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THOMAS A. FIECHTNER
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

TOTAL QUALITY LOGISTICS, LLC :

Plaintiff :

vs. :

NEW VISION TRANSPORTATION, INC. :

Defendant :

CASE NO. 2016 CVH 00926

Judge McBride

DECISION/ENTRY

Stuart C. Brinn, counsel for the plaintiff Total Quality Logistics, LLC, 150 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202

Gary C. Schaengold, counsel for the defendant New Vision Transportation, Inc., 4 East Schantz Avenue, Dayton, Ohio 45409

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiff Total Quality Logistics, LLC on February 10, 2017. The court held a hearing on the motion on May 12, 2017, after which it took the motion under advisement.

Upon consideration of the motion, the evidence presented for the court's consideration, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

This case involves a dispute involving a broker-carrier agreement (“the Agreement”) between the plaintiff Total Quality Logistics, LLC (hereinafter referred to as “TQL”) and the defendant, New Vision Transportation, LLC (hereinafter referred to as “New Vision”). The plaintiff is a broker who links customers in need of freight transportation with motor carriers in exchange for a fee. The defendant is a small trucking company¹ which agreed to transport a load of spinach for the plaintiff in December 2015, and that load of spinach is the subject of this case.

On or around December 21, 2015, the plaintiff hired the defendant to deliver a load of spinach from La Pryor, Texas to Taylor Farms in Smyrna, Tennessee.² The plaintiff was to pay the defendant \$1,850 to deliver the load.³

The spinach was loaded onto the defendant’s truck in Texas in good condition,⁴ and was packaged in approximately 1,000 plastic crates referred to as totes.⁵ Per the rate confirmation and order confirmation, the defendant was to keep the spinach at 35 degrees continuously.⁶ The defendant did not maintain the temperature of the spinach during the drive from Texas to Tennessee, as reflected by the note of the receiver in the order confirmation, which read: “REJECTED DUE TO TEMP ABUSE 12/23/15.”⁷ The plaintiff’s temperature recorder recorded the internal temperature of the truck’s trailer,

¹ M. Odeh Aff., 2/28/2017, ¶ 2.

² M. Bostwick Aff., 1/26/2017, ¶ 4; Pls. Ex. B; M. Odeh Aff., ¶ 3.

³ Pls. Ex. B.

⁴ M. Bostwick Aff., ¶ 5.

⁵ M. Odeh Aff., ¶ 3.

⁶ Pls. Exs. B and C; M. Odeh Aff., ¶ 4.

⁷ Pls. Ex. C; M. Bostwick Aff., ¶ 5; M. Odeh Aff., ¶ 4.

logging the temperatures every five minutes.⁸ A table and graph reflecting the temperature of the trailer throughout the trip shows that the temperature fluctuated and was most often in excess of 40 degrees.⁹

The defendant claims that, following the rejection of the spinach, the defendant called the plaintiff to advise of the rejection and to request salvage instructions.¹⁰ The defendant maintains that the plaintiff's dispatcher instructed the defendant to have its driver transport the product to the defendant's terminal in Hamilton, Ohio and await further salvage instruction.¹¹ The defendant claims that it complied by bringing the spinach to its terminal and paying to have it refrigerated pending further instructions from the plaintiff.¹² The defendant claims it called the plaintiff numerous times over the next 11 days, but the plaintiff never gave the defendant any salvage instructions.¹³ After the 11 days, the defendant avers that the spinach was spoiled and had to be spread out in a field as trash.¹⁴ The defendant also claims that it still has the totes and is willing to return them to the plaintiff.¹⁵

Contrary to the defendant's account of what occurred following the spinach's rejection, the plaintiff claims that it did attempt to assist the defendant in salvaging the spinach.¹⁶ The plaintiff notes that the USDA inspection office was closed for the

⁸ M. Bostwick Aff., ¶ 6.

⁹ Pls. Ex. D.

¹⁰ M. Odeh Aff., ¶ 6.

¹¹ M. Odeh Aff., ¶ 6.

¹² M. Odeh Aff., ¶ 7.

¹³ M. Odeh Aff., ¶ 7.

¹⁴ M. Odeh Aff., ¶ 7.

¹⁵ M. Odeh Aff., ¶ 8.

¹⁶ M. Bostwick Supplemental Aff., 3/17/2017, ¶ 2. Of note, the court raised in the hearing on this motion the issue of whether it would consider this supplemental affidavit that the plaintiff filed in connection with its reply. The defendant objected to the court's consideration of portions that dealt with alleged emails that were not attached to the affidavit. Therefore, the court will not consider the portions of the affidavit that reference those emails between the parties.

Christmas holiday on December 23, 2015, the day the load was rejected, making salvage attempts more difficult.¹⁷ As such, the plaintiff allegedly suggested that the defendant take the load home until a salvage dealer could be located and that the defendant contact its insurance carrier to see if it had a preference on what to do with the rejected spinach.¹⁸ The plaintiff further claims that on December 30, 2015, the day before the defendant disposed of the spinach, the plaintiff arranged for the defendant to take the load to DNO in Columbus, Ohio to see if the load had any salvage value.¹⁹ The plaintiff avers that the defendant refused to take the spinach to the salvage company.²⁰

Once the spinach was rejected, Taylor Farms, which was the plaintiff's customer, sent a claim to the plaintiff for \$28,872.75.²¹ Of that amount, \$2,250 was for the cost the plaintiff would have charged Taylor Farms for the freight.²² That amount was voided, and therefore the plaintiff was required to pay Taylor Farms \$26,622.75 to settle the claim.²³ Of note, \$8,120 of the total claim was for totes for the spinach that could be returned to Taylor Farms, and if returned, Taylor Farms could have reduced the claim by \$8,120.²⁴ The plaintiff paid Taylor Farms, and on February 24, 2016 Taylor Farms assigned its claim to the plaintiff.²⁵

¹⁷ M. Bostwick Supplemental Aff., ¶¶ 2-4.

¹⁸ M. Bostwick Supplemental Aff., ¶ 2.

¹⁹ M. Bostwick Supplemental Aff., ¶ 2.

²⁰ M. Bostwick Supplemental Aff., ¶ 2.

²¹ Pls. Ex. G.

²² Pls. Ex. G.

²³ Pls. Ex. G.

²⁴ Pls. Ex. G.

²⁵ Pls. Ex. F.

Thereafter, the plaintiff deducted \$11,356.00 from the defendant's invoices and then sent an invoice to the defendant for a balance due of \$17,516.75, which has not been paid to date.²⁶ The defendant has also yet to return the totes to the plaintiff.²⁷

The defendant claims to have sent the plaintiff an invoice for \$54,243.22, dated December 8, 2015.²⁸ The defendant avers that it is due this sum because the plaintiff wrongfully offset money owed to the defendant, resulting in an injury of \$24,928.26, and that the plaintiff owes \$29,314.96 for the wrongfully rejected load of spinach.²⁹ The plaintiff, on the other hand, avers that it never received the invoices from the defendant.³⁰

The parties, TQL and New Vision, entered into the Agreement that governs their relationship in June of 2015.³¹ The Agreement also imposed obligations on the defendant with respect to the delivery of the spinach load at issue. As to the defendant's duties and obligations during transportation and delivery, the Agreement sets forth as follows:

"CARRIER [New Vision] shall continuously maintain the temperature noted on BROKER's [TQL's] Rate Confirmation from pickup at shipper until delivery at receiver. * * * CARRIER shall contact BROKER immediately in the event of any problems including, without limitation, out-of-temperature condition, equipment malfunction, accident, or delay."³²

Regarding cargo and liability claims, the Agreement provides:

"CARRIER is fully responsible and liable for the freight once in possession of it, and the trailer(s) is loaded, even partially, regardless of whether a bill of lading has been issued, signed, and/or delivered to CARRIER. CARRIER's

²⁶ M. Bostwick Aff., ¶ 8; Pls. Ex. A.

²⁷ M. Bostwick Aff., ¶ 10. Of note, in oral argument counsel for the defendant expressed that the defendant was willing to return the totes.

²⁸ The court notes that the date on the invoice, December 9, 2015, is before the transportation of the spinach from Texas to Tennessee occurred. Defs. Ex. 1 to Am. Countercl.

²⁹ Defs. Am. Answer, Countercl., and Third Party Compl., ¶ 5.

³⁰ M. Bostwick Supplemental Aff., ¶ 5.

³¹ Pls. Ex. E, pg. 8.

³² Pls. Ex. E, ¶ 23(e).

responsibility/liability shall continue until proper and timely delivery of the shipment to the consignee and the consignee signs the bill of lading or delivery receipt evidencing successful delivery."³³

Furthermore, included in the defendant's general duties is the following provision:

"CARRIER is responsible for any damage or loss to the product, shipment, or its packaging, and any and all shortages."³⁴

As to indemnification, the Agreement states:

"CARRIER agrees to defend, indemnify, and hold BROKER and CUSTOMERS harmless from and against any and all claims or liability * * * arising out of or in any way related to CARRIER's negligence, willful misconduct, acts, omissions, or performance or failure to perform under this Agreement, including, without limitation, claims or liability for cargo loss and damage, theft, delay, damage to property, and bodily injury and/or death. * * *"³⁵

Regarding the offsetting of claims, the Agreement continues:

"Failure of the CARRIER to pay, decline, or offer settlement within this 60-day period [from the receipt of the claim] shall be deemed an admission by CARRIER of full liability for the amount claimed and a breach of this Agreement. Notwithstanding any other provision of this Agreement, BROKER [TQL] reserves the right to offset any claim(s) with CARRIER's pending invoices."³⁶

Lastly, the provision regarding salvaging damaged goods provides: "In the event the goods are compromised or damaged, BROKER or its CUSTOMER, in its sole discretion, may determine whether the goods are salvaged, and if salvageable, the value of the salvageable goods."³⁷

³³ Pls. Ex. E, ¶ 8.

³⁴ Pls. Ex. E, ¶ 22(d).

³⁵ Pls. Ex. E, ¶ 10.

³⁶ Pls. Ex. E, ¶ 8(e).

³⁷ Pls. Ex. E, ¶ 8(c).

PROCEDURAL BACKGROUND

On July 6, 2016, the plaintiff filed a complaint against the defendant based on two causes of action: (1) money owed on an account and (2) breach of contract. The plaintiff prayed for damages in the amount of \$17,516.75 plus interest and court costs.

The defendant answered on October 12, 2017, but then filed an amended answer, counterclaim, and third party complaint on December 5, 2016. The defendant has since voluntarily dismissed the third party complaint. The defendant's counterclaim against the plaintiff includes three causes of action: (1) breach of contract, (2) money owed on an account, and (3) quantum meruit. The defendant prayed for damages in the amount of \$54,243.22. The plaintiff answered the counterclaim on December 12, 2016.

On February 10, 2017, the plaintiff filed a motion for summary judgment on all of its claims and on all of the defendant's counterclaims. The defendant filed a memorandum in opposition on March 3, 2017. The plaintiff filed its reply in support of its summary judgment motion on March 27, 2017. The court held a hearing on the motion on May 12, 2017, after which it took the motion under advisement.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party

against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."³⁸

The court must view the evidence in a light most favorable to the nonmoving party.³⁹ Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.⁴⁰ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."⁴¹

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?⁴² This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."⁴³

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.⁴⁴ This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

³⁸ *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

³⁹ *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

⁴⁰ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

⁴¹ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

⁴² *Id.* at 251-52.

⁴³ *Id.* at 250.

⁴⁴ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond."⁴⁵ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁴⁶

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a "triable issue of fact" remains.⁴⁷ The duty of the nonmoving party is more than that of resisting the motion's allegations.⁴⁸ Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."⁴⁹ The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.⁵⁰ It may not rely on the pleadings or unsupported allegations.⁵¹

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."⁵² The trial court maintains the sound discretion to admit or exclude relevant evidence.⁵³ When a document falls outside the enumerated categories

⁴⁵ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁴⁶ *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁴⁷ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

⁴⁸ *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

⁴⁹ (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

⁵⁰ *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

⁵¹ *Id.*

⁵² See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").

⁵³ *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.⁵⁴

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.⁵⁵ "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."⁵⁶ "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."⁵⁷ Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."⁵⁸

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."⁵⁹ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁶⁰

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents

⁵⁴ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁵⁵ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

⁵⁶ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁵⁷ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

⁵⁸ *Id.*

⁵⁹ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁶⁰ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

referenced in the affidavit "must be attached to the affidavit."⁶¹ If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."⁶²

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.⁶³ Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁶⁴

However, even when summary judgment may not be granted in whole, the court must identify which facts are uncontroverted and deemed established for trial, when practicable. Civ.R. 56(D) provides:

"If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."⁶⁵

⁶¹ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁶² *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

⁶³ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

⁶⁴ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

⁶⁵ Civ.R. 56(D).

LEGAL ANALYSIS

The court will first deal with the plaintiff's cause of action for breach of contract because the resolution of this cause of action impacts the plaintiff's second cause of action, for money owed on an account, as well as the defendant's causes of action.

I. THE PLAINTIFF'S CLAIMS

A contract is "generally defined as a promise, or set of promises, actionable upon breach."⁶⁶ To prevail on a breach of contract claim, a plaintiff must prove: "(1) the existence of a contract, (2) plaintiff fulfilled its contractual obligations, (3) defendant failed to fulfill its contractual obligations, and (4) plaintiff incurred damages as a result."⁶⁷ A plaintiff proves that a defendant has breached a contract by showing the defendant "did not perform one or more of the terms of the contract."⁶⁸ After the plaintiff shows the breach of contract, then the burden shifts to the defendant to assert a defense."⁶⁹

⁶⁶ *Artisan Mechanical, Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶ 25.

⁶⁷ *Frisby v. Solberg*, 12th Dist. Butler No. CA2015-11-204, 2016-Ohio-7644, ¶ 9, citing *Underwood v. Boeppler*, 12th Dist. Butler No. CA2014-02-055, 2015-Ohio-156, ¶ 13. See *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12 (holding same).

⁶⁸ *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

⁶⁹ *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.*, 8th Dist. Cuyahoga No. 73002, 1998 WL 355846, *3 (July 2, 1998).

The construction of contracts is a matter of law.⁷⁰ The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."⁷¹ When confronted with an issue of contract interpretation, courts examine the contract as a whole.⁷² Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.⁷³

Courts use the "plain and ordinary meaning" of the language in the contract unless a different meaning "is clearly apparent" from the contract.⁷⁴ If the language is clear, then the court is confined to the writing in the contract itself to discern the parties' intent.⁷⁵

"As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."⁷⁶ However, the failure to "define a term" in a contract does not "automatically render" it ambiguous, as long as an "ordinary meaning of the term exists."⁷⁷ By contrast,

⁷⁰ *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus (1978).

⁷¹ *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren Nos. CA2015-11-107, CA2015-11-108, 2016-Ohio-3222, ¶ 14, citing *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 60. See *Lopez v. Citizens Auto Fin.*, 8th Dist. Cuyahoga No. 91184, 2009-Ohio-1082, ¶ 15, citing *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App. 3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 20 (10th Dist.) (holding same).

⁷² *Toledo Edison CoSunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 38. See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 22 (Citations omitted.) ("Often the intended meaning of a word or phrase may be clear when that word or phrase is considered in the context of other words or phrases in the contract. * * * Thus, the intended meaning of any part of the parties' contract should be determined in light of the whole contract.")

⁷³ *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 14, citing *Towne Dev. Grp., Ltd. v. Hutsepiller Contrs.*, 12th Dist. Butler No. CA2012-09-081, 2013-Ohio-4326, ¶ 17 (holding same).

⁷⁴ *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37.

⁷⁵ *Id.* See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, quoting *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2012-07-061, 2010-Ohio-5186, ¶ 12 (a clear and unambiguous contract "requires no interpretation or construction and will be given the effect called for by the plain language of the contract.")

⁷⁶ *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

⁷⁷ (Citations omitted.) *Fahnush v. Crum-Jones*, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16 (1st Dist.).

a "contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations."⁷⁸

If a party satisfactorily demonstrates a breach of the contract, the measure of damages " * * * is the amount necessary to place the non-breaching party in the position he or she would have been in had the breaching party fully performed under the contract."⁷⁹ To do so, the plaintiff "must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty."⁸⁰

In turning to the present case, when viewing the facts in a light most favorable to the defendant, the nonmoving party, the court finds that the defendant breached its contract with the plaintiff. As discussed, a plaintiff proves that a defendant has breached a contract by showing the defendant failed to perform one or more of the terms of the contract.⁸¹ Specifically, the defendant breached Paragraph 23(e) of the Agreement, which required that the defendant " * * * shall continuously maintain the temperature noted on BROKER's [TQL's] Rate Confirmation from pickup at shipper until delivery at receiver. * * *"⁸² The evidence is uncontroverted that the temperature of the trailer throughout the trip constantly fluctuated above the required 35 degrees.⁸³ Further, the defendant concedes that it breached the Agreement:

"The Defendant acknowledges its contractual responsibility to preserve refrigerated products in transport and to deliver them in unspoiled condition. As a practical matter, the Defendant

⁷⁸ *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, citing *Cooper*, 2010-Ohio-5186 at ¶ 12.

⁷⁹ *Frisby*, 2016-Ohio-7644 at ¶ 16, citing *Baird v. Crop Prod. Servs., Inc.*, 12th Dist. Fayette Nos. CA2011-03-003 and CA2011-04-005, 2012-Ohio-4022, ¶ 24.

⁸⁰ *James v. Sky Bank*, 11th Dist. Trumbull No. 2010-T-0116, 2012-Ohio-3883, ¶ 33, quoting *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 WL 222160 (Apr. 11, 1995).

⁸¹ *Stonehenge Land Co.*, 2008-Ohio-148 at ¶ 24, quoting, 148 Ohio App.3d at 10.

⁸² Pls. Ex. E, ¶ 23(e).

⁸³ Pls. Ex. D.

is unable and does not seek to contest the accuracy of the shipper's device which measured higher than permitted temperatures inside the Defendant's trailer during the transport."⁸⁴

The issue thus becomes whether the defendant has a viable defense for breaching the contract. The defendant has argued two defenses- mitigation of damages and equitable estoppel. In first dealing with the issue of mitigation, " * * * the failure to mitigate is an affirmative defense and, as such, the burden of proof is on the party asserting the defense."⁸⁵ The "general rule is that an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided."⁸⁶ The injured party's duty to mitigate, however, " * * * does not require the party to incur extraordinary expense and risk."⁸⁷ Moreover, "[w]hen both parties have the same opportunity to reduce damages, a defendant cannot later contend that the plaintiff failed to mitigate."⁸⁸

The common law duty of mitigation can also be abrogated by the parties' contract: " * * * [W]here 'the terms of the contract are clear,' and require full indemnification, the injured party is under no obligation to mitigate its damages."⁸⁹

⁸⁴ Defs. Resp., pg. 2.

⁸⁵ *Baird*, 2012-Ohio-4022 at ¶ 43, citing *Pinnacle Management v. Smith*, 12th Dist. No. CA2003-12-0327, 2004-Ohio-6928, ¶ 12.

⁸⁶ *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 276, 719 N.E.2d 955 (1999). See *Baird*, 2012-Ohio-4022 at ¶ 44, citing *Chicago Title Ins. Co.*, 87 Ohio St.3d at 276 (holding same).

⁸⁷ *Chicago Title Ins. Co.*, 87 Ohio St.3d at 276, citing *S & D Mechanical Contrs., Inc. v. Enting Water Conditioning Sys., Inc.*, 71 Ohio App.3d 228, 593 N.E.2d 354 (2d Dist. 1991). See *Baird*, 2012-Ohio-4022 at ¶ 44 (Internal citation omitted.) ("However, the obligation to mitigate is not unlimited; the party is not expected to incur extraordinary expenses or to do what is unreasonable or impracticable.").

⁸⁸ (Internal citation omitted.) *Chicago Title Ins. Co.*, 87 Ohio St.3d at 277.

⁸⁹ *United States Fire Ins. v. Am. Bonding Co., Inc.*, 1st Dist. Hamilton Nos. C-160307, C-160317, 2016-Ohio-7968, ¶ 24, citing *Four Seasons Environmental Inc. v. Westfield Cos.*, 93 Ohio App.3d 157, 160, 638 N.E.2d 91 (1st Dist. 1994). See *Ritter v. Fairway Park Properties, L.L.C.*, 9th Dist. Summit No. 21509, 2004-Ohio-2618, ¶ 15 (finding that there was no duty to mitigate damages due to the language of the contract at issue); *New Towne L.P. v. Pier 1 Imports (U.S.), Inc.*, 113

The plaintiff argues that the express language of the Agreement has abrogated any common law duty it may have had to mitigate the damages caused by the defendant's breach. There are several provisions in the contract that demonstrate that the parties' intent was to nullify the plaintiff's common law duty to mitigate damages.⁹⁰

First, the indemnification clause requires that the defendant indemnify the plaintiff for any claims resulting from the defendant's failure to perform under the Agreement and for claims for cargo damage. The Agreement states:

"CARRIER agrees to defend, indemnify, and hold BROKER and CUSTOMERS harmless from and against any and all claims or liability * * * arising out of or in any way related to CARRIER's negligence, willful misconduct, acts, omissions, or performance or failure to perform under this Agreement, including, without limitation, claims or liability for cargo loss and damage, theft, delay, damage to property, and bodily injury and/or death. * * *"⁹¹

The term "claim," as used in the agreement, is not defined within. However, courts use the "plain and ordinary meaning" of the language in a contract unless a different meaning "is clearly apparent" from the contract.⁹² Taylor Farms, which was the plaintiff's customer, sent a claim to the plaintiff for the spoiled spinach and unreturned totes, which the plaintiff paid in the amount of \$26,622.75.⁹³ The claim that the plaintiff paid to settle with Taylor Farms is a claim within the meaning of the indemnity provision in the Agreement. As other courts have likewise concluded, because the express terms of the Agreement required the defendant to fully and unconditionally indemnify the plaintiff for

Ohio App.3d 104, 108, 680 N.E.2d 644 (6th Dist.) (finding that a contract provision annulled the duty to mitigate damages).

⁹⁰ *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 14, citing *Baruk*, 2014-Ohio-1585 at ¶ 60.

⁹¹ Pls. Ex. E, ¶ 10.

⁹² *Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37.

⁹³ Pls. Ex. G.

claims resulting from the defendant's breach of contract, the plaintiff had no general obligation under the common law to mitigate its damages.⁹⁴

Furthermore, there are other provisions that buttress the plaintiff's argument that the Agreement placed the responsibility for the spinach's safe delivery wholly on the defendant:

"CARRIER is fully responsible and liable for the freight once in possession of it, and the trailer(s) is loaded, even partially, regardless of whether a bill of lading has been issued, signed, and/or delivered to CARRIER. CARRIER's responsibility/liability shall continue until proper and timely delivery of the shipment to the consignee and the consignee signs the bill of lading or delivery receipt evidence successful delivery."⁹⁵

Moreover, the Agreement continues: "CARRIER is responsible for any damage or loss to the product, shipment, or its packaging, and any and all shortages."⁹⁶ These two provisions show that the defendant is fully responsible and liable for the damage to the load because it was unable to complete a successful delivery.

Finally, although the Agreement states that the plaintiff "may determine whether the goods are salvaged," it does not impose a duty on the plaintiff to salvage the goods.⁹⁷ Upon construing the Agreement as a whole, the court finds that the plaintiff did not have a duty to mitigate the damages the defendant caused in breaching the Agreement.

In addition to the defendant's mitigation argument, the defendant also posits that, even if the plaintiff had no duty to mitigate its damages, the defendant should be estopped from moving forward on its breach of contract claim because it gave instructions to the

⁹⁴ See *United States Fire Ins.*, 2016-Ohio-7968 at ¶ 28 (finding that indemnification clause nullified a party's common law duty to mitigate damages).

⁹⁵ Pls. Ex. E, ¶ 8.

⁹⁶ Pls. Ex. E, ¶ 22(d).

⁹⁷ Pls. Ex. E, ¶ 22(c).

defendant to keep the spinach until it gave further instructions, which never came. "The doctrine of equitable estoppel prevents a party from exercising rights which he might otherwise have had against one who has in good faith relied upon the conduct of that party to his detriment."⁹⁸ It is a "flexible doctrine that 'must be determined on the particular facts of each case.'"⁹⁹ Courts apply equitable estoppel to "prevent results contrary to good conscience and fair dealing."¹⁰⁰ Equitable estoppel will "not create a new right or cause of action; it prevents a party from raising a claim it otherwise could have."¹⁰¹

In order for equitable estoppel to apply, the defendant must show the following:

"* *(1) a representation by the party to be estopped; (2) which representation communicates some fact or state of affairs in a misleading way; (3) and which induces reasonable, actual reliance by the second party; (4) who would suffer prejudice or pecuniary disadvantage unless the first party is estopped from asserting an otherwise valid right in contradiction to his earlier representation."¹⁰²

⁹⁸ *Young v. Brookshire Village Properties*, 101 Ohio App.3d 458, 462, 655 N.E.2d 1329 (12th Dist. 1995). See *Marden Rehab. Servs., Inc. v. E. Liverpool Convalescent Ctr.*, 7th Dist. Columbiana No. 10 CO 24, 2011-Ohio-6638, ¶ 20, quoting *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743, ¶ 10 (2d Dist.) ("The defense of equitable estoppel applies when a party prosecuting a claim for relief has induced the adverse party to believe that certain facts exist and the adverse party changed his position in reasonable reliance thereon, to his detriment.").

⁹⁹ *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 20, quoting *In re Election of Nov. 6, 1990 for Office of Atty. Gen. of Ohio*, 58 Ohio St.3d 103, 114, 569 N.E.2d 447 (1991).

¹⁰⁰ *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 20, quoting *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. Franklin No. 05AP-662, 2006-Ohio-3810, ¶ 34.

¹⁰¹ *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 20, citing *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-2305, ¶ 31.

¹⁰² *Young*, 101 Ohio App.3d at 462. See *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 21, citing *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 246, 743 N.E.2d 484 (7th Dist.) ("A prima facie case for equitable estoppel requires a party to prove: (1) that the adverse party made a factual misrepresentation; (2) that it is misleading; (3) that it induced actual reliance which is reasonable and in good faith; and (4) that the reliance caused detriment to the relying party.").

Further, the “party asserting estoppel must either lack knowledge of the relevant facts or at least have a lesser knowledge than the party to be estopped.”¹⁰³ Additionally, the reliance must have been reasonable.¹⁰⁴

In the present case, the defendant has argued that the plaintiff should be estopped from its breach of contract claim because it allegedly told the defendant’s driver to await further salvage instructions, which the plaintiff never provided. In other words, the plaintiff led the defendant to believe that it would exercise its contractual option to manage the salvage operation, causing the defendant to hold the spinach until it spoiled instead of seeking salvage opportunities. Given that the Agreement does provide the plaintiff with the option of determining whether goods are salvageable,¹⁰⁵ it may be reasonable for the defendant to have awaited directions from the plaintiff instead of salvaging the spinach.

However, there exist several genuine issues of material fact, such as whether the plaintiff instructed the defendant to await its further instructions, whether the plaintiff found a potential salvage opportunity in Columbus that the defendant ignored, and whether the plaintiff suggested that the defendant should contact its insurance provider to determine what to do with the spinach. The court cannot determine whether the doctrine of equitable estoppel should apply because these facts need to be resolved by the trier of fact. As such, summary judgment on the plaintiff’s breach of contract claim must be denied.

¹⁰³ *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 21, quoting *Heskett v. Paulig*, 131 Ohio App.3d 221, 227, 722 N.E.2d 142 (3d Dist. 1999).

¹⁰⁴ *Marden Rehab. Servs., Inc.*, 2011-Ohio-6638 at ¶ 28, citing *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630 (1990).

¹⁰⁵ “* * * In the event the goods are compromised or otherwise damaged, BROKER [TQL] or CUSTOMER, in its sole discretion, may determine whether the goods are salvaged * * *.” Pls. Ex. E, ¶ 22(c).

The plaintiff's second cause of action is for money owed on an account. An action on an account is " * * * founded upon contract and thus a plaintiff must prove the necessary elements of a contract action, and in addition, must prove that the contract involves a transaction that usually forms the subject of a book account."¹⁰⁶ To recover money on an account, the balance on the account must be a provable sum.¹⁰⁷ A large amount of the plaintiff's account claim is based on its unresolved breach of contract claim. It claims that the defendant's breach of contract cost it \$28,872.75, which it then offset by \$11,356. Because the plaintiff's claim for money owed on an account is so enmeshed with the success of the plaintiff's breach of contract claim, which is unresolved, the court finds that reasonable minds cannot come to but one conclusion, that being a finding for the plaintiff.

II. THE DEFENDANT'S COUNTERCLAIMS

The defendant filed a counterclaim against the plaintiff for claims of breach of contract, money owed on an account, and quantum meruit. As with the plaintiff's claim for money owed on an account, the defendants' claims for breach of contract and money owed on an account are very much entwined with the unresolved breach of contract issue that is the subject of the plaintiff's claim. In addition to the genuine issues of material fact related to the breach of contract claim, there also exists a genuine issue of material fact regarding the defendant's claim for money owed on an account because the plaintiff claims that the invoices the defendant attached to its counterclaim complaint were never

¹⁰⁶ *Gabriele v. Reagan*, 57 Ohio App.3d 84, 87, 566 N.E.2d 684 (12th Dist. 1988).

¹⁰⁷ *Wolf Automotive v. Rally Auto Parts, Inc.*, 95 Ohio App.3d 130, 133, 641 N.E.2d 1195 (10th Dist. 1994).

sent to it, and the plaintiff goes so far as to argue that the invoices are fabricated.¹⁰⁸ Because genuine issues of material fact remain regarding the defendant's breach of contract claim and its claim for money owed on an account, the court must deny summary judgment as to those claims.

The defendant's final claim is for quantum meruit. "Quantum meruit is an equitable remedy giving 'rise to obligations imposed by law, irrespective of the intentions of the parties, in order to prevent an injustice when one party retains a benefit from another's labors."¹⁰⁹ A claim for quantum meruit "is generally awarded when one party confers some benefit upon another without receiving just compensation for the reasonable value of services rendered."¹¹⁰ For a plaintiff to prevail on a quantum meruit claim, the plaintiff "must show (1) he conferred a benefit upon the defendant; (2) the defendant had knowledge of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment."¹¹¹

In the instant case, the plaintiff did not include any argument in its motion for summary judgment as to why it should receive summary judgment on the defendant's quantum meruit cause of action. As such, the court finds that it has not met its burden under Civ.R. 56 for this claim.

CONCLUSION

¹⁰⁸ See M. Bostwick Supplemental Aff., ¶ 5; Pls. Reply, pg. 3.

¹⁰⁹ *A.N. Bros. Corp. v. Total Quality Logistics, L.L.C.*, 2016-Ohio-549, 59 N.E.3d 758, ¶ 41 (12th Dist.), citing *In re Suchodolski*, 9th Dist. Lorain No. 10CA0099833, 2011-Ohio-6333.

¹¹⁰ *A.N. Bros. Corp.*, 2016-Ohio-549 at ¶ 41, quoting *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989).

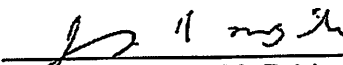
¹¹¹ *A.N. Bros. Corp.*, 2016-Ohio-549 at ¶ 42, citing *In re Suchodolski*, 2011-Ohio-6333 at ¶ 8.

For the aforementioned reasons, the court finds the plaintiff's motion for summary judgment is not well-taken and is hereby denied.

Counsel shall conference and call Rosemary Petts in the Assignment Office to schedule a trial setting conference with the court. The call shall occur within three business days and the trial setting conference shall be set within thirty days.

IT IS SO ORDERED.


DATED: 10-10-2017



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 13th day of November 2017 by e-mail to Stuart C. Brinn, Attorney for the Plaintiff, at scbrinn@strausstroy.com, and to Gary C. Schaengold, Attorney for the Defendant, at gschaengold.law@sbcglobal.net.



Judicial Assistant to Judge McBride