IP 99-1434-C T/K Columbus Container v. Logility
Judge John D. Tinder Signed on 2/7/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COLUMBUS CONTAINER, INC, Plaintiff, vs. LOGILITY INC (COUNTERCLAIM 10/20/99), Defendant.	)	CAUSE NO. IP99-1434-C-T/?

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COLUMBUS CONTAINER, INC.,	)	
	)	
Plaintiff,	)	
	)	IP 99-1434-C-T/K
vs.	)	
	)	
LOGILITY, INC.,	)	
	)	
Defendant.	)	

ENTRY ON PENDING MOTIONS[1]

Plaintiff, Columbus Container, Inc. ("Columbus Container"), sued Defendant, Logility, Inc. ("Logility"), in Indiana state court alleging breach of contract. Logility removed the suit to this court. Following removal, Logility asserted counterclaims against Columbus Container for payment on open account and breach of contract. Columbus Container subsequently amended its complaint to allege fraud in the inducement in addition to breach of contract. Logility filed a motion for summary judgment on Columbus Container's claims and its counter-claims. Related motions followed. The court decides as follows.

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

I. Motion To Strike Affidavit

Columbus Container moves to strike the affidavit of Kerry Naliwajka submitted by Logility to support its motion for summary judgment. Logility opposes the motion.

Though the affidavit is replete with conclusions lacking in factual bases and legal conclusions, with one exception, none of the statements in the affidavit are material to the summary judgment motion, and the court need not consider them in order to resolve that motion. The exception is the statement that Columbus Container accepted the WarehousePRO software delivered by Logility and made no attempt to return it until December 29, 1998. (Naliwajka Aff. ¶ 18.) Columbus Container's Rule 56.1 Statement of Additional Material Facts ("AMF") asserts that it accepted delivery of WarehousePRO (AMF 215) and it attempted on December 29, 1998, to return the software, documentation, hardware and related materials to Logility (AMF 219). So, Naliwajka's assertion is essentially uncontested. Therefore, Columbus Container's Motion To Strike Affidavit Of Kerry Naliwajka is DENIED.

II. Motion To Strike Statement Of Material Facts

Columbus Container moves to strike Logility's Statement of Material Facts ("SMF") for noncompliance with Local Rule 56.1. Logility opposes this motion. Though Logility's SMF does not substantially comply with Local Rule 56.1, and the court is very sympathetic to the inordinate burden imposed on Columbus Container in responding to the SMF, the court declines to strike the SMF. Whether to strictly enforce Local Rule 56.1 is within the

court's discretion, and the court may excuse failure to comply strictly when in the interests of justice or for good cause. S.D. Ind. L.R. 56.1(k).

The court believes that the failure to comply should be excused in the instant case as the *material* facts are not many and are not in dispute. Most of the factual assertions in the SMF are not material and can and should be disregarded. Columbus Container does not dispute the terms of the agreements entered into with Logility. It does not dispute that it did not comply with the notice of default provision. Nor does it dispute that it has not paid Logility the outstanding balance on the account as claimed by Logility. Finally, Columbus Container does not dispute that the alleged misrepresentation was made by Logility in Indiana, the agreements were executed by the parties in Indiana, performance was to occur in Indiana, and Columbus Container's alleged damages occurred in Indiana.

Moreover, many of the factual assertions in the SMF (both material and immaterial) are either admitted by Columbus Container in its Response to Statement of Material Facts ("RSMF") (*see*, *e.g.*, RSMF 1-9, 12-13, 15-17, 19-24, 30, 31-33, 36-43, 45-46, 48, 55, 64-72, 73, 75-84, 86-91, 93-95, 97-98, 104-105, 111, 115, 117-118, 120, 128, 131, 134-139, 142-143, 148-151, 153-154, 156-159, 161, 164, 167, 172, 174, 176-177, 182, 187), or restated by Columbus Container in its AMF (*see*, *e.g.*, SMF 191-93, 210, 215, 219.) Thus, striking and disregarding such statements in the SMF would not accomplish much. Instead, the court will address, where necessary, Columbus Container's various objections to material factual assertions in the SMF. The motion to strike the SMF is therefore denied.

III. Motion For Summary Judgment

Logility moves for summary judgment on Columbus Container's claims for fraud in the inducement and breach of contract as well as on its counter claims on open account and breach of contract. Columbus Container opposes the motion.

A. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the initial burden of proving the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. If the movant discharges this burden, then the nonmovant cannot rest on bare allegations but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pugh v. City of Attica, Ind.*, 259 F.3d 619, 625 (7th Cir. 2001). A genuine issue exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue of material fact, the court must construe all facts in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.* at 255.

Affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Fed. R. Civ. P. 56(e); Fed. R. Evid. 602; *see*, *e.g.*, *Drake v. Minn. Min. & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998). Conclusory statements in affidavits are insufficient to create genuine issues. *See*, *e.g.*, *DeLoach v. Infinity Broad.*, 164 F.3d 398, 402 (7th Cir. 1999) ("the nonmoving party is not entitled to rely on conclusory allegations, unsupported by the record"). Inferences and opinions must be substantiated by specific facts. *See*, *e.g.*, *Drake*, 134 F.3d at 887 (citation omitted).

B. Facts[2]

On April 30, 1998, Columbus Container and Logility entered into two agreements, the first of which is entitled "Logility Inc. Basic License Agreement Number 4677," including Exhibit A to that agreement, entitled "Exhibit 'A' Software System, Environment and Location" (the "Basic License Agreement") (Dep. Excerpts, Exs. & Case Law App. Logility's Mot. Summ. J. ("Def.'s App."), Ex. 18), and the second of which is entitled "Logility, Inc., Implementation Assistance Amendment Number One to Basic License Agreement Number 4677 Customer: Columbus Container, Inc." (the "Implementation Assistance Amendment") (*Id.*, Ex. 19.) The Basic License Agreement and Implementation Assistance Amendment were executed by the parties in Indiana and were to be performed in Indiana.

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[2] These facts are not disputed unless otherwise noted. Additional facts may be set forth in the Discussion section as necessary. That section also will address various disputes about factual submissions proffered by the parties.

Pursuant to the terms of the Basic License Agreement, Columbus Container agreed to license certain of Logility's Standard Application Software Systems, consisting of computer programs and documentation (collectively the "System") designated on Exhibit "A" to the Basic License Agreement. The operating system and version of the software designated on Exhibit "A" was WarehousePro Version 3.0 for Windows NT. (Def.'s App., Ex. 18, Ex. "A".) Pursuant to the terms of the Basic License Agreement, Logility was to deliver the System to Columbus Container within thirty days from the Effective Date of April 30, 1998 (the "Delivery Date"). (*Id.*, Ex. 18, at 1 & 2, ¶ 4.) As part of the Basic License Agreement, Columbus Container also agreed to pay Logility for three years of Continuing Support Services for the System licensed by Columbus Container, following an Initial Support Services period of twelve months from the Delivery Date (thirty days from April 30, 1998). (*Id.*, Ex. 18, ¶¶ 5 & 6.) The annual cost for such Continuing Support Services was twelve percent of the Total License Fee for the System ($280,000) or $33,600.00 per annum. (*Id.*, ¶ 6 & Ex. "A".) Columbus Container agreed to pay Logility annually in advance for these services. (*Id.*, ¶ 6.)

Paragraph 13 of the Basic License Agreement, entitled "DEFAULTS" states as follows:

> Neither party shall be in breach of this Agreement because of any default in any term or condition herein, unless the other party shall first give the defaulting party notice of such default, and such defaulting party shall fail to cure its default within sixty (60) days from its receipt of notice or shall fail to submit a mutually acceptable schedule to cure the default.

(Def.'s App., Ex. 18, ¶ 13.)[3] The Basic License Agreement requires that all notices be in writing (*id.* ¶ 16(c)), and states that it "cannot be modified or changed except by a writing executed by both parties." (Def.'s App., Ex. 18, ¶ 16(b).) The parties never executed any writing purporting to modify or change the Basic License Agreement. The Basic License Agreement further states that it "shall be governed by and construed in accordance with the laws of the State of Georgia." (*Id.* ¶ 16(d).)

As part of the Implementation Assistance Amendment, Columbus Container agreed to pay Logility implementation consulting service fees, consisting of consulting fees and expenses for assisting Columbus Container in setting up the System and training Columbus Container's staff to operate the System. (Def.'s App. Ex., 19 at 1.) The expenses which Columbus Container agreed to pay included travel costs, meals and living expenses incurred by Logility. (*Id.* at 2.) The terms and conditions of the Basic License Agreement are incorporated into the Implementation Assistance Amendment. (*Id.* at 1.)

Before execution of the parties' agreements and during sales meetings at Columbus Container's facilities in Indiana, Logility explained to Columbus Container that the Windows NT version of WarehousePRO was not quite finished and that the currently available version of WarehousePRO had some functionalities still operating on the OS/2 system. Bob Combs, Columbus Container's chief information officer at the time who was

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[3] Logility first paraphrases and then quotes this paragraph in its SMF 76. Columbus Container objects on the grounds that the SMF is not a concise statement of fact. Nevertheless, it has admitted SMF 76 and does not dispute that the Basic License Agreement contains this notice of default provision. (RSMF No. 76.)

present at the sales meeting, was opposed to the OS/2 system. Logility's sales team represented that the full, Windows NT version was "almost" finished (Mark Foster Dep. at 263) and explained that Logility would provide Columbus Container a full, Windows NT version once it was available. Columbus Container agreed to this arrangement.

Logility delivered to Columbus Container and installed a copy of WarehousePRO and the System Documentation. Columbus Container accepted delivery and installation of the OS/2 version of WarehousePro.[4] Logility provided consulting services and training to Columbus Container, thus incurring expenses. Columbus Container has refused to pay certain amounts invoiced on its account with Logility.

On December 29, 1998, Bob Haddad, Jr., then Columbus Container's Marketing Director, wrote a letter to Mike Edenfield, Logility's President and CEO, announcing that Columbus Container was terminating "the contract with Logility," (Def.'s App., Ex. 20 at 2), thus attempting to rescind both the Basic License Agreement and the Implementation Assistance Amendment. The letter stated Columbus Container's intent to return the software and all related documentation to Logility. In identifying Columbus Container's reasons for termination, the letter does not mention the failure to deliver the Windows NT version of WarehousePRO. Prior to terminating the agreements, Columbus Container failed to provide the required written notice specifying Logility's alleged default and a sixty

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[4] These facts are asserted in SMF 90 and 91. Though Columbus Container interposes objections (RSMF 90 and 91), it also has admitted these assertions. (*Id.*; *see also* AMF 215.) They are accepted as true.

day period following the notice, within which Logility would have had the opportunity to cure the alleged default.

Kerry Naliwajka, Logility's Director of Implementation and Customer Support Services, responded to Mr. Haddad's December 29 letter by letter dated January 13, 1999, in which he affirmed Logility's commitment to completing the project with Columbus Container. (Def.'s App., Ex. 21.) Columbus Container rejected the offer to complete the implementation. (*Id.*, Ex. 22.) Logility remains ready, willing, and able to completing the project implementation.

The Windows NT version of WarehousePro was not released until at least October 1, 1999.[5] Nothing in the record suggests that Logility would not have provided this version to Columbus Container had it not terminated the contracts with Logility.[6]

Columbus Container made payments totaling more than $347,000 to Logility. Logility claims that the amount of $155,050 remains due and owing under the Basic

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[5] Columbus Container objects to SMF 67 which asserts that Logility completed a full Windows NT version of WarehousePRO and would have provided it to Columbus Container had it not terminated the contract, on grounds of admissibility and failure to comply with S.D. Ind. L.R. 56.1(f)(2). Even if SMF 67 were stricken and disregarded, Columbus Container submits as its AMF 204 that the full, Windows NT version of WarehousePRO was not released until at least October 1, 1999. Its assertion is substantiated by specific citation to record evidence. Thus, it is undisputed that Logility did complete and release a full, Windows NT version of WarehousePRO.

[6] Logility cites to the Naliwajka affidavit to establish that it would have provided the full Windows NT version to Columbus Container had it not terminated the contracts with Logility. However, Naliwajka's testimony on what would have happened is speculation and fails to establish a fact.

License Agreement and the Implementation Assistance Amendment. Pursuant to Paragraph 2 of the Basic License Agreement, all invoices rendered under that agreement are to be paid within thirty days of the invoice date unless otherwise stated. The Paragraph states in relevant part:

> Any amount payable pursuant to this Agreement and not paid within thirty (30) days of the date of the invoice for said amount shall be delinquent and shall bear interest at the rate of one and one half percent (1-1/2%) (or the maximum legal rate if less) for each month or portion thereof it is delinquent, Customer shall pay all such interest, as well as all costs and reasonable attorneys' fees incurred by Company in the collection of such delinquent sums.

(Def.'s App., Ex. 18, ¶ 2.) This provision is incorporated into the Implementation Assistance Agreement.

Columbus Container commenced this breach of contract action against Logility in the Bartholomew Superior Court, Indiana. Logility timely removed this action to this court. Logility subsequently counterclaimed for payment on open account in Count I of its Counterclaim and for breach of contract in Count II of its Counterclaim. Columbus Container then filed an Amended Complaint which alleges breach of contract in Count I and fraud in the inducement in Count II.

C. Columbus Container's Breach of Contract Claim

Columbus Container alleges breach of contract against Logility in Count I of the Amended Complaint. Logility contends that it should be granted summary judgment on the

breach of contract claim because Columbus Container failed to comply with the notice of default provisions of the agreements into which the parties entered. Columbus Container concedes that it failed to comply with the notice of default provisions, but argues its failure does not bar its breach of contract claim because cure was impossible.

As stated, the Basic License Agreement provides that it "shall be governed by and construed in accordance with the laws of the State of Georgia." This provision was incorporated into the Implementation Assistance Amendment, and the parties agree that Georgia law governs the breach of contract claims. Thus, the court looks to decisions applying Georgia law. Neither *Ali v. World Omni Financial Corp.*, 522 S.E.2d 525 (Ga. Ct. App. 1999), nor *Berryhill v. State Farm Fire & Casualty Co.*, 329 S.E.2d 189 (Ga. Ct. App. 1985), cited in Logility's opening brief, refers to a contractual notice of default provision, but there is ample authority discussing the validity and enforceability of notice of default provisions under Georgia law. *See*, *e.g.*, *In re Colony Square Co.*, 843 F.2d 479, 481 (11th Cir. 1988) (holding creditor not liable on breach of contract claim under Georgia law where debtor failed to comply with notice and cure provisions of lease); *AHC Physicians Corp. v. Dulock*, 504 S.E.2d 464, 465 (Ga. Ct. App. 1998) (stating that notice provisions in contracts "must be reasonably construed" and finding party claiming breach of contract complied with notice and cure provision); *Orkin Exterminating Co. v. Stevens*, 203 S.E.2d 587, 593 (Ga. Ct. App. 1973) ("The failure to give notice as required . . . is an independent bar to the maintenance of a successful cause of action on the contract.").

In re Colony Square is instructive. Defendant Prudential Insurance Company took possession of a hotel, shopping and office complex of the plaintiff, Colony Square Company, under a lease as part of a bankruptcy plan of reorganization. Thereafter, Colony Square brought a breach of contract claim against Prudential alleging mismanagement of the complex. 843 F.2d at 480. Prudential moved for summary judgment, and the motion was granted. The district court, applying Georgia law, held that the breach of contract claim was barred by the notice and cure provisions of the lease which required Colony Square to give Prudential written notice of any alleged default and thirty days to cure the default. *Id.* at 480-81. On appeal, the Eleventh Circuit affirmed, stating:

> Contracts which set forth the manner in which a party must exercise a remedy in the event of a default must be strictly adhered to. If a party does not comply with the requirements of the contract's default clause, it forfeits its rights under the clause. Accordingly, when a default clause contains a notice provision, it must be strictly followed, and summary judgment is warranted if notice is not given.

Id. at 481 (citations omitted). The court held that Colony Square's breach of contract action was barred as a matter of law because it failed to comply with the conditions precedent to a breach of contract action and failed to present evidence that is noncompliance should be excused. *Id.* Similarly, in *Stevens*, the court said that notice provisions are valid under Georgia law and held that the plaintiff's failure to comply with notice provisions of the contract barred his breach of contract action. 203 S.E.2d at 593.

That Columbus Container failed to give Logility the written notice of the alleged default and an opportunity to cure required under the Basic License Agreement is undisputed. Columbus Container argues that under the circumstances, the limited remedy in the Basic License Agreement failed of its purpose and it may look to the commercial code for a remedy (revocation of acceptance and rescission), citing *Advanced Computer Sales, Inc. v. Sizemore*, 366 S.E.2d 303 (Ga. Ct. App. 1988). Columbus Container maintains that Logility was required to deliver a full, Windows NT version of WarehousePRO within thirty days of the effective date of the agreement, failed to do so, and the software system was not completed until at least October 1999. Columbus Container thus argues that no amount of notice would have been sufficient to allow Logility to cure its default. It argues further that even if it had given Logility notice of default on December 29, 1998, it would have been impossible for Logility to cure its default.

There are several problems with these arguments. First, the reliance on *Advanced Computer Sales* is misplaced as the case fails to even mention a notice of default provision. Instead, it involved an express waiver of warranty provision. 366 S.E.2d at 304. More importantly, Columbus Container has presented no evidence to establish that the notice of default provision failed of its purpose. The purpose of a notice of default provision is "not difficult to fathom." *AHC Physicians Corp*, 504 S.E.2d at 465 (quotation omitted). One purpose is to notify a defaulting party of the default and give that party the opportunity to cure the default. Other purposes, though, are to give the defaulting party a chance to investigate the claimed default, minimize the other party's damages or reach a

compromise of a potential claim for breach of contract. *Cf. BDI Distribs., Inc. v. Beaver Computer Corp.*, 501 S.E.2d 839, 841 (Ga. Ct. App. 1998) (discussing the purpose of the notice requirement of Georgia's Uniform Commercial Code, O.C.G.A. § 11-2-607(3)(a), which provides that where a buyer has accepted goods, he must within a reasonable time after discovering any breach notify the seller of breach or be barred from any remedy).

Columbus Container's claim that cure was impossible is based entirely on speculation, not fact. Though the Windows NT version was not rolled out until at least October 1999, no one will ever know what would have happened had Columbus Container given Logility the notice and opportunity to cure, as it was required and agreed to do under the terms of the Basic License Agreement and incorporated into the Implementation Assistance Amendment. Columbus Container seems to suggest that the only cure was delivery of Windows NT version within thirty days of April 30, 1998, and because that time period had passed, cure was an impossibility. The problem with this argument is that Columbus Container cites no legal authority to support its implicit assertion that the sole purpose of the notice of default provision was to allow the defaulting party to cure. As stated, the provision serves other purposes as well, and Columbus Container has offered no evidence that these purposes could not have been served had it complied with the notice of default provision.

The court holds that since Columbus Container failed to comply with the notice and cure provision of the Basic License Agreement and the Implementation Assistance Amendment and has not come forward with any evidence to establish that its compliance

would have been futile, Columbus Container's breach of contract claim is barred as a matter of law.[7] Therefore, Logility's motion for summary judgment on Columbus Container's breach of contract claim should be granted.

D. Columbus Container's Claim for Fraud in the Inducement

Columbus Container alleges fraud in the inducement in Count II of its Amended Complaint. Logility seeks summary judgment on this claim.

The first issue the court must decide is what substantive law provides the rule of decision on this tort claim. Logility apparently believes Georgia law governs, since it cites a Georgia case for the elements of a fraud claim. Columbus Container maintains that Indiana law should apply. As this court sits in diversity, it must apply the choice-of-law rules of the forum state, Indiana. *See Land v. Yamaha Motor Corp.*, 272 F.3d 514, 516 (7th Cir. 2001). Under Indiana's choice-of-law rules, if the place of the injury is not insignificant, then the law of the place where the injury occurred applies. *Id.*; *Cox by Zick v. Nichols*, 690 N.E.2d 750, 752 (Ind. Ct. App. 1998). Here, the place of the injury is not insignificant and is Indiana. Most of the representations that Logility made to Columbus Container about its product were made in Indiana, performance was to occur in Indiana, and Columbus Container's alleged damages occurred in Indiana. Thus, the court applies Indiana substantive law to the fraud claim.

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[7] This conclusion obviates the need to consider the other grounds on which Logility moves for summary judgment on the breach of contract claim.

Logility argues that the fraud allegation is pled with insufficient particularity and, therefore, fails to satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Logility is right. Rule 9(b) provides that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). Under Seventh Circuit case law: Rule 9(b)'s "reference to 'circumstances' . . . requires 'the plaintiff to state the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'" *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994) (quoting *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992) (quotation omitted)).

Were the court inclined to overlook the Amended Complaint's failed compliance with Rule 9(b), Columbus Container nevertheless has not even in its summary judgment papers identified with particularity the person alleged to have made any misrepresentation. Instead, Columbus Container claims that "Logility's sales team" made a material misrepresentation. (Answer Br. at 5 (citing Foster Dep. at 263); *see also*, *e.g.*, *id.* at 6 ("The representation of Logility's sales team"); *id.* at 7 ("the representation of Logility's sales team".)) Even if Columbus Container was unable to plead fraud with the specificity required at the time it amended its Complaint, surely it should be able to offer specifics as to the individual alleged to have made any representation at this summary judgment stage, following the extensive discovery exemplified by the volume of the parties' evidentiary submissions, including interrogatories, production of documents, and the depositions of

twenty individuals. But it has not. A ruling on Logility's summary judgment motion as to the fraudulent inducement claim, however, need not be based on this failure.

Columbus Container faces another, more substantive problem. It has not come forward with any evidence of actionable fraud. Under Indiana law, the elements of actual fraud are:

> 1) a false statement of past or existing material fact 2) made with knowledge it was false or made recklessly without knowledge of its truth or falsity 3) made for the purpose of inducing the other party to act upon it 4) and upon which the other party did justifiably rely and act 5) proximately resulting in injury to the other party.

Baxter v. I.S.T.A. Ins. Trust, 749 N.E.2d 47, 52 (Ind. Ct. App. 2001) (quoting *Epperly v. Johnson*, 734 N.E.2d 1066, 1073 (Ind. Ct. App. 2000) (citing *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996)).

Columbus Container maintains that Logility's sales team made representations of existing fact. However, the alleged representation is of a future event rather than a present or past existing fact. The recent case of *Taylor Investment Corp. v. Weil*, 169 F. Supp. 2d 1046 (D. Minn. 2001), provides guidance because of the striking similarity between its facts and those in the instant case. The plaintiff, Taylor Investment ("Taylor") contracted with the defendant, Construction Management and Consulting, Inc. ("CMAC") on December 8, 1995, for a package of computer software, hardware and services. *Id.* at 1052. A "core component" of the package presented by CMAC to Taylor during the bidding process was a newly developed Microsoft Windows-compatible software product

called “StarBuilder.” StarBuilder was a Windows-based version of a Microsoft DOS-based product called “CS2000.” When CMAC’s package was presented to Taylor, CS2000 was in use by other customers; StarBuilder was still in the developmental stages. CMAC’s president, Weil, used CS2000 to market StarBuilder to Taylor and demonstrate its expected capabilities. Weil informed Taylor that StarBuilder’s development was unfinished, and Taylor was aware when it signed the contract in December 1995 that the development of StarBuilder was incomplete. Weil represented to Taylor that StarBuilder was “virtually” complete and would be available in January 1996. He also indicated that StarBuilder was expected to be as reliable as CS2000. *Id.* at 1052. CMAC installed StarBuilder in 1996 and encountered serious defects in the software. StarBuilder was not released until sometime after the end of 1996. *Id.* at 1062 n.8.

Taylor sued alleging fraud under Minnesota common law. *Id.* at 1053. Taylor’s fraud claims were based on the representations that “StarBuilder was ‘virtually complete,’” *id.* at 1063, “StarBuilder would be available by January 1996,” *id.* and StarBuilder was expected to be as reliable as CS2000. *Id.* The defendants moved for summary judgment on the fraud claims. *Id.* at 1053. Under Minnesota common law fraud, as under Indiana law, the alleged representation must be of a past or present fact. *Id.* at 1061 (quoting *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 289 (Minn. 1992)). The defendants contended that the representations relied on by Taylor were “mere predictions” that could not serve as the basis for fraud. *Id.* at 1062. The court agreed, concluding that “All three of these statements constitute representations of expectations as to the outcome of future events,

rather than statements of past or present fact." *Id.* at 1063. The court held that the statements of future expectations could not support the fraud claims. *Id.*

The Georgia court of appeals reached the same conclusion where a fraud was based on a similar representation in *Shivers v. Sweda International, Inc.*, 247 S.E.2d 576 (Ga. Ct. App. 1978).[8] In that case, the plaintiff alleged that he was induced to buy a computer from the defendant based on defendant's promises, including that software would be available for the computer by a particular time after purchase. *Id.* at 576. The plaintiff testified that he understood at the time the representation was made that the defendant could not and did not guarantee the availability of the software by a particular time and the proposed time was only a "target" date. *Id.* at 577. The court held that the representation was not actionable fraud because it was a representation as to a future event. *Id.*[9]

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[8] The court cites this opinion not because Georgia law controls, Indiana's does; but rather, because of the factual similarity in the claimed fraudulent representations. This opinion is not a binding precedent but it is persuasive. Thus, the differences between Georgia and Indiana law on fraud are not so great as to negate the wisdom of the reasoning used by the Georgia court in analyzing the problem before it.

[9] Georgia law makes an exception to the general rule that such representations are not actionable where the representation is made with the present intent not to perform or present knowledge that it would not be fulfilled. *Id.* As stated, Indiana law, rather than Georgia law, governs the fraud claim in this action. And, under Indiana law, as Columbus Container points out in footnote 1 of its Answer Brief, "actionable fraud cannot be predicated upon a promise to do a thing in the future, even if the promisor has no intention of fulfilling his obligation." *Whiteco Properties v. Thielbar*, 467 N.E.2d 433, 436 (Ind. Ct. App. 1984). Even if Georgia law were applicable, Columbus Container cannot show that any representations by "Logility's sales team" was made with the present intent not to perform or knowledge that it would not be fulfilled, particularly where Columbus Container

(continued...)

As stated, the facts of *Taylor* are strikingly similar to those of the instant case. Columbus Container and Logility entered into a contract for computer software and services. Just as StarBuilder was a core component of the package offered to Taylor, the availability of a Windows NT version was of great importance to Columbus Container–Mr. Combs, Columbus Container's Chief Information Officer at the time, testified that had Logility not promised an NT platform he would have "run away from" the OS/2 platform (Combs Dep. at 17); Roland Bray, Columbus Container's former Director of Warehousing and Logistics, testified that he would not have recommended the purchase of WarehousePro had he known that the Windows NT version would be unavailable (Second Bray Dep. at 80.) Furthermore, at the time the parties entered into the contract, Windows NT was not yet finished, just as StarBuilder was still in the developmental stages. And, Columbus Container, like Taylor, knew at the time of contracting that Windows NT version was not yet finished. Viewing the facts in the light most favorable to Columbus Container, Logility's sales team represented that the Windows NT version was "almost" finished; Bobby Haddad, Jr. and Roland Bray understood that the Windows NT version would be delivered within the thirty days called for in the contracts. Similarly, CMAC had represented that StarBuilder was virtually complete and would be available in about one month. Like StarBuilder, the Windows NT version was not released until some time well afterward. As in *Taylor* and *Shivers*, the alleged representations of Logility's sales team constitute representations of the expectation that the Windows NT version of

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[9](...continued)
has failed to identify who on the sales team made the representations.

WarehousePRO would be available in the future, rather than of past or existing facts. The court therefore concludes that such representations are not actionable under Indiana law. As a result, summary judgment must be granted in favor of Logility on Columbus Container's fraud claim, too.

E. Logility's Counter-Claims on Open Account and Breach of Contract

Logility has counterclaimed against Columbus Container for payment on its open commercial account and for breach of contract. Logility seeks summary judgment on this counterclaim.

As stated, by letter dated December 29, 1998, Columbus Container terminated and attempted to rescind the Basic License Agreement and Implementing Assistance Amendment, but did not comply with the notice of default provision. Because of Columbus Container's failure of compliance with the notice of default provision, a condition precedent to a breach of contract action, its attempted rescission and repudiation of the Basic License Agreement and Implementing Assistance Amendment constituted an anticipatory breach of those agreements. *See McLeod v. McLatcher*, 410 S.E.2d 144, 145-46 (Ga. Ct. App. 1991) (holding real estate buyer's attempt to rescind contract was ineffective and his repudiation constituted anticipatory breach where he failed to substantially comply with contract). The uncontradicted evidence establishes that Columbus Container has refused to pay Logility $155,050 in amounts provided for under the Basic License Agreement and

the Implementation Assistance Amendment.[10] Specifically, it has failed to pay Logility the following which have been invoiced by Logility (1) $28,000 for software license fees due under the Basic License Agreement;[11] (2) $33,600 for the first year's continuing support services under the Basic License Agreement;[12] and (3) $26,250 for Implementation Service Fees due for consulting services Logility provided to Columbus Container under the Implementation Assistance Amendment.[13] Pursuant to Paragraph 2 of the Basic

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[10] Columbus Container objects to this assertion in SMF 179, which assertion is supported by citation to the affidavit of Bill Whalen, the credit manager for Logility, at paragraphs 3 to 6. Columbus Container admits it has not paid the amounts demanded by Logility, but denies that the amounts are due. The court understands this denial to be based on Columbus Container's claim that Logility breached their contracts, which claim is barred by Columbus Container's noncompliance with the notice of default provision. Furthermore, the attempted rescission and repudiation by Columbus Container constituted a breach of the parties' agreements. Thus, its objection and denial are overruled.

[11] This factual assertion is found in SMF 180 and substantiated by citation to paragraph 3 and Exhibit A to the affidavit of Bill Whalen. Columbus Container admits it has not paid the amount demanded by Logility, but denies that the amount is due. The objection and denial are overruled, see note 10 *supra*. Columbus Container cites no record evidence to refute the evidence that it has been invoiced for these fees.

[12] Again, Columbus Container objects to the assertion in SMF 181 that it has failed to pay continuing support services to Logility, as required by the Basic License Agreement. However, it admits it has not paid the amounts demanded by Logility and admits the assertion in SMF 182 that Logility has invoiced it for the first year's continuing support services. SMF 181 and 182 are substantiated by citation to paragraph 4 of and Exhibit B to Mr. Whalen's affidavit. The court understands Columbus Container's objection to be to the language "as required by the Basic License Agreement" in SMF 181. The objection is overruled, see note 10 *supra*. Columbus Container cites no record evidence to refute the evidence that it has been invoiced for these fees.

[13] Once again, Columbus Container objects to this assertion in SMF 184, which is supported by paragraph 6 of and Exhibit C to Mr. Whalen's affidavit. Though it admits it has not paid the amounts demanded by Logility, it denies the amounts are due. The objection and denial are overruled, see note 10 *supra*. Columbus Container cites no

(continued...)

License Agreement, which is incorporated into the Implementation Assistance Amendment, these amounts bear interest at the rate of one and one half percent (or the maximum legal rate if less) per month commencing from the date thirty days after the invoice date for each service.[14] In addition, pursuant to Paragraph 2, Columbus Container is obligated to pay Logility's costs and reasonable attorney's fees in collecting these amounts. The court finds that Logility should be granted summary judgment on its claim for payment on open account.

As for Logility's breach of contract counterclaim, the uncontradicted evidence establishes that pursuant to the terms of the Basic License Agreement, Columbus Container agreed to pay Logility $33,600 per year for two additional years of Continuing Support Services; these amounts remain unpaid;[15] Columbus Container repudiated the agreements before Logility could perform these services. Logility argues that interest is due on these amounts for the final two years, but under the terms of the agreements, the

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[13](...continued)
record evidence to refute the evidence that it has been invoiced for these fees.

[14] Logility's reply brief states the amounts of accrued interest as of the date of the brief's filing, March 15, 2001. The court does not attempt to calculate the accrued interest from that date forward, but leaves the resolution of the amount of interest due to a later date.

[15] SMF 183 states that the Basic License Agreement calls for Columbus Container to pay two more years of continuing support services at $33,600 per year and that those amounts remain unpaid. Paragraph 5 of Mr. Whalen's affidavit provides evidentiary support for these assertions. In a similar vein, Columbus Container objects to SMF 183, but admits it has not paid the amounts demanded by Logility. The court takes Columbus Container's objection to be that the amounts were due. The objection is overruled, see note 10 *supra.*

one and one-half percent interest was due on amounts not paid within thirty days of the date of invoice. The record does not show that these amounts were invoiced to Columbus Container. Thus, it appears that the contractual interest should not be assessed on these amounts.

Had Columbus Container argued that Logility's failure to comply with the notice of default provision bars its counterclaim for breach of contract, its argument would be to no avail. A party's failure to comply with a notice and cure provision may be excused on the ground of futility. *See Alliance Metals, Inc. v. Hinely Indus., Inc.*, 222 F.3d 895, 906 (11th Cir. 2000) (citing cases). In this sense, the notice of default would have been pointless because the other party already had repudiated the contract. It is undisputed that by letter dated December 29, 1998, Columbus Container terminated the contracts with Logility. Requiring Logility to give written notice to Columbus Container after Columbus Container repudiated the contracts would be a futile exercise. In any event, it is noted that in response to the December 29 letter, Logility affirmed its commitment to Columbus Container, but Columbus Container rejected the offer to complete the project implementation. The court finds that Logility should be granted summary judgment on its breach of contract counterclaim.

IV. Conclusion

For the foregoing reasons, the court DENIES Columbus Container's motion to strike the affidavit of Kerry Naliwajka, DENIES Columbus Container's motion to strike

Logility's Statement of Material Facts, and finds that Logility's motion for summary judgment should be GRANTED on Columbus Container's claims and Logility's counterclaims. Because matters regarding Logility's costs and reasonable attorney's fees as well as accrued interest remain, judgment will not be entered at this time.

This matter will be referred to the Magistrate Judge for the setting of a schedule for disposition of the issues remaining for resolution before judgment can be entered, namely, the amount of costs, interest, and attorneys' fees to be awarded.

ALL OF WHICH IS ENTERED this 7th day of February 2002.

John Daniel Tinder, Judge
United States District Court

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