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

TERRY STRICKLER,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
PETERBILT MOTORS	:	
COMPANY, et al.,	:	**No. 04-3628**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **May 27, 2005**

Plaintiff Terry Strickler brings this action against Defendants Peterbilt Motors Company ("Peterbilt"), Eaton Corporation ("Eaton"), and Cummins, Inc. ("Cummins") for damages arising from alleged defects in a tractor he purchased in December of 2003. The tractor was manufactured by Peterbilt, while the tractor's transmission and engine were manufactured by Eaton and Cummins, respectively. Presently before the Court is Cummins's motion for summary judgment.[1] For the reasons discussed below, Cummins's motion is granted in part and denied in part.

I. BACKGROUND

The following facts are undisputed. Plaintiff is the owner of Top Shelf Enterprises, an independent trucking business which operates out of New Market, Virginia. (Dep. of Terry Strickler at 7-9.) On December 1, 2003, Plaintiff started to "think about" looking for a new tractor for his business. (*Id.* at 15.) After comparing prices and negotiating for additional features, Plaintiff decided to purchase his new tractor from Hunter Keystone Peterbilt, located in Breinigsvile,

[1] On April 11, 2005, the Court granted Peterbilt's motion for partial summary judgment, and on April 14, 2005, the Court denied Eaton's motion for partial summary judgment.

Pennsylvania. (*Id.* at 17-18, 21.) Plaintiff took possession of the tractor on December 31, 2003. (*Id.* at 20-21.)

As part of his purchase of the tractor, Plaintiff received an engine warranty from Cummins of approximately thirty pages in length. (*See* Pl.'s Resp. Ex. D (Cummins Warranty).) This document limits Plaintiff's remedy to repair or replacement of defective engine parts and disclaims Cummins's responsibility for incidental and consequential damages. (*Id.* at W5-7, W9-12, W15-16, W18.) The document also disclaims Cummins's implied warranties, repeatedly stating that Cummins offers:

> **NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OR OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

(*Id.* at W5, W10, W15, W21, W26 (emphasis in original).)

Plaintiff contends that, almost immediately after he obtained it, the tractor began to exhibit a series of substantial defects, including engine defects. (Am. Compl. ¶ 14.) For instance, despite having only 2031 miles on the odometer, the engine required new thermostats less than thirty days after purchase. (Pl.'s Resp. Ex. B (Repair Invoices) Invoice No. 005-88853.) Beginning in January 2004, Plaintiff sought assistance from Hunter Keystone Peterbilt, which attempted to repair the tractor on more than one occasion. (*Id.* Ex. B.) Cummins, in turn, also attempted multiple repairs. (Def.'s Mot. Ex. G (Cummins Repair Invoices).) Nonetheless, Plaintiff contends that the tractor's defects have persisted to this day. (Am. Compl. ¶ 15.) Indeed, a February 3, 2005 inspection concluded that, while the engine posed no "current drivability concern," engine oil was "still seeping in [the] main cab of the vehicle" and the engine's coolant filter contained "small sand like particles." (Pl.'s Resp. Ex. C (Expert Rep. of Jeffrey Taylor).) Plaintiff asserts that the tractor's myriad of

uncorrected problems have forced it out of service for at least forty days and rendered it worthless. (*See* Am. Compl. ¶¶ 11,18.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2004); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, as here, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. To meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S. at 324. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

Plaintiff asserts claims against Cummins for breach of express and implied warranties and

for negligent repair. (Am. Compl. ¶¶ 19-31.) For these alleged violations, Plaintiff seeks to recover the contract price of the tractor, as well as incidental and consequential damages. (*Id.* ¶ 24.) Cummins has moved for summary judgment on all of these claims, contending that: (1) it has fulfilled the terms of the express engine warranty given to Plaintiff; and (2) Plaintiff is not entitled to any remedies beyond those stated in that warranty. The Court finds that a genuine issue of material fact exists as to whether Cummins fully and adequately honored the terms of the engine warranty. Moreover, the Court finds that there is a genuine issue of material fact regarding whether the engine warranty failed in its essential purpose, thus entitling Plaintiff to incidental and consequential damages. The Court also holds, however, that Cummins properly disclaimed its implied warranties as a matter of law. Accordingly, Cummins's motion for summary judgment is granted in part and denied in part.[2]

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[2] As stated above, this Court previously granted Peterbilt's motion for partial summary judgment and denied Eaton's motion for partial summary judgment. (*See* Mem. & Order of Apr. 11, 2005 (granting Peterbilt's motion); Order of Apr. 14, 2005 (denying Eaton's motion).) Plaintiff observes that these motions contained nearly identical wording and suggests that the Court resolved them differently because of "[P]laintiff's [interim] discovery of controlling case law," which he cited in response to Eaton's motion. (Pl.'s Mem. in Supp. of Resp. at 3.) As Cummins's motion is "nearly identical" to the previous two, Plaintiff implies that it, like Eaton's motion, should be denied in full. (*Id.*)

Plaintiff's proposition is incorrect. The three motions have been analyzed distinctly not because Plaintiff brought new case law to the Court's attention, but because each motion involved a different warranty agreement for a different part of the tractor. For example, although Peterbilt and Eaton both contended that they properly disclaimed their implied warranties, the Court found that Peterbilt's written disclaimer was sufficiently conspicuous while Eaton's was not. *See, e.g.*, 13 PA. CONS. STAT. § 2316(b) (2005) (providing that implied warranties may be disclaimed by seller so long as disclaimer is in writing and conspicuous). Furthermore, Plaintiff has produced different evidence in response to each motion, which has presumably been tailored to the particular behavior of each defendant. (*See, e.g.*, Pl.'s Resp. Ex. C (expert report relied on to oppose Eaton's and Cummins's motions, but not Peterbilt's motion).) Therefore, the Court rejects Plaintiff's suggestion that the "nearly identical" wording of Eaton's and Cummins's motions compels identical results.

A. Fulfillment of the Express Warranty

Cummins argues that Plaintiff's claim for breach of express warranty is moot because the tractor's engine defects have already been remedied at no charge to Plaintiff. Plaintiff, however, has produced evidence that the engine problems persist. (*See* Pl.'s Resp. Ex. C.) Specifically, Plaintiff's expert found that as of February 3, 2005, engine oil was seeping into the truck and the engine's cooling filter contained casting sand. (*Id.*) Under the terms of the engine warranty, Cummins is bound to pay for all parts and labor needed to repair engine defects. (*Id.* Ex. D at W7.) If, as the record suggests, engine defects are still present, then Plaintiff's express warranty claim remains viable. Cummins protests that the supposed defects have not prevented Plaintiff from driving his tractor and points out that, as of December 2004, the tractor had over 111,000 miles on its odometer. (*See id.* Ex. B Invoice No. 002-24588.) Yet, simply because Plaintiff can drive the tractor does not mean that all of its warrantable defects have been remedied, which is the key issue in dispute here. *See, e.g., Ruffin v. Fleetwood Motor Homes of Pa., Inc.*, Civ. A. No. 96-4922, 1997 WL 752000, at *13, 1997 U.S. Dist. LEXIS 19374, at *36-37 (E.D. Pa. Dec. 4, 1997) (denying summary judgment where questions of fact remained as to whether motor home defects had been repaired and whether defendant had complied with terms of written warranty).

Therefore, Cummins's motion is denied as to Plaintiff's claim for breach of express warranty.

B. Incidental and Consequential Damages

Cummins further argues that Plaintiff cannot seek incidental and consequential damages, such as loss of income and attorneys' fees, because the engine warranty explicitly disclaims responsibility for those damages. (*See* Pl.'s Resp. Ex. D at W5-7, W9-12, W15-16, W18.) Under Pennsylvania law, consequential damages may be excluded unless: (1) the exclusion is

unconscionable; or (2) the limited remedy fails of its essential purpose. 13 PA. CONS. STAT. § 2719 (2005); *see also Kruger v. Subaru of Am., Inc.*, 996 F. Supp. 451, 458 (E.D. Pa. 1998) (citations omitted).

1. *Unconscionability*

Cummins's disclaimer of liability for incidental and consequential damages is not unconscionable. An exclusion is unconscionable where: (1) one of the parties to the contract lacked a meaningful choice about whether to accept the provision; and (2) the provision unreasonably favors the other party to the contract. *See Worldwide Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 196 (3d Cir. 1992) (*citing Koval v. Liberty Mut. Ins. Co.*, 531 A.2d 487, 491 (Pa. Super. Ct. 1987)). As this Court has previously held, "the record indicates that Plaintiff was a sophisticated party . . . who understands warranties and is experienced in negotiating contracts." (Mem. & Order of Apr. 11, 2005 at 6-7.) This suggests that Plaintiff did, in fact, possess a "meaningful choice" about whether to accept Cummins's disclaimer. *See Brady*, 973 F.2d at 196. Regardless, there is no doubt that the disclaimer does not "unreasonably favor" Cummins, as it simply limits the scope of Plaintiff's remedies rather than eliminating them entirely. This Court has already observed that such limitations do not unreasonably favor sellers in the automobile industry, who, when drafting warranties, must consider "the latent nature of automobile defects [and] the differences in use and how cars might be driven." (*See* Mem. & Order of Apr. 11, 2005 at 7 (*quoting Hornberger v. Gen. Motors Corp.*, 929 F. Supp. 884, 892 (E.D. Pa. 1996)).)

2. *Failure of Essential Purpose*

Even though Cummins's disclaimer is not unconscionable, it will be rendered inoperative if Plaintiff can prove that Cummins's limited remedy has "failed of its essential purpose." *See*

Hornberger, 929 F. Supp. at 890 (stating that a limited remedy fails of its essential purpose where it deprives either party of the substantial value of the bargain); *see also Earl Brace & Sons v. Ciba-Geigy Corp.*, 708 F. Supp. 708, 711 (W.D. Pa. 1989) (same). In agreements where a buyer's remedies are limited to repair or replacement of defective parts, "the validity of the consequential damage exclusion . . . [should] depend on the effectiveness of the limited remedy; if the limited remedy fails, so [should] the consequential damage exclusion." *Caudhill Seed & Warehouse Co. v. Prophet 21, Inc.*, 123 F. Supp. 2d 826, 832 (E.D. Pa. 2000) (quotation omitted) (predicting how Pennsylvania Supreme Court would rule on this issue). This result is the most logical one, for the remedy of repair or replacement is the "silver bullet" that the buyer receives "[i]n exchange for parting with an arsenal of legal remedies." *Id.* If the limited remedy fails, the "silver bullet turns to dust," leaving the buyer defenseless and at the seller's mercy, unless the buyer is then permitted to seek the full range of damages available under Pennsylvania law. *Id.* at 832-33.

Here, there is a genuine factual dispute about whether Cummins's limited remedy failed of its essential purpose. Under the limited remedy, Cummins has promised to pay for all parts and labor needed to repair defects in the tractor's engine. (Pl.'s Resp. Ex. D at W7.) This Court previously examined an analogous clause in Peterbilt's warranty and, in the absence of any proof that the clause's terms had not been fulfilled, concluded that Peterbilt's limited remedy had not failed. (*See* Mem. & Order of Apr. 11, 2005 at 7.) With respect to Cummins, however, Plaintiff has presented at least some evidence that he did not receive the benefit of his bargain. *See Hornberger*, 929 F. Supp. at 890. Plaintiff's expert's report, viewed in the light most favorable to Plaintiff, suggests that Cummins failed to provide Plaintiff with effective repairs for over a year. (*See* Pl.'s Resp. Ex. C (recounting expert's finding that, as of February 3, 2005, multiple problems with the

engine still existed).) If Cummins, either "intentionally or negligently," has indeed stymied Plaintiff's efforts to take advantage of the remedy that he bargained for, then this remedy has failed in its essential purpose and the damages disclaimer will become ineffective. *Caudhill Seed*, 123 F. Supp. at 833; *see also Barrack v. Kolea*, 651 A.2d 149, 154 (Pa. Super. Ct. 1994) (holding exclusive remedy failed in essential purpose where builder had not repaired house within reasonable period of time and purchasers could reasonably believe builder had repudiated remedy obligations).

Therefore, Cummins's motion is denied as to Plaintiff's claim for incidental and consequential damages.

C. Disclaimer of Implied Warranties

Finally, Cummins contends that Plaintiff's claim for breach of implied warranties cannot be sustained because Cummins has disclaimed those warranties. (*See* Pl.'s Resp. Ex. D at W5, W10, W15, W21, W26.) Implied warranties of merchantability and fitness for a particular purpose arise by operation of law. *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1105 (3d Cir. 1992). These implied warranties, however, may be disclaimed by the seller so long as the disclaimer is in writing and conspicuous. 13 PA. CONS. STAT. § 2316(b) (2005). Conspicuousness, which is a question of law for the court, is decided by whether "a reasonable person against whom the modification or exclusion is to operate ought to have noticed it." *Hornberger*, 929 F. Supp. at 889 (quotation and citation omitted). In determining whether a reasonable person should have noticed an implied warranty disclaimer, courts may consider: (1) the placement of the disclaimer in the document; (2) the size of the disclaimer's print; and (3) whether the disclaimer was highlighted or called to the reader's attention by being in a different type, style or color. *Id.*; *see also Calabria, D.D.S. v. Newmar Corp.*, Civ. A. No. 98-4026, 1999 WL 98574, at *1, 1999 U.S. Dist. LEXIS 1933,

at *4 (E.D. Pa. Feb. 26, 1999).

The engine warranty contains a written disclaimer of Cummins's implied warranties which is conspicuous as a matter of law. Although the engine warranty is approximately thirty pages in length, the disclaimer is obvious because it is set forth on at least five of those pages. (*See* Pl.'s Resp. Ex. D at W5, W10, W15, W21, W26.) Moreover, each time the disclaimer appears, it is in bold type, capitalized, and set apart from the surrounding text. (*Id.*) The Court therefore holds that a reasonable person should have noticed this clause and that, accordingly, Cummins's implied warranties have been properly disclaimed. *See, e.g.*, *Calabria*, 1999 WL 98574, at *2 (holding disclaimer of implied warranty conspicuous when set off in bold and block capital letters); *St. Paul Mercury Ins. Co. v. ADT Sec. Sys., Inc.*, Civ. A. No. 96-7526, 1997 WL 535184, at *3, 1997 U.S. Dist. LEXIS, at *8 (E.D. Pa. Aug. 5, 1997) (same).

Therefore, Cummins's motion is granted as to Plaintiff's claim for breach of implied warranties.

IV. CONCLUSION

For the reasons stated above, Cummins's motion for summary judgment is granted in part and denied in part. An appropriate Order follows.

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v.	:	
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PETERBILT MOTORS	:	
COMPANY, et al.,	:	**No. 04-3628**
Defendants.	:	

ORDER

AND NOW, this **27th** day of **May, 2005**, upon consideration of Defendant Cummins, Inc.'s ("Cummins") Motion for Summary Judgment, Plaintiff's response thereto, Cummins's reply thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Cummins's Motion to Submit a Reply (Document No. 34) is **GRANTED**.

2. Cummins's Motion for Summary Judgment (Document No. 22) is **GRANTED in part** and **DENIED in part**, as follows:

   a. The motion is **GRANTED** as to Plaintiff's claim against Cummins for breach of implied warranties. Accordingly, this claim is **DISMISSED**.[1]

   b. In all other respects, the motion is **DENIED**.

BY THE COURT:

_____
Berle M. Schiller, J.

[1] To date, the claims that have been dismissed in this action are: (1) Plaintiff's claims against Peterbilt for incidental and consequential damages, breach of implied warranties, and attorneys fees'; and (2) Plaintiff's claim against Cummins for breach of implied warranties.