STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

SCOT INDUSTRIES, INC.

Plaintiff,

v.

Case No. 2018CV002317
Code No(s). 30303 (Other Contracts)

GEXPRO INC. AND LUNERA INC.

Defendants.

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

¶1. This case involves a dispute over the terms and conditions relating to the plaintiff's purchase of lights from the defendants, Lunera and Gexpro ("Gexpro")—the DBA for Rexel USA, Inc. ("Rexel"). Rexel seeks summary judgment dismissing all of the plaintiff's claims, contending that the terms and conditions of their agreement disclaim the warranties on which the plaintiff bases its claims. The Court heard oral argument on the motion and requested supplemental briefing. The Court now grants the motion.

SUMMARY JUDGEMNT RECORD

¶2. The parties presented the following undisputed facts in relation to the pending motion for summary judgement.

¶3. Rexel is a distributor of energy and electrical products, including various lights and lighting solutions.

¶4. Rexel does not manufacture its own electrical products, but instead acts as a distributor of lights manufactured by others and sells those lights to end users.

¶5. Lunera Lighting, Inc. ("Lunera") designs and manufactured lighting products.

¶6. Lunera is the manufacturer of the lights Rexel sold to the plaintiff, Scot Industries, Inc. ("Scot") and which form the basis for this lawsuit.

¶7. In or around May 2016, Scot contacted Rexel looking to order certain Lunera-manufactured lights through Rexel. Scot informed Rexel that Lunera would be in contact with Rexel with regard to the pricing and specification of the lights previously agreed to between Scot and Lunera.

¶8. Prior to this time, Rexel had not had any communication with Scot regarding the lights, their specifications, the facilities in which they would be installed, or Scot's general needs with regard to the lights.

¶9. Lunera provided to Rexel the pricing and specifications upon which Lunera and Scot had negotiated and agreed. Upon receiving the pricing and specification, Rexel provided Scot with an Application for Credit ("Credit Agreement"). Scot signed the Credit Agreement on May 17, 2016.

¶10. The Credit Agreement that Scot signed provides:

> *BY SUBMITTING THIS APPLICATION YOU AGREE that all purchase of products and/or services from Rexel, Inc., its affiliates, subsidiaries, trade name entities, and business units (collectively "Seller") are conditioned on and made pursuant to Seller's Terms and Conditions of Sale, which are subject to change from time to time, and are available at www.rexelusa.com/terms and also upon request.

¶11. This language in the Credit Agreement is set off from the rest of the agreement and appears just above the signature block.

¶12. Rexel also provided Scot with a quotation for the Lunera manufactured lights dated May 17, 2016 and numbered S113898899. The May 17, 2016 quotation provides:

> Any quotation and all transactions with Gexpro are conditioned upon Gexpro's Terms and Conditions of sale located at

> http://www.gexpro.com/terms. Quotation is valid for 30 days after the date of issue unless otherwise specified with the exception of commodity items. Quotation for commodity items is valid for the day of the quote only unless otherwise specified.

¶13. This language is set off from the rest of the quotation.

¶14. The quotation contained the Lunera lights' product number, number of lights, price per light, shipping date and method, credit terms, and total cost. The quotation additionally provided that the lights sold to Scot were to come from Lunera directly and not from Rexel's inventory.

¶15. Entering either the url set forth in the Credit Agreement or from the quotation takes one to the same document, entitled Seller's Terms and Conditions of Sale ("Terms and Conditions of Sale") – Rev. February 25, 2016. The Terms and Conditions of Sale provided in relevant part,

> 1. **ACCEPTANCE:** . . . BY REQUESTING A QUOTE FROM SELLER OR PRESENTING AN ORDER TO SELLER, BUYER CONFIRMS THAT THESE TERMS & CONDITIONS SHALL GOVERN ALL PURCHASES OF GOODS, MATERIALS AND/OR SERVICES. . . . SELLER OBJECTS TO AND REJECTS ANY CHANGES OR ADDITIONAL OR DIFFERENT TERMS (CONTAINED IN A PURCHASE ORDER ACCEPTED BY SELLER OR OTHERWISE) AND NO SUCH TERMS WILL CHANGE THESE TERMS & CONDITIONS UNLESS ACKNOWLEDGED IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF SELLER. NO SELLER EMPLOYEE OR AGENT HAS THE AUTHORITY TO MODIFY THESE TERMS & CONDITIONS VERBALLY. . . .
>
> 6. **QUOTATIONS**: All quotations expire thirty (30) days from the date of the quotation unless otherwise noted on the quotation. This time limit applies even if Buyer uses the quotation to submit a job or project bid to any other party.
>
> . . .
>
> 14. **WARRANTIES:** (a) SELLER'S WARRANTIES: Seller warrants that all Goods sold are new and, upon payment in full by Buyer of Goods, free and clear of any security interests or liens. Buyer's exclusive remedy for breach of such warranty shall be replacement with a new product or termination of any security interests or liens. Seller is a distributor and not

> a manufacturer and makes no independent warranties other than those set forth herein. (b) VENDOR'S WARRANTIES: Seller shall also assign to Buyer any Vendor warranties and/or remedies provided to Seller by its Vendor.
>
> ...
>
> (d) LIMITATIONS: THERE ARE NO OTHER WARRANTIES WRITTEN OR ORAL, EXPRESS, IMPLIED OR BY STATUTE. NO IMPLIED STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLES. NO REPAIR OF GOODS OR OTHER COSTS ARE ASSUMED BY SELLER UNLESS AGREED TO, IN ADVANCE, IN WRITING.
>
> ...
>
> 16. **MISCELLANEOUS**.
>
> ...
>
> (c) GOVERNING LAW: These Terms & Conditions and all disputes related to it shall be governed by the laws of the State of New York, United States of America, without giving effect to its conflict of law rules.

¶16. From the time of the quotation in May 2016 and through February 2017, Scot issued ten purchase orders for the shipment of lights and lighting equipment, as reflected in the table below:

P.O. Number	Date	Amount	Ship To	Add'l Language
104971BJT	June 16, 2016	$31,700	Centralia, WA	
104972BJT	June 16, 2016	$31,700	Muscoda, WI	
104973BJT	June 16, 2016	$63,400	East Troy, WI	
105172BJT	August 12, 2016	$63,517.87	Pewaukee, WI	
48869 S	October 19, 2016	$77,057	Sugar Grove, IL	*
48870 S	October 19, 2016	$110,520	Wooster, OH	*
48885 S	October 19, 2016	$8,442.50	Wooster, OH	*
48869 S	November 1, 2016	$3,837.50	Lone Star, TX	*
48871 S	November 1, 2016	$76,750	Centralia, WA	*
48896 S	February 16, 2017	$307,000	Muscoda, WI	*

¶17. Each of these purchase orders specifically referenced "Quotation #S113898899 dated 5/17/2016"—that is, the quotation from Rexel sent on May 17, 2016.

¶18. None of the purchase orders objected to Rexel's Terms and Conditions of Sale. None of the purchase orders attached or referenced any standard terms and conditions proposed

by Scot. The purchase orders contained shipping information, payment terms, product, quantity and price.

¶19. The six purchase orders marked with an "*" in the table above also contained the following additional language:

> Total Amp consumed 230W per bulb
> Delivered lumens 20,000lm per bulb
> Warranty 5 years

¶20. Sometime between May 2016 and March 2017, the Lunera lights began to fail.

¶21. Scot and Lunera contacted Rexel to request copies of the purchase orders and to coordinate the shipment of additional Lunera lights. Thereafter, Lunera contacted Rexel to arrange for a new shipment of replacement lights to Scot.

¶22. Based on Lunera's communication to Rexel, Rexel issued Scot a quotation for replacement lights at a discounted rate.

¶23. Rexel Quotation # S116582029 dated March 29, 2017, was for 1000 units at $133.50 per unit. It stated under "SHIPPING INSTRUCTIONS" the following:

> PRICE INCLUDES $20.00 PER UNIT CREDIT
> PRICE INCLUDES RETURN SHIPPING
> CHARGES ON OLD LAMPS
> 1000 LAMPS ORDERED ALL AT ONE TIME
> ALL 1000 LAMPS FOR DELIVERY IN APRIL,
> MAY, JUNE 2017
> OLD LAMPS SHIPPED IN BULK CONTAINER
> (LOOSE) AT LUNERA'S EXPENSE

¶24. The March 29, 2017, quotation also included the same language from the May 17, 2016 quotation: "Any quotation and all transactions with Gexpro are conditioned upon Gexpro's Terms and Conditions of sale located at http://www.gexpro.com/terms."

¶25. On March 31, 2017, Scot issued Purchase Order #48901 ET for $73,425 (550 units at $133.50 per unit). The product was to be shipped to East Troy, Wisconsin. The

purchase order referenced the original May 17, 2016, quote and, in handwriting referenced the March 29, 2017 quote number. The purchase order does not object to Rexel's Terms and Conditions of Sale and does not attach or reference standard terms and conditions proposed by Scot. It does include the same additional language as the purchase orders with the * noted above.

¶26. Other than the quotation and purchase order for the replacement lights, Rexel had no communications with Scot regarding the replacement lights, their specification, the facilities in which they would be installed, or Scot's general needs.

¶27. In March 2018, Scot informed Rexel of additional light failures in requesting copies of purchase orders to provide to Lunera.

¶28. During the time Scot experienced the alleged light failures, Scot did not request assistance from Rexel and Scot informed Rexel that Lunera would be issuing Scot a refund.

¶29. On December 20, 2018, Scot filed this lawsuit again Lunera and Rexel alleging claims for Breach of Express Warranty (Count I), Breach of Implied Warranty of Merchantability (Count II), Breach of Implied Warranty of Fitness (Count III), and Breach of the Duty of Good Faith and Fair Dealing (Count IV).

¶30. Lunera did not answer or otherwise respond to the Complaint but Scot has not requested a default judgment against Lunera.

DISCUSSION

¶31. Summary judgment must be granted "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." Wis. Stat § 802.08(2). In making this determination, this Court must apply a two-step test. *Green Spring Farms v. Kersten,* 136 Wis. 2d 314 – 15, 401 N.W.2d 816 (1987). Under the first step, this Court asks if the plaintiff stated a claim for relief. *Id.* at 315. Under the second step, this Court applies the summary judgment statute and asks if any factual issues exist that preclude summary judgement. *Id.*

¶32. "Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *L.L.N. v Clauder,* 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). "A 'material fact' is a fact that is significant or essential to the issue or matter at hand." *State v. Allen,* 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Black Law Dictionary* 611 (7th ed. 1999)).

¶33. Because the sale of the lights was a transaction in goods, it is governed by the uniform commercial code -- sales (UCC-Sales), as both sides acknowledge.

¶34. Since the facts are largely undisputed, issues concerning contract formation are questions of law. *Resch v. Greenlee Bros. & Co.*, 128 Wis. 2d 237, 240, 381 N.W.2d 590, 591 (Ct. App. 1985).

I. REXEL'S TERMS AND CONDITIONS OF SALE DISCLAIM ANY EXPRESS WARRANTIES OTHER THAN THAT THE PRODUCTS ARE NEW, FREE AND CLEAR OF LIENS, AND THAT REXEL ASSIGNS TO BUYER VENDOR'S WARRANTIES.

¶35. Scot alleges in Count I of its Complaint that "Lunera and Gexpro made express warranties to Scot regarding the lights which became part of the basis of the bargain to purchase the lights," and incorporates by reference prior allegations from its Complaint.

¶36. Scot also alleges that "At no time did Gexpro provide or share with Scot any limiting term or condition of sale. Nothing was communicated, whether orally or in writing, to

disclaim, limit or reduce any warranties, implied warranties, or remedies available to Scot under the Uniform Commercial Code and otherwise applicable law."

¶37. Of course, as stated above, Rexel's Terms and Conditions of Sale in place from February 25, 2016, through January 1, 2018, disclaim any express or implied warranties other than that the products were new, free and clear of liens, and that Rexel, as distributor, assigns to Scot the vendor's—that is, Lunera's—warranties. Scot has not alleged or shown that Rexel breached any of these three express warranties.

A. The Terms and Conditions of Sale Were Incorporated by Reference Into the Credit Agreement and Rexel Quotations.

¶38. To be sure, Rexel's Terms and Conditions of Sale were not contained directly in the Credit Agreement, the May 17, 2016, quotation, or the March 29, 2017, quotation. Nonetheless, they were made a part of those documents by reference to a url. In *Madison Indus., Inc. v. Garden Ridge Co.*, No 111640/2010, 2011 WL 2746542 (N.Y. Sup.Ct. July 3, 2011),[1] for example, the court found that terms and conditions accessed by a link protected by a password were incorporated into the document because the plaintiffs had access to the password, and it was reasonable for them to have known about the terms and conditions.

¶39. Here, the link was clearly referenced in the documents and it was clear that they incorporated Rexel's Terms and Conditions of Sale into any transaction with Scot. Certainly a merchant like Scot is charged under the law with knowing the Terms and Conditions of Sale and that they would form the basis for its bargain with Rexel. *See State Farm Fire & Cas. Co. v. Home Ins. Co.*, 88 Wis. 2d 124, 129, 276 N.W.2d 349 (Ct. App. 1979) ("Failure to

[1] The Court finds that, pursuant to the Terms and Conditions of Sale, New York law governs the agreement and all disputes relating to it. Both New York and Wisconsin have adopted the Uniform Commercial Code, the intent of which is to promote uniformity in the law. The Court cites to and relies upon Wisconsin cases, the law of this forum, because both parties relied upon Wisconsin cases and because the Court finds little difference in the two jurisdictions' application of the UCC, except as specifically noted.

read a contract before signing it will generally not affect its validity. A court will not protect a person who fails to take reasonable steps for his own protection.').

B. The Terms and Conditions of Sale Were Not Illusory Or Void For Having Lapsed by Their Terms.

¶40. Scot contends that Rexel's Terms and Conditions of Sale are not part of the agreement because they were illusory or had lapsed by their terms, and thus were at best an invitation to negotiate.

¶41. First, Scot contends that the Terms and Conditions of Sale as reflected in the Credit Agreement were illusory because the Credit Agreement makes clear that all purchases of product or services from Rexel are conditioned on and made pursuant to Seller's Terms and Conditions of Sale, "which are subject to change from time to time…" Because Rexel was free to change the terms, Scot asserts, they are illusory.

¶42. Scot also argues that the Terms and Conditions of Sale, as reflected in both the May 2016 and March 2017 quotations, lapsed. The quotations specify that they are "valid for 30 days after the date of issue unless otherwise specified with the exception of commodity items," and if commodity items, the quotation is valid for the day of the quote only. Rexel's representative, Daniel Leis, testified that the lights were commodity items, and thus, that the quotations, by their terms, lapsed after one day.

¶43. As Scot acknowledges, there is no doubt that the parties entered into a contract. According to Scot, however, because the quotations lapsed, and the Terms and Conditions of Sale found in the Credit Agreement were illusory, they were at best invitations to negotiate. Scot's purchase orders then were the offers, which Rexel accepted by delivering the product and accepting payment, and Rexel's Terms and Conditions of Sale formed no part of the purchases.

¶44. The Court rejects Scot's argument. The Credit Agreement put Scot on notice that all purchases of Rexel's product are subject to Rexel's Terms and Conditions of Sale and that all orders require a purchase order. Scot undisputedly signed the Credit Agreement, and there is no suggestion that Rexel attempted to change the Terms and Conditions of Sale after the date the Credit Agreement was signed. Thus, the same Terms and Conditions of Sale were in effect when Scot issued every one of its purchase orders.

¶45. Moreover, the provision in the quotations stating that they lapsed after 30 days or, with commodity items, after one day, is for Rexel's benefit, not Scot's. It protects Rexel from, among other things, price fluctuations that could otherwise oblige Rexel to fulfill a purchase order when the economics of the original proposal change and it is no longer in Rexel's interest to proceed with the deal as originally contemplated. As a provision that works to protect Rexel, it can be waived.

¶46. In this regard, the provision stating that the quotations lapse is analogous to the provision at issue in *Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 598-99, 451 N.W.2d 456 (Ct. App. 1989). In that case, the buyer claimed that its purchase order, specifically referencing the seller's proposal, did not constitute an acceptance of the proposal and the proposal's terms and conditions because the proposal specifically stated that it became a binding contract only if buyer and someone from seller's home office signed the proposal in the spaces provided, which did not happen. The Court of Appeals held that by failing to contest the acceptance, seller waived the protection of the countersignature provision, and buyer's purchase order was an acceptance of the proposal and the proposal's terms and conditions governed. *Id.*

¶47. So too here. Rexel waived the position that the quotations lapsed when Rexel did not contest Scot's acceptance through its various purchase orders and thereafter fulfilled the contract.

C. Scot's Purchase Orders Incorporate by Reference Rexel's Quotations and the Terms and Conditions of Sale.

¶48. In any event, even if Scot's purchase orders were considered offers, which Rexel accepted, every one of those purchase orders incorporated by reference Rexel's May 17, 2016, quotation or March 29, 2017, quotation. By specifically referencing Rexel's quotation numbers, it is well settled those purchase orders incorporated the Terms and Conditions of Sale found in those quotations absent some specific change, addition or objection. *Consolidated Papers, Inc.*, 153 Wis. 2d at 597-598; *Bijou Int'l Corp. v Kohl's Corp.*, 2008 N.Y. Misc. LEXIS 10117, *12, 2008 NY Slip Op 33439(U); *In re Brandenburg's Estate*, 13 Wis. 2d 217, 226, 108 N.W.2d 374 (1961) ("The great majority of states, including Wisconsin, have accepted the doctrine of incorporation by reference."); *Wis. Local Gov't Prop. Ins. Fund v. Lexington Ins. Co.*, 840 F.3d 411, 417 (7th Cir. 2016) ("Wisconsin contract law provides [for incorporation by reference] [s]o long as the extrinsic terms are clearly identifiable . . . .") (citations and quotations omitted).

¶49. Rexel's Terms and Conditions of Sale are incorporated by reference in both the Credit Agreement and the quotations. Directly above the signature line, the Credit Agreement provides, "BY SUBMITTING THIS APPLICATION YOU AGREE that all purchases of products and/or services from Rexel, Inc., its affiliates, subsidiaries, trade name entities, and business units (collectively "Seller") are conditioned on and made pursuant to Seller's Terms and Conditions of Sale, which are subject to change from time to time, and are available at www.rexelusa.com/terms and also upon request."

¶50. Similarly, the quotations Rexel provided to Scot for the original lights and replacement lights state conspicuously on their face that "Any quotation and all transactions with Gexpro are conditioned upon Gexpro's Terms and Conditions of Sale located at http://www.gexpro.com/terms."

¶51. Finally, the Terms and Conditions of Sale, expressly state

> **1. ACCEPTANCE:** . . . BY REQUESTING A QUOTE FROM SELLER OR PRESENTING AN ORDER TO SELLER, BUYER CONFIRMS THAT THESE TERMS & CONDITIONS SHALL GOVERN ALL PURCHASES OF GOODS, MATERIALS AND/OR SERVICES. . . . SELLER OBJECTS TO AND REJECTS ANY CHANGES OR ADDITIONAL OR DIFFERENT TERMS (CONTAINED IN A PURCHASE ORDER ACCEPTED BY SELLER OR OTHERWISE) AND NO SUCH TERMS WILL CHANGE THESE TERMS & CONDITIONS UNLESS ACKNOWLEDGED IN WRITING AND SIGNED BY AN AUTHORIZED REPRESENTATIVE OF SELLER.

¶52. Scot did not object to the Terms and Conditions of Sale. Scot did not attach or reference its own terms and conditions of sale. Based upon the express terms of the signed Credit Agreement, the quotations, and the Scot purchase orders which incorporate them, the Court finds as a matter of law that the parties intended that the Terms and Conditions of Sale control and form the basis of their bargain.

D. Statements from Rexel's Webpage Are Not Actionable Warranties.

¶53. Scot's Complaint as a general matter alleges that *Lunera* made express warranties and representations to Scot, but Scot does not allege in any detail that Rexel made specific warranties or representations to Scot.

¶54. In response to specific discovery requests asking Scot to identify the basis for its breach of warranty claim against Rexel, Scot claimed that statements found on Rexel's webpage constitute actionable warranties, including the following statements:

- "Gexpro can handle everything – from planning to incentives to performance metrics"
- "You can completely change and upgrade any space with new lighting – get more pleasing conditions with less energy"
- "We're changing [notorious energy waters] by lowering lighting energy use while improving lighting effectiveness and aesthetics – you get more light from every watt"
- "we can show you a better way"
- "we can help you see the light"
- "Gexpro uses leading-edge technology to analyze and update lighting requirements and track use"
- "Our rich reporting can analyze an entire building or focus all the way down to an individual fixture. So you can identify lighting-related inefficiencies or operational anomalies anywhere in a facility. It's the peace of mind of always knowing how the system is working."
- "It's the difference between being a part of your business or simply selling parts to your business."
- "Before we talk about the products you need, we want to talk to you about your business."
- "Because when we know what you're trying to do we can usually find ways to help you do it better."
- "We are focused on slashing energy use with more efficient solution, smarter energy strategies and a holistic approach to energy management"
- "We have the resources, experience and expertise to help you thrive because we're more focused on helping your business win that winning your business"
- "In addition to our online store, we have over 80 warehouse storefront locations through the U.S. where customers can find the electrical material they need for their projects as well as product expertise from our experienced staff. Gexpro supports customers across the country to create value, lower their total costs of ownership and run their businesses better."

¶55. NY UCC § 2-313 addresses the creation of express warranties by affirmation, promise, description, and sample, and provides

> (1) Express warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

See also Wis. Stat. § 402.313.

¶56. The statements from the webpage cannot form the basis for Scot's breach of warranty claim for several reasons. In addition to the obvious problem that Rexel's Terms and Conditions of Sale exclude any express warranties other than the three identified, the statements cited by Scot constitute puffery or "sales talk," as opposed to affirmations of fact about the product.

¶57. "Puffery" is considered an expression of the seller's opinion and, as such, the buyer has no right to rely on such statements. *Loula v. Snap-On-Tools Corp.*, 175 Wis. 2d 50, 54, 498 N.W.2d 866, 868 (Ct. App. 1993); *Feliciano v. Gen. Motors LLC*, No. 14 Civ. 06374 (AT), 2016 WL 9344120, at *3 (S.D.N.Y. Mar. 31, 2016) ("[T]here can be no [express] warranty if the statements are 'puffery' or 'sales talk.'"); *Haley v. Kolbe & Kolbe Millwork Co., Inc.*, No 14-cv-99-bbc, 2015 WL 3774496, at *17 (W.D. Wis. June 16, 2015) ("Such vague statements [that the distributor was strongly positive about the windows and assured plaintiffs that defendant's windows were high quality and American made] made verbally by a distributor are insufficient to constitute an affirmation of fact on the part of the defendant."); *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 41, 270 Wis. 2d 146, 677 N.W.2d 333 (affirming that "vague and indefinite" statements "amount[] to nothing more than mere puffery."); Wis. Stat. § 402.313(2) and NY UCC § 2-313(2).

¶58. Only statements of fact about the product can create an express warranty by affirmation under NY UCC § 2-313 and Wis. Stat. § 402.313. The distinction between vague and indefinite sales talk or "puffery," on the one hand, and a representation of fact about the product, on the other, may be difficult to draw in some cases. *See Lambert v. Hein*, 218 Wis. 2d 712, 724, 582 N.W.2d 84 & n.4, 218 Wis. 2d 712, 582 N.W.2d 84, 89 & n.4 (Ct. App. 1998). In drawing the line, this Court must carefully consider the circumstances surrounding the transaction and the "objective context in which the statement is made." *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 36-37, 349 Wis. 2d 587, 836 N.W.2d 807 (quoting *Lambert*).

¶59. Here, given the circumstances surrounding the transaction and the objective context relating to the statements, the Court finds as a matter of law that such statements were puffery and cannot form the basis for Scot's breach of warranty claim. The statements themselves smack of Rexel's opinions and generally are not objectively measurable. Most of them do not relate to the goods, but to Rexel's level of service. Further, Scot submitted no evidence to support a contention that these statements were statements of fact in this industry or in this context such that it had the right to rely upon them. Likewise, Scot submitted no evidence of how it can or would show that Rexel somehow breached them based on the alleged defects in the goods alleged in its Complaint.

¶60. Finally, in order for these statements to constitute warranties under NY UCC § 2-313, they must not only constitute an affirmation of fact but Scot must show that they became "part of the basis of the bargain." Scot failed to submit any evidence that these statements were on Rexel's website prior to purchasing the lights in 2016 and replacement lights in 2017. In fact,

Scot failed to submit any evidence that anyone at Scot in fact read or otherwise relied upon these statements in striking a deal with Rexel.

¶61. Scot contends that it need not prove reliance at the summary judgment stage, but need only allege a breach of warranty and it is for the trier of fact to decide whether Scot has proven its claim, that is, that the representation or promise was "part of the basis of the bargain." The Court disagrees.

¶62. It is an understatement to say that there are diverging cases and opinions about whether a buyer must prove reliance in order to show that the affirmation of fact or promise is part of the basis of the bargain under the UCC § 2-313. As one author wrote in opening his article,

> A strange phenomenon in the law of express warranties has been taking place over the last several decades. After many years of reliance's prominent role in the Uniform Sales Act, the drafters of the Uniform Commercial Code [hereinafter UCC or the Code] abruptly disposed of the reliance requirement by the express language contained in official comment 3 to section 2-313. Yet the majority of courts has persistently ignored the Code's mandate and has frequently deemed reliance an important and determinative factor. Instead of an expected uniformity, the courts have found themselves enmeshed in a battle over semantic definitions, assuming oftentimes irreconcilable positions on a spectrum of possible approaches. By contrast, a growing minority of courts has rejected reliance in section 2-313 outright. Other courts have adopted or rejected reliance only implicitly, without declaring themselves on either side of the battle. In addition, reliance has been ignored by some courts which, narrowly construing the language of section 2-313, emphasized "representations" and "basis of the bargain" as main aspects of the transactions. Finally, another group of courts has opted for an equation between reliance and "basis of the bargain." Regardless of the courts' positions, reliance remains, implicitly or explicitly, a vigorously disputed ingredient of express warranties despite the UCC's exclusionary language.

Matthew A. Victor, *Express Warranties Under the UCC--Reliance Revisited*, 25 NEW ENG. L. REV. 477, 477-478 (1990).

¶63. Comment 3 of UCC § 2-313, referenced in the quoted paragraph above, states:

> Affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.

¶64. A summary and history of the debate, as well as a catalog of cases addressing the issue, are found in a host of articles. *See, e.g.*, James J. White, *Freeing the Tortious Sole of Express Warranty Law*, 72 TULANE L. REV. 2089 (1998); Richard L. Savage III, *Laying The Ghost Of Reliance To Rest In Section 2-313 Of The Uniform Commercial Code: An "Endpoints" Analysis*, 28 WAKE FOREST L. REV. 1065; Sidney Kweste, *Express Warranty as Contractual - The Need for a Clear Approach*, 53 MERCER L. REV. 557 (2002).

¶65. As a general matter, the articles are critical of how both New York and Wisconsin cases deal with reliance. For example, one article cites in a footnote a host of New York cases continuing to require that a buyer prove reliance to recover on a breach of warranty. *See* James J. White, *supra*, 72 TULANE L. REV. at 2100 n.31 (citing *Scaringe v. Holstein*, 477 N.Y.S.2d 903, 904 (N.Y. App. Div. 1984) (citation omitted) ("A necessary element in the creation of an express warranty is the buyer's reliance upon the seller's affirmations or promises."); *Pilch, Inc. v. L & L Started Pullets, Inc.*, No. 84 Civ. 6513 (CSH), 1987 WL 9430, at *4 (S.D.N.Y. Apr. 9, 1987) (citation omitted) ("In order to succeed on an express warranty theory under [2-313], it is necessary for the purchaser to plead and prove that the written promotional literature in question was furnished to buyer prior to the purchase, and relied upon him [sic] in making the purchase."); *Shapiro Budrow & Assocs., Inc. v. Microdata Corp.*, No. 84 Civ. 3589 (CBM), 1986 WL 2756, at *7 (S.D.N.Y. Feb. 24, 1986) (quoting *Eddington v. Dick*, 386 N.Y.S.2d 180, 181 (City Court, Geneva County, 1976)) ("In order to make out a cause of action for breach of express warranty, the buyer must demonstrate by a preponderance of the

evidence, 1) an affirmation of fact or promise by the seller; 2) the natural tendency of the said affirmation or promise was to induce the buyer to purchase goods; 3) that the buyer purchased goods in reliance thereon....")).

¶66. Another article criticizes our Wisconsin Supreme Court's decision in *Ewers v. Eisenzopf*, 88 Wis.2d 482, 276 N.W.2d 802, (Wis. 1979), with the following discussion:

> The Supreme Court of Wisconsin expressed a similarly confusing position in a section 2-313 "basis of the bargain" case. In *Ewers v. Eisenzopf*, the plaintiff, Ewers, purchased a saltwater aquarium and seventeen fish in June 1975. The defendant, Eisenzopf, was the owner of a "rock shop." In August of 1975, plaintiff went to purchase some decorations for his aquarium at the defendant's shop. A friend of the plaintiff asked the store clerk if the items they were purchasing were suitable for a saltwater aquarium. The clerk said that "they had come from salt water and that they were suitable for salt water aquariums." Plaintiff purchased the items. Within a week of placing the "shells, coral, and branch" in the aquarium, all seventeen of Mr. Ewers' fish died. The Supreme Court of Wisconsin then articulated its "basis of the bargain" test. The court first stated that a buyers' reliance was "irrelevant" to the formation of an express warranty. "The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it." Thus, the court first states that reliance is "irrelevant," but then states that the linchpin in the determination is whether the statement had the "natural tendency" to induce the buyer. The court reversed and remanded. This merging of conceptual ideas is typical for most courts trying to move away from a reliance standard.

Richard L. Savage III, *supra*, 28 Wake Forest at 1078-79.

¶67. The author of the Tulane Law Review article catalogued many cases and argued that not all warranty claims are the same, and that to better understand and apply the "part of the basis of the bargain" language, courts should look at the nature of the claimed warranty. For example, if there is a representation or promise that relates to the goods and is included in the contract, a buyer need not prove any reliance on the contractual term to enforce the warranty. Likewise, a representation or promise that relates to the goods and is contained in a written

owner's manual, on a label attached to the goods or otherwise in a record delivered with the goods is an express warranty irrespective of reliance.

¶68. On the other hand, a representation or promise that relates to the goods and is neither part of the contract nor delivered in a record with the goods is an enforceable warranty only if the buyer purchased in reliance on the representation or promise. In this circumstance, reliance is required to prove it is part of the basis of the bargain—something presumed in the other two contexts. At a minimum, the buyer must show that it had knowledge of the representation or promise. Otherwise, there is simply no basis for contending that the representation or promise formed a "part of the basis of the bargain."

¶69. This case falls in the last category. The alleged express warranties were not part of the contract and were not delivered in a record with the goods (like in an owner's manual or product label). As a result, for Scot to satisfy its burden of proving that the alleged representations were part of the basis of the bargain, it must establish, at a bare minimum, that it had knowledge of them when it issued its purchase orders. The Court concludes that this is consistent with both New York and Wisconsin law cited above. A buyer need not show that it relied upon the representation or promise as being material to the transaction—that is, that it was a substantial factor leading the buyer to proceed with the bargain. It must, however, show that it was aware of the representation or promise in the circumstances presented here for the representation or promise to form part of the basis of the bargain.

¶70. In response to Rexel's motion, Scot was unable to present any evidence that it was aware of the alleged representations prior to issuing its purchase orders. In fact, it presented no evidence that representatives of Scot ever knew of the statements. As a result, the alleged representations from Rexel's website cannot support Scot's breach of warranty claim.

E. The Additional Language Included in Some of Scot's Purchase Orders Do Not Constitute Rexel Warranties.

¶71. Scot next argues that the language found in the purchase orders marked with an * constitute express warranties made by Rexel to Scot, and rely upon the deposition testimony of Rexel representative Daniel Leis to support its position. The language at issue is

> Total Amp consumed 230W per bulb
> Delivered lumens 20,000lm per bulb
> Warranty 5 years

¶72. Scot quotes Mr. Leis's deposition testimony discussing the amp consumption and delivered lumens for the lights. Moreover, Scot cites the following question and answer from Mr. Leis's deposition and insists that it plainly constitutes an admission that Rexel individually warranted the lights for five years:

> Q: And you can refer to [the Terms], or you can just tell me, does Gexpro have a standard warranty that it offers to all of its customers?
>
> A: Warranty? It looks to me that our warranty is basically what the manufacturer offers.
>
> Q: One in the same?
>
> A: It looks like it, yes.

¶73. The Court read the entirety of Mr. Leis's deposition. His testimony about lumens and hours of life were from reading Lunera's specification sheet, and were not based upon what Rexel allegedly represented or promised Scot.

¶74. The Court finds as a matter of law on the undisputed facts presented that the additional language included on some of Scot's purchase orders were not Rexel warranties but were simply recitations of Lunera's warranties assigned to Scot by Rexel. Scot presented no

evidence that any one of its representatives intended the addition of that language on some of its purchase orders to constitute or confirm warranties Rexel made to Scot. Scot relies upon the documents—the quotations and the purchase orders—and the quotations make clear that Rexel was not warranting the lights, other than that they were new, free and clear of liens, and would assign to Scot Lunera's warranties.

¶75. Scot's reliance on Mr. Leis's deposition testimony quoted above, taken in context, cannot support Scot's claim that Rexel also warranted the lights for five years. In the light of the Terms and Conditions of Sale, no reasonable fact-finder could interpret that testimony as meaning that both Rexel and Lunera were warranting the lights for five years. His statement that the warranty "is what the manufacturer offers… one in the same" was clearly intended to convey that Rexel is assigning whatever warranty Lunera provides, which is precisely what the Terms and Conditions of Sale state, and not that Rexel would bootstrap the manufacturer's warranty with its own. *Cf Thomas v. FireRock Prod., LLC*, 40 F. Supp. 3d 783, 792 (N.D. Miss. 2014) ("Where, as here, a plaintiff relies on a manufacturer warranty against a seller, a cause of action will not arise unless the seller 'embraced [the] warranty in any capacity other than as an agent of [the manufacturer].'") (quoting *Wright v. Paul Moak Pontiac, Inc.*, 828 So. 2d 201, 202 (Miss. Ct. App. 2001)).

¶76. Even if, in the alternative, the Court did not interpret the statements and contract language as it does, at most the additional language would be considered proposals for addition to the contract, which never became part of the bargain.

¶77. NY UCC § 2-207 spells out what happens when additional terms are included in buyer's acceptance or confirmation. It provides in pertinent part

> **(1)** A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an

> acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
> **(2)** The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> **(a)** the offer expressly limits acceptance to the terms of the offer;
> **(b)** they materially alter it; or
> **(c)** notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

See also Wis. Stat. § 402.207.

¶78. Scot's purchase orders were a definite and seasonable expression of acceptance and operated as an acceptance of the quotations and the Terms and Conditions of Sale. Even if the additional language quoted above were considered additional terms (that is, a warranty from Rexel as opposed to simply reciting the warranty Scot would receive from Lunera), those purchase orders would still constitute an acceptance of the Terms and Conditions of Sale because the purchase orders did not expressly condition its acceptance on Rexel's assent to those terms.

¶79. NY UCC § 2-207(2) provides that those additional terms are then to be considered proposals for addition to the contract. Here, they do not become part of the contract because the Terms and Conditions of Sale expressly limits acceptance to the Terms and Conditions of Sale and they contain Rexel's objection to any additional or different terms. *See AEP Indus. Inc. v. Thiele Tech. Inc.*, Case No. 16-C-391, 2016 WL 4591902 at *1,4 (E.D. Wis. Sept. 2, 2016) (Griesbach, J.) (holding that Seller's terms and conditions of sale in sales proposal containing similar language regarding acceptance of seller's terms and conditions governed and that additional terms in purchase order were excluded under same § 402.207(2)(a) analysis). Given the exclusion of warranties contained in the Terms and Conditions of Sale, the Court finds that the additional language (if read as inviting Rexel to warrant the lights for five years) would materially alter the terms of the contract as reflected in the Terms and Conditions of Sale.

¶80. In conclusion, the Terms and Conditions of Sale are binding and form the basis for the contract between Rexel and Scot. Those Terms and Conditions of Sale exclude all warranties other than that Rexel warranted that the lights were new, free and clear of liens, and that Rexel would assign Lunera's warranties to Scot. Scot does not claim Rexel breached those warranties. Scot's contentions that other statements and alleged representations constituted actionable warranties fail as a matter of law and, as a result, summary judgment dismissing Count I is appropriate.

II. REXEL'S TERMS AND CONDITIONS OF SALE DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS.

¶81. Count II of Scot's Complaint alleges Breach of the Implied Warranty of Merchantability and Count III alleges Breach of the Implied Warranty of Fitness.

¶82. Rexel submits that it properly disclaimed the implied warranties of merchantability and fitness in its Terms and Conditions of Sale. "An implied warranty is something the law reads into a contract to save the parties the trouble of having to negotiate an express term; it is an off-the rack term. If the parties don't like it, . . . they are free . . . to disclaim the implied warranty." *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1027 (7th Cir. 1993) (interpreting Wisconsin law); *see also Freemantle v. U.S. Hoffman Mach. Corp.*, 151 N.Y.S.2d 856, 858 (N.Y. App. Div. 1956) (written disclaimer of implied warranties was "valid and enforceable.").

¶83. Of course, NY UCC § 2-316 and Wis. Stat. § 402.316 expressly provide that the implied warranty of merchantability and the implied warranty of fitness may be excluded. To do so, any disclaimer of the implied warranty of merchantability must mention merchantability and be conspicuous if in writing, and any disclaimer of the implied warranty of fitness must be in writing and conspicuous. NY UCC § 2-316(2) and Wis. Stat. § 402.316(2). *See Maltz v. Union*

Carbide Chem. & Plastics Co., Inc., 992 F. Supp. 286, 304 (S.D.N.Y. 1998) (holding warranty disclaimer in capital letters that specified warranties being disclaimed was sufficient under NY UCC § 2-316(2)); *AEP Indus., Inc. v. Thiele Tech. Inc.*, No. 16-C-391, 2016 WL 4591902, at *5 (E.D. Wis. Sept. 2, 2016) (holding bolded sentence disclaiming implied warranties of merchantability and fitness was a sufficient disclaimer under Wis. Stat. § 402.316(2)); *Brown v. Buschman Co.*, No Civ.A. 99- 108(GMS), 2002 WL 389139, at *6 (D. Del. Mar. 12, 2002) (noting that where a sophisticated party is involved, a disclaimer need not be in bold type or capital letters to be conspicuous under Wis. Stat. § 402.316(2) because a sophisticated party would not be surprised by the presence of a disclaimer) (interpreting Wisconsin law).

¶84. Rexel's disclaimer is in writing, mentions both implied warranties by name, and is sufficiently conspicuous in that it is all capital letters in the sub-section denoting Limitations of Warranties:

> LIMITATIONS: THERE ARE NO OTHER WARRANTIES WRITTEN OR ORAL, EXPRESS, IMPLIED OR BY STATUTE. NO IMPLIED STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLIES. NO REPAIR OF GOODS OR OTHER COSTS ARE ASSUMED BY SELLER UNLESS AGREED TO, IN ADVANCE, IN WRITING.

¶85. The Court finds that Scot was a sophisticated party familiar with such disclaimers. The summary judgment record established that Scot's own online terms and conditions of sale to buyers of its products disclaim implied warranties of merchantability and fitness. The Court finds that the disclaimer in the Terms and Conditions of Sale was sufficiently conspicuous.

¶86. Scot nonetheless posits that issues of fact preclude summary judgment because it contends that the disclaimer of warranties will inevitably leave it without a remedy. As a result, Scot argues that it may take advantage of NY UCC § 2-719(2) and Wis. Stat. §402.719(2),

which grants relief to an aggrieved party "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose." Scot asserts, "[w]hen a limitations provision 'provides neither a minimum nor adequate remedy' for a breach of contract, it is unconscionable," citing *Trinkle v. Schumacher Co.*, 100 Wis. 2d 13, 19, 301 N.W.2d 255, 259 (Wis. App. 1980).

¶87. Scot, however, confuses a disclaimer of warranties with a limitation of remedies. The UCC provision upon which Scot relies addresses exclusive or limited remedies, not the disclaimer of warranties. The failure of essential purpose of which the UCC provision speaks is not the failure of the product or of a warranty or warranty disclaimer, but a limited remedy.

¶88. A contract that purports to limit the remedies available for breach must nonetheless provide "a fair quantum of remedy." *Waukesha Foundry, Inc. v. Industrial Eng'g, Inc.*, 91 F.3d 1002, 1010 (7th Cir. 1996) (citing *Phillips Petroleum Co. v. Bucyrus-Erie Co.*, 131 Wis. 2d 21, 40, 388 N.W.2d 584 (1986)). This principle requires the party claiming breach to demonstrate "harm that the contractual remedy was incapable of curing." *Id.* Thus, a provision that excludes or limits consequential damages, or that provides that the exclusive remedy for a breach is a "repair and replace" remedy may fail of its essential purpose if the limited remedy provides the aggrieved party with no remedy, or the product cannot be repaired or replaced. *See Tankstar USA, Inc. v. Navistar, Inc.*, 2019 WI App 1, ¶¶ 32-35, 385 Wis. 2d 211, 923 N.W.2d 170, 2018 Wisc. App. LEXIS 890.

¶89. In the present case, Scot has not claimed that a limitation of remedies has left it without a remedy for a breach of the contract. It presumes some phantom breach of contract that must be remedied and urges the Court to resuscitate the disclaimed warranties to provide a contractual and legal foundation for its alleged damages.

¶90. Scot insists that it is entitled to a remedy. It is not. A remedy is only available if Scot has a legal basis to hold Rexel liable for the alleged damages.

¶91. Because Rexel properly disclaimed the implied warranties of merchantability and fitness, the Court grants summary judgment dismissing Counts II and III.

III. THERE IS NO VIABLE CLAIM UNDER THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

¶92. Finally, Count IV of Scot's Complaint alleges that Rexel breached the implied covenant of good faith and fair dealing.

¶93. As an initial matter, there is no separate cause of action for allegedly breaching the implied covenant of good faith and fair dealing. The cause of action is properly designated one for breach of contract. *Jacobs Private Property, LLC v. 450 Park LLC*, 22 A.D.3d 347, 803 N.Y.S.2d 14 (1st Dept. 2005); *Ramsden v. Farm Credit Servs. of N. Cent. Wis. ACA*, 223 Wis. 2d 704, 712, 590 N.W.2d 1 (Ct. App. 1998) ("a breach of the covenant of good faith and fair dealing does not state a separate cause of action in Wisconsin from the contract claim from which it arises, absent special circumstances not present here"); Restatement (Second) Contracts § 205 cmt. d, illus. 1-2 (finding breaches of good faith performance to be "a breach of contract").

¶94. A covenant of good faith and fair dealing is implied in every contract. *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 663 N.E.2d 289, 639 N.Y.S.2d 977 (1995); *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶ 27, 348 Wis. 2d 360, 842 N.W.2d 240. *See* NY UCC § 1-304 ("Every contract or duty within this act imposes an obligation of good faith in its performance and enforcement."); Wis. Stat. § 401.304.

¶95. Under the NY UCC § 2-103(b) (Wis. Stat. § 402.103(b)) , '"[g]ood faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

¶96. There is much debate about what the covenant of "good faith" means and how it should be interpreted. As a general matter, however, the implied covenant serves two principal purposes: (1) to supply terms "approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute"; and (2) "to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule." *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991). In respect to this second goal, "'[g]ood faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Id. See Columbus Milk Producers' Cooperative v. Dep't of Agriculture*, 48 Wis. 2d 451, 462-63, 180 N.W.2d 617 (Wis. 1970) ("Good faith is defined in Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 Univ. of Chicago L. Rev. (1963), 666, 669 [as] '. . . an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations.'").

¶97. Interpreted this way, the covenant is narrow, and properly so lest it be used to change the terms of the contract or prevent one side from exercising rights expressly granted in the agreement. No contractual provision can be implied that is inconsistent with the terms of the agreement, and the covenant cannot be used to handcuff a party from exercising its contractual rights. *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *Beidel*, 2013 WI 56 ¶ 29 ("'Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a "bad faith"

breach of that contract.'" (*quoting Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988)).

¶98. In the present, Scot does not discuss how Rexel breached the implied covenant. There was no opportunistic or sharp conduct on the part of Rexel and none has been alleged. There are no "gap-filler" terms that need to be supplied to the agreement.

¶99. At bottom, Scot appears to argue that the implied covenant requires a seller to assume liability for allegedly defective products when the manufacturer can't. This is not the stuff of the implied covenant. The parties allocated the risks in the Terms and Conditions of Sale, and it would be unfair and inconsistent with the covenant of good faith if it were used to foist responsibility upon Rexel when it clearly and unequivocally disclaimed such responsibility.

¶100. The Court grants summary judgment dismissing Count IV.

***

¶101. For the foregoing reasons, the Court grants summary judgment dismissing Scot's Complaint and all claims raised in it. The Court orders that Judgment be entered in favor of Rexel and against Scot on all claims.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

Dated this 2nd day of June, 2020.

BY THE COURT:

Michael J. Aprahamian
Circuit Court Judge