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

NORFOLK SOUTHERN RAILWAY CO.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BASELL USA, INC.,	:	**No. 05-3419**
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J. **July 10, 2006**

Norfolk Southern Railway Company ("Norfolk") brings this breach of contract action against its customer Basell USA, Inc. ("Basell"). The parties have filed cross-motions for summary judgment, and this Court heard oral argument on the motions on June 16, 2006. The same day, the Court issued an Order from the Bench granting Norfolk's motion and denying Basell's motion. The Court's reasons for its decision are discussed below.

I. BACKGROUND

A. Factual Background[1]

Norfolk is an interstate rail carrier and a major provider of freight transportation services in the Eastern United States. (Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J. at 3.)[2] Basell manufactures plastic resin pellets, which it ships throughout the United States mostly by rail. (Def.'s Resp. in Opp'n to Pl.'s Mot. for Partial Summ. J. at 2.) Since 2002, Basell's shipments to the

[1] The following facts are undisputed unless otherwise noted.

[2] In support of their current motions for summary judgment, the parties incorporate portions of memoranda they submitted in relation to two previous motions for partial summary judgment in this case. The Court cites to the original documents.

Eastern United States have been conducted in a two-carrier joint-line service with Burlington Northern & Santa Fe Railroad ("BNSF") serving as the carrier from Basell's facility and either Norfolk or the CSX Transportation Company ("CSX") serving as the carrier to the destination. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. [hereinafter Def.'s Mem.] at 7.)

In 2001, Basell and BNSF formed a Master Contract that was effective for ten years beginning February 1, 2002. (*Id*. at 8; Pl.'s Mem. of Law in Supp. of Mot. for Summ J. [hereinafter Pl.'s Mem.] Ex. I (BNSF Master Contract) at 7.) The BNSF Master Contract was designed to be accompanied by separate contracts with destination carriers, such as Norfolk, who would interchange with BNSF. (Def.'s Mem. at 8; Pl.'s Mem. Ex. I.) These separate contracts are called implementing agreements. (Def.'s Mem. at 8.) The BNSF Master Contract provides that Basell has an annual 95% volume commitment of its total shipments from the origins to the destinations covered by the Master Contract and any implementing agreements.[3] (*Id*.; Pl.'s Mem. Ex. I at 7.) Thus, under the Master Contract Basell has a 95% volume commitment to BNSF and to any destination carrier with whom it forms an implementing agreement.

In February 2002, Norfolk and Basell formed an implementing agreement to the BNSF Master Contract, which is the contract that is the subject of this litigation. (Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J. at 9; Pl.'s Mem. at 27 & Ex. B (Granatelli-Julian-Rosencranz

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[3] The BNSF Master Contract reads:

> Customer [Basell] agrees to ship or cause to be shipped, pursuant to the this [sic] Master Contract and Implementing Agreements, a Minimum Annual Volume of at least 95% of those rail shipments made by or on behalf of Customer from Origin(s) to Destination(s) during each annual period, except as otherwise adjusted pursuant to provisions of this Master Contract or any applicable Implementing Agreement . . . .

(Pl.'s Mem. Ex. I at 7.)

email thread, Feb. 7, 12 & 13, 2002).) Representatives of Norfolk and Basell met on January 29, 2002 in Philadelphia, and their contract negotiations focused on Basell's West Lake Charles facility. (Def.'s Mem. at 8-9.) The parties' representatives continued to negotiate via email and telephone after the Philadelphia meeting, and their emails reveal the close relationship between the BNSF Master Contract and the contract at issue here. (*See* Pl.'s Mem. Ex. B.) Norfolk representative Alan Julian cited specific sections of the BNSF Master Contract "for clarification," and he identified various contract characteristics for which the BNSF Master Contract "will apply" or "will be modified." (*Id.*) With respect to liquidated damages, Julian wrote: "Pursuant to the methodology defined in the BNSF Master, the IA [implementing agreement] will specify a payment of $1,000 per car directly to NS [Norfolk Southern] as liquidated damages in the event of a volume commitment shortfall." (*Id.*) However, because Basell proposed $500 per car and Norfolk proposed $1,000 per car, the parties never agreed on an amount for liquidated damages. (Def.'s Mem. at 10-11.)

The parties eventually agreed on the following contract terms: (1) Basell would commit to Norfolk 95% of its aggregate West Lake Charles traffic for destinations within one hundred miles of a Norfolk terminal; (2) the contract would be effective from February 2002 to May 31, 2007; (3) Norfolk's annual rate increases would be limited; and (4) Norfolk would cover rail to truck terminal charges. (Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J. at 5-6; Pl.'s Mem. Ex. C (Slovak Dep.) at 140, 151-52.)

On February 4, 2002, Basell accepted joint-line rates that Norfolk and BNSF had proposed for West Lake Charles. (Pl.'s Mem. at 3.) The joint-line rates were listed in a written implementing agreement to the BNSF Master Contract. (*Id*. at 4.) This implementing agreement was assigned number 305125.003 and was effective June 1, 2005 through May 31, 2007. (Pl.'s Mem. Ex. F

(Contract 305125.003).) Norfolk, Basell and BNSF were all signature parties to implementing agreement 305125.003. (*Id*.)

Although the parties now dispute the exact configuration of the contract that gives rise to Basell's 95% volume commitment to Norfolk, they agree on the gist of what the contract accomplishes. Norfolk argues that it formed a bilateral contract with Basell, partially written and partially oral, in which BNSF has no interest. (Pl.'s Mem. at 19, 26-28.) In contrast, Basell maintains that the volume commitment is part of a three-party contract formed with Norfolk, Basell and BNSF that is set forth in a series of written implementing agreements to the BNSF Master Contract, including contract 305125.003. (Def.'s Mem. at 5, 8-10.) It is undisputed that Basell met the 95% volume commitment to Norfolk in 2002, 2003 and 2004. (*Id*. at 32.) Beginning in February 2005, however, Basell did not meet its volume commitment to Norfolk because of contractual obligations it assumed with CSX. (*Id*. at 12; Pl.'s Mem. at 4.)

B. Procedural Background

In this Court, Norfolk initially alleged that the contract giving rise to Basell's 95% volume commitment to Norfolk involved Basell's West Lake Charles, Bayport and Canadian facilities. (First Am. Compl. ¶¶ 8-9; Answer ¶ 7; Pl.'s Mem. in Supp. of Mot. for Partial Summ. J. at 2.) Claiming that Basell had breached the contract and denied its existence, Norfolk sought: (1) declaratory judgment that it was owed the difference between tariff rates and the discount contract rate for shipping provided to Basell since June 2002; (2) money damages to compensate for Basell's breach of the volume commitment; or (3) specific performance of the contract. (First Am. Compl. Counts I-IV.) Basell counterclaimed for declaratory judgment, quantum meruit, unfair competition, tortious interference with contractual relations, and breach of contract by Norfolk. (Countercl.

Counts I-IV; Am. Countercl.)

Norfolk filed motions for summary judgment on its breach of contract claim and Basell's breach of contract counterclaim, and the Court denied both motions. (Order, May 3, 2006; Order, May 12, 2006.) Also, the parties entered into a stipulation in which: (1) Norfolk withdrew its claims for declaratory judgment and monetary judgment based on tariff rates; and (2) Basell withdrew its quantum meruit counterclaim. (*See* Stipulation & Order, May 8, 2006.)

On May 19, 2006, three days before the scheduled bench trial, Norfolk faxed a letter informing the Court that it would no longer pursue its claims related to Basell's Bayport and Canadian facilities. (Def.'s Mem. Ex. A (Charles Howard letter).) In this letter Norfolk also requested termination of the contract for the first time. (*Id*.) On May 22, 2006, the morning the trial was to begin, the Court discussed with the parties the sudden simplification of the case given that Basell did not contest the existence of a contract related solely to West Lake Charles. (R. at 19-20, 33-35, May 22, 2006.) The Court concluded that summary judgment motions were appropriate and allowed the parties three weeks to file their motions. (*Id*. at 33-35.) On June 16, 2006, the Court held oral argument on the cross-motions for summary judgment and issued a dispositive order the same day, which this opinion explains.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party makes such a demonstration, then the burden shifts to the nonmovant, who must offer evidence that establishes a genuine issue of material fact that should proceed to trial. *Id*. at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986).

III. DISCUSSION

Norfolk moves for summary judgment on its material breach of contract claim, seeking termination of the contract and restitution or, in the alternative, monetary damages. (Pl.'s Mot. for Summ. J. at 1.) Basell counters that termination of the contract is inappropriate because it has not committed a material breach, and liquidated damages are the appropriate remedy. (Def.'s Mot. for Summ. J. at 2.) The parties agree that Basell failed to meet its volume commitment from February 2005 to the present, and they offer comparable estimates of Norfolk's lost profits stemming from this breach. (Pl.'s Mem. at 8 (Norfolk estimates $258,080; Basell estimates $270,430); R. at 42, June 16, 2006.) Accordingly, the issues presently before the Court are: (1) whether Basell's breach of its volume commitment is a material breach, making contract termination possible; and (2) if termination is not appropriate, whether lost profits or liquidated damages is the proper remedy.

A. Basell's Breach was Not a Material Breach

To determine the materiality of a breach of contract a court must assess whether the breach is important enough to justify the non-breaching party avoiding its contractual duties. *E. Elec. & Heating, Inc. v. Pike Creek Prof'l Ctr.*, Civ. A. No. 85L-AP-21, 1987 Del. Super. LEXIS 1115, at

*11 (Del. Super. Ct. Apr. 7, 1987).[4] Delaware courts look to the Restatement (Second) of Contracts to determine if a breach is material. *See, e.g., SLMsoft.com, Inc. v. Cross Country Bank*, Civ. A. No. 00C-09-163-JRJ, 2003 Del. Super. LEXIS 112, at *51-*52 (Del. Super. Ct. Apr. 2, 2003); *E. Elec. & Heating*, 1987 Del. Super. LEXIS 1115, at *11-*12. The Restatement identifies five circumstances to consider in determining whether the failure to perform under a contract is material:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

The Court finds the second factor most significant in this case: Norfolk can be adequately compensated for Basell's breach because Norfolk's present damages are readily calculable. *See id*. cmt. c ("Difficulty that [the injured party] may have in proving with sufficient certainty the amount of that loss will affect the adequacy of compensation."). In addition, a breach is less likely to be regarded as material if it occurs late in the term of the contract or after substantial performance has taken place. *See id*. cmt. d. For this reason, it is pertinent that Basell met and exceeded its volume

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[4] Basell argues that Delaware law governs the contract at issue here, while Norfolk argues that Pennsylvania law governs. (Def.'s Mem. at 17; Pl.'s Mem. at 9 n.4.) The BNSF Master Contract, which governs implementing agreements unless expressly provided otherwise, contains a Delaware choice-of-law provision. (Pl.'s Mem. Ex. I at 3.) There is no evidence that choice of law was discussed during Norfolk and Basell's negotiations, but the BNSF Master Contract was used as a reference. (Def.'s Mem. 8-9.) Because the contract at issue is an implementing agreement to the BNSF Master Contract that does not contradict the Master Contract's choice of law, the Court applies Delaware law in this case.

commitment during the first three years of the contract. (Def.'s Mem. at 32.) Along with three years of full performance, the fact that Basell's shortfall is only 15% underscores the limited extent to which Norfolk has been deprived of the benefit it reasonably expected from the contract.[5] (R. at 14, June 16, 2006.) Furthermore, the Court does not accept Norfolk's characterization of the breach, namely that Basell's business decision, driven by operational needs, amounted to a spiteful "slap in the face" to Norfolk. (R. at 33, May 22, 2006; *see also* Def.'s Mem. at 35.) Finally, although Basell does not promise that it will not breach the contract going forward, Basell states that "it is not a foregone conclusion that Basell will not meet the minimum volume commitment in 2006" and "[t]here could very well be no shortfall in 2007." (Def.'s Mem. at 34.) For these reasons, the Court concludes that no reasonable fact finder could find that Basell's breach of its volume commitment is a material breach.

A non-material breach of contract gives rise to an action for damages but does not support termination of the contract. *E. Elec. & Heating*, 1987 Del. Super. LEXIS 1115, at *11. Therefore, the Court declines Norfolk's request for termination of the contract.

B. Lost Profits is the Appropriate Remedy, Not Liquidated Damages

The Court rejects Basell's argument that the proper measure of damages in this case is liquidated damages of $500 per car.[6] Here, the parties discussed liquidated damages during contract

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[5] Norfolk concedes that Basell has shipped 80% rather than 95% volume but also emphasizes that this figure includes only 55% of the competitive traffic in which Norfolk has a choice of carriers. (R. at 14-15, June 16, 2006; *see also* Def.'s Mem. at 33.) The Court notes that the contractual 95% volume commitment applies to aggregate traffic and does not distinguish between competitive and sole-served traffic.

[6] Though Basell most often uses the $500 per car liquidated damages figure in its summary judgment memorandum, it also states that an acceptable alternative is $750 per car. (Def.'s Mem. at 29, 37.) In support of $500 per car, Basell reasons that $500 was the amount it

negotiations, but they did not agree on an amount. (Def.'s Mem. at 37.) The Court will not insert an amount as Basell suggests it should. (*Id*. at 28-29.) Rather, the Court concludes that liquidated damages should not be applied in this case.

Application of the two-prong test used by Delaware courts to determine the validity of a liquidated damages clause weighs against the award of liquidated damages in this case. In order for a liquidated damages clause to be valid:

> (1) the damages which the parties might reasonably anticipate must be difficult to ascertain at the time of the contracting, and (2) the amount must be either a reasonable estimate of the damages which would probably be caused by the breach, or must be reasonably proportionate to the damages which have reasonably been caused by the breach.

First State Homes v. McCann, 1999 Del. Super. LEXIS 439, at *6 (Del. Super. Ct. 1999). This test is not met here. Applying the first prong, the damages that the parties could reasonably anticipate at the time of contracting were not difficult to ascertain because costs per carload and profits per carload are readily estimable. The second prong of the test is not satisfied either. Because the $500 per car figure was not based on an estimate of costs and profits per carload, it did not represent a reasonable estimate of the probable damages in the event of breach by Basell. According to Basell, application of a $500 per car figure yields liquidated damages of $54,500 for its shortfall from January 2005 through December 2005. (Def.'s Mem. at 14.) Yet, the strikingly similar estimates of Norfolk's actual lost profits offered by the parties show that such liquidated damages would represent only a fraction of Norfolk's actual losses. The parties estimate that Norfolk's actual loss

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suggested during contract negotiations, and the BNSF Master Contract has a $500 per car liquidated damages clause. (Def.'s Mem. 26, 29.) As justification for $750 per car, Basell offers that one year after the contract at issue was negotiated Norfolk and Basell formed a separate New Jersey-focused contract that set liquidated damages at $750 per car. (*Id*. at 29.)

is $1200-$1500 per car, and they agree that actual damages are approximately $270,000 for the period from the breach in February 2005 through June 30, 2006. (R. at 16, June 16, 2006; Pl.'s Mem. at 8.) Liquidated damages based on $500 per car total roughly one-third the amount of the actual damages estimated, which is not "reasonably proportionate." Therefore, liquidated damages of $500 per car are not a valid remedy in this case.

Moreover, the BNSF Master Contract suggests that liquidated damages should not be applied in this situation. Although the BNSF Master Contract only addresses liquidated damages owed to BNSF in the even of breach by Basell, the Master Contract's liquidated damages methodology was explicitly invoked during Norfolk and Basell's contract negotiations. (Pl.'s Mem. Exs. B & I at 3.) The BNSF Master Contract's liquidated damages clause reads in relevant part: "Liquidated damages are intended in the event Customer is unable to tender its committed volumes; in no event shall this provision be construed as allowing Customer to tender committed volumes to another carrier at its discretion . . . ." (Pl.'s Mem. Ex. I at 8.) Here, Basell asserts that it made a "rational business decision" to give its shipments to Norfolk's competitor, CSX. (Def.'s Mem. at 35; *see also* R. at 28-29, June 16, 2006.) To the extent that the BNSF Master Contract's liquidated damages clause reflects the intent of the parties in the contract at issue here, Basell cannot invoke liquidated damages for its discretionary choice to ship with CSX.

Because lost profits can be calculated easily in this situation and the parties most likely intended to foreclose liquidated damages for this type of breach, the Court concludes that the damages awarded in order to make Norfolk whole must be based on actual lost profits, rather than any liquidated damages provision.

IV. CONCLUSION

For the reasons discussed above, the Court issued an Order on June 16, 2006 granting summary judgment in favor of Norfolk and awarding Norfolk $270,430 in damages for lost profits. This case is now closed, and an appropriate Order follows.

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

NORFOLK SOUTHERN RAILWAY CO.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
BASELL USA, INC.,	:	**No. 05-3419**
Defendant.	:	

ORDER

AND NOW, this **10th** day of **July**, **2006**, for the foregoing reasons, it is hereby **ORDERED** that:

1. Judgment is entered in favor of Plaintiff according to the terms of the Court's Order of June 16, 2006.
2. The Clerk of Court is directed to close this case.

BY THE COURT:

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Berle M. Schiller, J.