Gibbs, supra. In this case, we conclude that defendant has not

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<sup>31</sup> Defendant Lightnin’s Statement of Facts in Support of its Motion for Summary Judgment, Exhibit Z.

<sup>32</sup> Defendant Lightnin’s Statement of Facts in Support of its Motion for Summary Judgment, Exhibit H.

yet established by clear and convincing evidence what injuries it has suffered which were proximately caused by plaintiff's fraudulent conduct, and what if any amount of damages it has sustained.

Accordingly, while we grant defendant's motion for summary judgment on the first five elements of its fraud claims against Kelvin and Mr. Arencibia, we deny defendant's motion insofar as it relates to fraud damages. At trial, defendant will have to prove not only what fraud damages it suffered, but also that those damages were proximately caused by Kelvin and Mr. Arencibia.

#### Conclusion

For all the foregoing reasons, we grant defendant's motion for summary judgment concerning plaintiff's Complaint, and we dismiss the Complaint. We also grant defendant's motion for summary judgment regarding defendant's counterclaim for breach of contract and defendant's counterclaim and third-party action for fraud. We deny as moot defendant's motion for summary judgment on its counterclaim for quantum meruit.

We award defendant \$77,015 damages, representing its contract price for the industrial mixer sold to plaintiff. We reserve for trial the issues of defendant's entitlement to shipping and handling expenses, attorneys' fees, interest and

costs regarding its breach of contract counterclaim, and all damages regarding its fraud claims.

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

KELVIN CRYOSYSTEMS, INC.,	)	Civil Action
	)	No. 03-CV-00881
Plaintiff	)	
	)	
vs.	)	
	)	
LIGHTNIN, a Division of	)	
SPX Corporation,	)	
	)	
Defendant	)	
vs.	)	
	)	
	)	
JOSE P. ARENCIBIA, JR.,	)	
	)	
Third-Party Defendant	)	

O R D E R

NOW, this            day of November, 2004, upon consideration  
of Defendant Lightnin's Motion for Summary Judgment, which motion

was filed June 7, 2004; upon consideration of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment filed June 28, 2004; upon consideration of the Motion to Strike, or Alternatively, for Leave to File a Reply, filed on behalf of defendant July 13, 2004; upon consideration of the briefs of the parties; upon consideration of the pleadings, exhibits, affidavits, depositions, deemed admissions and record papers; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that the Motion to Strike, or Alternatively, for Leave to File a Reply is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's motion to strike Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that defendant's motion to file a reply brief in support of its motion for summary judgment is granted.

IT IS FURTHER ORDERED that the Clerk of Court shall file Defendant's Reply Brief in Support of Motion for Summary Judgment, which reply brief is attached as Exhibit A to defendant's motion for leave.

IT IS FURTHER ORDERED that Defendant Lightnin's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant Lightnin, a division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc. on plaintiff's Complaint.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on its counterclaim for breach of contract is granted in part and denied in part.

IT IS FURTHER ORDERED that judgment on liability and contract price damages only is entered in favor of defendant Lightnin, a Division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc., on defendant's counterclaim for breach of contract in the amount of \$77,015 for contract price damages only. All other damages for breach of contract on defendant's counterclaim, including shipping and handling expenses, attorneys' fees, interest, and costs, if any, shall be determined at the non-jury damages trial scheduled to commence before the undersigned on November 16, 2004.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on its counterclaim for quantum meruit is denied and dismissed as moot.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on its counterclaim for fraud against plaintiff Kelvin Cryosystems, Inc., is granted in part and denied in part.

IT IS FURTHER ORDERED that judgment on liability only is granted in favor of defendant Lightnin, a Division of SPX Corporation and against plaintiff Kelvin Cryosystems, Inc., on defendant's counterclaim for fraud. All fraud damages shall be determined at the non-jury damages trial.

IT IS FURTHER ORDERED that judgment on liability only

is granted in favor of defendant Lightnin, a Division of SPX Corporation and against third-party defendant Jose P. Arencibia, Jr., on defendant's Third-Party Complaint for fraud. All fraud damages shall be determined at the non-jury damages trial.

BY THE COURT:

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James Knoll Gardner  
United States District Judge