CISG-online 5529	
Jurisdiction	USA
Tribunal	U.S. District Court for the Northern District of Georgia
Date of the decision	15 July 2008
Case no./docket no.	1:07-CV-2471-MHS
Case name	*Caffaro Chimica S.r.l. et al. v. Sipcam Agro USA et al.*

Order

Marvin H. Shoob, Senior Judge

Before the Court are five motions filed by plaintiffs dealing with both substantive and procedural matters. The parties have fully briefed each of the motions. The Court's rulings on the various motions are set forth below. 1

Background

This action involves a dispute over a Supply Agreement governing the production and sale of technical grade chlorothalonil («CTL TG»), a component of fungicides used in various agricultural and turf and ornamental markets. Pursuant to the agreement, Caffaro S.r.l. («Caffaro»), an Italian corporation, contracted to manufacture CTL TG at its plant in Brescia, Italy, for purchase by Sipcam Agro USA, Inc. («Sipcam») and Sostram Corporation, a wholly-owned subsidiary of Sipcam. Sipcam and Sostram are American corporations organized under the laws of Georgia. After receiving the CTL TG and making certain additions, defendants Sipcam and Sostram marketed the final product as Chlorothalonil F in the U.S., Canada, Mexico and Puerto Rico. In consideration of defendants' agreement to purchase certain minimum quantities of CTL TG from Caffaro on an annual basis, Caffaro agreed to refrain from selling CTL TG to any other entities in the sales territory described above. The parties executed the Supply Agreement on or around August 3, 2004, and the agreement's term was for seven calendar years, effective January 1, 2004 and terminating on December 31, 2011. The Supply Agreement is governed by Italian law.[1] According to the amended complaint, the Supply Agreement was assigned by Caffaro to Caffaro Chimica S.r.l. («Chimica») on or around December 1, 2006.[2] 2

A key component in the manufacture of CTL TG is the petrochemical, isophthalonitrile («IPN»). According to the allegations contained in defendants' amended counterclaims («ACC»), at the time of the negotiations leading up to the Supply Agreement, «the CTL TG manufactured by 3

[1] Section 5.6 of the Supply Agreement states: «Governing law: This Agreement, and all purchases of [CTL TG] made by Sipcam from Caffaro pursuant to this Agreement, shall be governed by and construed in accordance with the Italian laws.»

[2] Chimica filed an amended complaint to add Caffaro as a plaintiff after defendants challenged Chimica's standing in their original answer and counterclaim.

Caffaro in its Brescia plant was not cost competitive in the U.S. market.» ACC ¶ 104. This resulted from the fact that Caffaro utilized IPN from a European supplier as opposed to the more competitively priced IPN from Asian sources. *Id.* Defendants allege that Caffaro made representations during the negotiations that it would investigate and make necessary changes to the Brescia plant to enable it to utilize lower-priced IPN of Asian origin. *Id.* at ¶ 105. The parties entered into a Letter of Intent («LOI») in January 2004 memorializing Caffaro's assurances that they would make the necessary investments in the plant in order to utilize lower-priced IPN in the manufacture of CTL TG. *Id.* at ¶ 108. Defendants allege that they entered into the Supply Agreement «justifiably relying on Caffaro's repeated representations that it would take the necessary steps to use IPN of Asian origin and supply cost competitive CTL TG.» *Id.* at ¶ 110.

In the amended complaint, Chimica alleges that defendants breached the Supply Agreement by failing in 2006 to purchase the annual minimum of CTL TG as set forth in the contract and by announcing their intention in their letter of February 6, 2007, not to place any orders for CTL TG in 2007. Chimica seeks declaratory relief in Count I and brings claims for breach of contract, anticipatory breach, and breach of the covenant of good faith and fair dealing in Counts II, III, and IV, respectively. In Count V, Caffaro reasserts Counts I–IV on its own behalf in the event that the assignment of the Supply Agreement from Caffaro to Chimica is found to be invalid or ineffective. 4

Defendants have asserted several affirmative defenses and counterclaims. Counts I, II, and III of the ACC set forth claims for fraudulent inducement, fraud, and incidental fraud. In support of these claims, defendants allege that «Caffaro knew its representations concerning its purported intention to use IPN of Asian origin and provide CTL TG at cost competitive prices were materially false and misleading when made and that, notwithstanding its representations to the contrary, Caffaro had no intention to take the necessary steps to use IPN of Asian origin at its Brescia plant.» ACC ¶¶ 127, 132, 138. In support of the fraud and incidental fraud claims, defendants allege that Caffaro made fraudulent misrepresentations regarding its intention to use Asian IPN during the negotiations leading up to the Supply Agreement and into 2006 and that defendants continued to order CTL TG from Caffaro in reliance on these misrepresentations. *Id.* ¶¶ 135, 141. Count IV states a claim for breach of contract and states that plaintiffs «breached the pricing provisions set forth in Sections 1.7 and 1.8 of the Supply Agreement, in addition to breaching its obligation to provide CTL TG at cost competitive prices as set forth in Section 1.1(b) of the Supply Agreement.» *Id.* ¶ 145. Counts V and VI of the ACC set forth claims for breach of the implied covenant of good faith and fair dealing and anticipatory breach, based on the allegation that plaintiff had long standing plans to shut down the Brescia plant that rendered fulfillment of its obligations under the Supply Agreement impossible. The ACC also includes 15 affirmative defenses, including: breach of contract, fraudulent inducement, fraud, incidental fraud, unclean hands, and the Italian law doctrine of *presupposizione.* 5

Before the Court is plaintiffs' motion to dismiss defendants' fraud-based counterclaims and portions of defendants' claim for breach of the implied covenant of good faith and fair dealing. Plaintiffs also move to strike defendants' fraud-based affirmative defenses as well as the affirmative defenses of unclean hands and *presupposizione.* In support of their arguments for dismissal as a matter of Italian law, plaintiffs have submitted a certification by Italian law ex- 6

pert Enrico Zattoni. Defendants' response brief in opposition to plaintiffs' arguments for dismissal offers a contrary perspective of the relevant Italian law and is supported by a certification by Italian attorney and law professor, Giorgio De Nova. Plaintiffs' reply brief in support of their motion relies on a certification by two additional Italian legal experts, Giuseppe B. Portale and Andrea Perrone.

Soon after Chimica filed the pending motion to dismiss/strike, the Court granted a consent order allowing Chimica to file an amended complaint in order to add Caffaro as co-plaintiff. In response to the amended complaint, defendants filed an amended answer and counterclaim in which they expounded upon allegations of post-execution misrepresentations by plaintiffs. Subsequently, plaintiffs filed a motion to amend their original motion to dismiss/strike in order to apply the arguments contained therein to defendants' modified fraud claims found in the amended counterclaim. Plaintiffs move in the alternative to dismiss the post-execution fraud claims for failure to comply with the pleading requirements of Fed. R. Civ. P. 9(b). Defendants have filed a brief in opposition setting forth both procedural and substantive arguments. Both parties have supported their arguments under Italian law with additional certifications from the experts mentioned above. Accordingly, plaintiffs' motion to amend their original motion to dismiss is also before the Court. 7

Plaintiffs have also filed a motion for separate trials on issues of liability and damages along with a motion for a protective order staying certain discovery pending resolution of their motion to dismiss. While these motions were pending, plaintiff filed a motion to set a scheduling and status conference. The Court's rulings on all five of these motions are set forth below. 8

Motion to Dismiss and Strike

When reviewing a claim pursuant to a Rule 12(b)(6) motion, the Court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262 (11th Cir. 2004). «While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.» *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007) (internal quotations and citations omitted). Instead, the complaint must set forth factual allegations «plausibly suggesting (not merely consistent with)» a violation of the law. *Id.* at 1966; see also *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 n. 43 (11th Cir. 2008). 9

On its own or pursuant to motion, a court «may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.» Fed. R. Civ. P. 12(f). It is well established, however, that «[t]hese types of motions are disfavored ... and should not be granted when the sufficiency of the defense depends upon disputed issues of fact or unclear questions of law.» *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971, 974 (N.D. Ga. 1991). 10

Summary of Arguments

Defendants arguments regarding dismissal of the fraud-based claims and affirmative defenses based on pre-execution representations can be summarized as follows. Defendants argue that pursuant to Italian law, the presence of a merger clause in the Supply Agreement bars defendants from claiming that they «reasonably relied» on any pre-agreement representations, discussions, negotiations, or agreements. Furthermore, plaintiffs argue that the specific terms and conditions of the Supply Agreement negate defendants' claim of reasonable reliance on any representations by plaintiffs regarding their intention to update their plant in order to utilize lower-cost Asian IPN. In addition, plaintiffs contend that defendants waived any claims based on pre-execution conduct by continuing to purchase CTL TG from plaintiffs after receiving an email on October 15, 2004, in which plaintiffs' representative indicated that upgrades to the Brescia plant were not likely to occur. 11

Defendants argue in response that the merger clause does not, as a matter of Italian law, bar its fraudulent inducement claim. Defendants submit that according to the law of Italian contract interpretation, the Court is required to ascertain the common intent of the parties and in doing so, is not limited to the four corners of the contract. In addition, they argue that dismissal is not appropriate at this stage because the reasonableness of their reliance is a fact-based determination. Waiver is also a fact-based determination, according to defendants, and therefore, dismissal on the grounds that defendants waived their claims is not appropriate. 12

Governing law

As stated above, the Supply Agreement is governed by Italian law. Both parties have submitted certifications by experts regarding the applicable legal principles. The Court's consideration of foreign law is governed by Fed. R. Civ. P. 44.1, which states that «[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.» Defendants argue that the Court should «give no weight» to the Certification on Italian law by Enrico Zattoni, which was submitted by plaintiffs in support of their motion to dismiss. Defendants contend that plaintiffs failed to disclose that Zattoni works for the same law firm that represents Caffaro in a related pending arbitration in Italy. Plaintiffs reply that Zattoni has no involvement in the pending arbitration on behalf of his firm, and considering that Zattoni offers expert opinions regarding Italian law, defendants' arguments regarding the impropriety of fact-based testimony by counsel are not relevant. The Court finds defendants' general attacks on Zattoni's fitness as a expert in this case unavailing and has taken under consideration his opinions, as well as those contained in the De Nova and Portale certifications. 13

As experts of both parties have pointed out, the Supply Agreement is governed by the United Nations Convention on Contracts for the International Sale of Goods («CISG»), which is part of Italian law.[3] The fact that the «Governing Law» provision in the Supply Agreement indicates 14

[3] The Supply Agreement is governed by CISG because it is a contract for goods between two companies whose places of businesses are in different countries, both of which countries are Contracting States under art. 1(1)(a) of the convention. See De Nova Cert. at 7 and Portale Cert. at 6.

that the agreement «shall be governed by and construed in accordance with the Italian laws» supports this conclusion. Supply Agreement at Section 5.6. The majority of courts interpreting similar choice of law provisions have concluded that «[w]here parties seek to apply a signatory's domestic law in lieu of the CISG, they must affirmatively opt-out of the CISG.» *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador)*, 332 F.3d 333, 337 (5th Cir. 2003); see also *Travelers Prop. Cas. Co. of Am. v. St.-Gobain Tech. Fabrics Can., Ltd.*, 474 F. Supp. 2d 1075, 1081 (D. Minn. 2007) (adopting majority position and finding that parties did not opt-out of CISG by indicating in purchase order that laws of Minnesota would govern transaction between American and Canadian company) and *Asante Techs. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (interpreting choice of law provision and finding that parties did not opt-out of CISG). This approach is in line with that of other international courts and tribunals. See Joseph Lookofsky, 'In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)', 13 Duke J. Comp. & Int'l L. 263, 272–73 (2003) («a very large number of precedents show that an express contractual choice of (e.g.) 'Austrian law,' or 'the laws of Switzerland' or 'the law of the seller's country' should be interpreted ... as the parties' reaffirmation of the (CISG) rule-set which, absent the clause, would apply by default»). While the Zattoni certification addressed only Italian domestic law, neither party in this dispute argues that the CISG does not apply.

a. CISG Analysis

The CISG does not contain any specific provisions relating to the effect of a merger clause on contract interpretation. Article 8 of the CISG provides a framework for contract interpretation that requires the court to inquire into the intent of the contracting parties. Whereas the limits of contract interpretation in common law jurisdictions are typically defined in part by the parol evidence rule, no such rule limiting the use of oral or prior written representations exists under the CISG. In fact, Article 8(3) has been interpreted as a «clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.» *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998). Article 6 of the CISG provides, however, that parties may derogate from such default contract interpretation rules. See Portale Cert. at 9. As the Eleventh Circuit Court of Appeals has recognized, «to the extent parties [contracting under CISG] wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.» *MCC-Marble Ceramic Ctr.*, 144 F.3d at 1391. Thus, under the CISG, a merger clause may represent a valid and enforceable expression of the parties' intent to derogate from the expansive contract interpretation principles embodied in Article 8 of the CISG. **15**

Both parties' experts cite an opinion by the CISG Advisory Council[4] regarding the effect of a merger clause in a contract governed by CISG.[5] The Advisory Opinion states that pursuant to the CISG, a merger clause may «prevent a party from relying on evidence or statements or agreements not contained in the writing, ... [h]owever, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as other relevant circumstances shall be taken into account.» CISG Advisory Opinion 3. Specifically, the commentary to the advisory opinion states that one of the objectives of a merger clause may be to «prevent recourse to extrinsic evidence for the purpose of contract interpretation [, which] would constitute a derogation from the [CISG's] canons of interpretation incorporated in Article 8.» *Id.* at 4.1. Whether or not this objective has been accomplished is a question of interpretation of the merger clause. *Id.* 16

Applying these principles and construing the facts in favor of defendants, the non-moving party, the Court finds that the merger clause operates to bar consideration of prior representations. Section 5.4 of the Supply Agreement states as follows: 17

> Entire Agreement: This Agreement, including the Exhibits attached hereto, constitutes the entire agreement between the parties, superseding all prior written representations, negotiations, understandings and agreements, on the subject matter hereof, and there are not conditions to this Agreement that are not expressed herein.

The task for the Court is determining the effect of this provision. Defendants' expert contends that the merger clause «does not deal with contract interpretation» and that it does not derogate from the canons of interpretation in Article 8 of the CISG. De Nova Cert. at 8. The Court disagrees. Giving effect to the merger clause necessarily derogates from a mode of contract interpretation that would allow for the integration of new or conflicting terms into the Supply Agreement. Lest the merger clause have no meaning whatsoever, the Supply Agreement must supercede prior commitments or representations by Caffaro regarding «the subject matter hereof,» namely, the parties' reciprocal obligations regarding the manufacture and purchase of CTL TG. Accordingly, any promises made by Fausto Ferrazzi, the Managing Director of Caffaro in November 2003, regarding Cafffaro's use of Asian-sourced IPN, was superceded by the Supply Agreement. See ACC ¶ 106. Likewise, the «prior written representations» contained in the LOI were superceded by the Supply Agreement. The merger clause contained in Section 1.8 is a clear expression of the parties' intent to abandon prior agreements related to the subject matter of the Supply Agreement. As a matter of law, therefore, defendants could not have reasonably relied on the alleged prior representations. 18

Applying the rules of interpretation under Article 8 of the CISG to the merger clause itself, the Court comes to the same conclusion with regard to the preclusive effect of the merger clause. 19

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[4] The CISG Advisory Council «was established in 2001 as a private initiative to respond to the emerging need to address some controversial, unresolved issues relating to the CISG which would merit interpretative guidance.» It is composed of imminent legal scholars from around the world. CISG Advisory Council, http://www.cisgac.com/default.php?sid=149.

[5] See De Nova Cert. at 7 and Portale Cert. at 12 (citing CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004, http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html).

Under the facts alleged in the ACC, Article 8 requires the Court to determine the objective intent of the parties «according to the understanding a reasonable person of the same kind ... would have had in the same circumstances» and giving «due consideration ... to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.»[6] CISG Art. 8(2) and (3).

According to defendants' allegations, Caffaro and Sipcam entered into an LOI in January 2004, that provided in part that, **20**

> Caffaro undertakes to carry out at its own expenses the needed investments to enable the plant in Brescia to utilize, by June 30 2004, in the production of Chlorothalonil, the [IPN] even of different origin from the present one and in particular of Asian origin.

Ex. A ¶ D to ACC. The LOI also contained a provision allowing either Sipcam or Caffaro «to terminate this [LOI] and all related reciprocal obligations except the obligations [pertaining to sales of CTL TG in 2004]» if Caffaro «will not be able to comply with the obligation» to update its plant. *Id.* ¶ L. Section 4.2 of the Supply Agreement contained a provision allowing only Caffaro to terminate the agreement «upon written notice to Sipcam received prior to July 1, 2004 ... if and only if Caffaro shall have determined in good faith and after exercising its best efforts that it is unable to manufacture [CTL TG] with [IPN] from Asian suppliers.» When the parties signed the Supply Agreement on August 3, 2004, the operative deadlines of June 30, 2004 (LOI) and July 1, 2004 (Supply Agreement) had already passed. The parties signed the agreement knowing that these deadlines had passed, and rather than re-stating Caffaro's alleged promises to update the Brescia plant, the parties signed the Supply Agreement containing a merger clause indicating that the agreement constituted the entire agreement between the parties. Therefore, the negotiations leading up to the execution of the Supply Agreement support the Court's conclusion that the merger clause is conclusive objective proof of the parties' intent to preclude enforcement of earlier agreements. Accordingly, reliance on such earlier agreements cannot be justified. **21**

The Court rejects defendants' argument that Section 4.2 of the Supply Agreement, although expired at the time of execution, amounts to an «implicit representation» that Caffaro had an ongoing obligation to modify its plant in order to utilize lower-cost IPN. ACC ¶¶ 111(i) and 114. Defendants' argument is inconsistent with the very language contained in Section 4.2 of the Supply Agreement, which provides that Caffaro, as opposed to defendants, «may» choose to unilaterally terminate the Supply Agreement by a certain date if Caffaro is unable to modify **22**

[6] This case is distinguishable from *MCC-Marble Ceramic Ctr.* in which the court was required to determine the parties' *subjective* intent as required by Article 8(1) of the CISG. In that case, affidavits from both parties indicated that the parties had agreed orally prior to executing a contract that the contract's written terms would not apply. The Court indicated that absent such a unique situation, «we would interpret the contract and the parties' actions according to article 8(2), which directs courts to rely on objective evidence of the parties' intent.» 144 F.3d at 1388 n. 11. Defendants have not alleged that plaintiffs expressed a subjective intention not to be bound by the clear language of the merger clause.

its plant. The clause cannot be construed to express an obligation on behalf of Caffaro nor can it be understood to create any rights in defendants.

The Court also disagrees with defendants' argument that other terms of the Supply Agreement «are consistent with [p]laintiff's pre-execution promises to use the Asian raw material.» Defs.' Resp. to Pls.' Mot. to Dismiss at 16. The Court agrees with plaintiffs' statement that defendants' arguments amount to «an attempt to carry out, in the name of interpretation, integration of prior agreements which are precluded.» Pls.' Reply Br. in Supp. of Mot. to Dismiss at 8. Specifically, the Court rejects defendants' contention that the pricing formula set forth in Section 1.8 of the Supply Agreement is proof of a promise by plaintiffs to use Asian IPN. The pricing term provides: **23**

> 1.8 [CTL TG] Pricing
>
> (a) The purchase price in US dollars for the [CLT TG] sold to Sipcam hereunder conforming to the specifications set forth in Exhibit 1 shall be (i) $4.58/kg during the first Annual Contract Period and (ii) $4.25/kg (the 'Base Price') during the Annual Contract Period commencing January 1, 2005 and for each Annual Contract Period thereafter, subject to the adjustments set forth in subsection (b) hereof.

Subsection (b) of the pricing term sets forth a formula for adjusting the Base Price for CTL TG, which relies in part on changes in the price of IPN. Even assuming that under the prevailing market conditions plaintiffs' inability to use lower-cost Asian IPN made it commercially impracticable for them to adhere to the pricing formula set forth in Section 1.8, this does not lead to the inevitable conclusion that plaintiffs made an enforceable commitment to utilize Asian IPN. Discovery with regard to defendants' counterclaim alleging breach of the pricing provision will perhaps reveal more about the meaning of this clause of the Supply Agreement. On its face, however, the pricing provision provides no support for defendants' argument that they justifiably relied on alleged pre-execution negotiations despite the clear language of the merger clause. **24**

Insofar as the intent inquiry under Article 8 of the CISG requires the Court to examine post-execution conduct to interpret the merger clause, the emails from Ralf Knauf at Caffaro do not support defendants' argument that a binding obligation to update the Brescia plant was in existence at the time the parties executed the Supply Agreement. Exs. B, C, and D to ACC. To the contrary, the emails from Knauf to Sipcam, dated September 14, 2004 and October 15, 2004, provide updates with regard to plaintiffs ability to utilize Asian-origin IPN in the context of the price formula.[7] Notably, defendants have not included any related emails from Sipcam **25**

[7] See Ex. B to ACC, Email of September 14, 2004 («Pricing – actually we are not technically able to consume IP[N] of Chinese origin, purification still to be determined in all details, process and cost-wise. Therefor I can give you only the quotation of the actual IP[N]-supplier which is Euro 3.8/kg ...») and Ex. C to ACC, Email of October 15, 2004 («According to the conclusion in the project of our tech. staff the investment for new IPN feeding equipment to our existing CTN plaint for the use of [C]hinese IPN would require an investment of Euro 1.0 Milo. Our business with the USA is actually based on net revenue ... of Euro 3.37/kg, our actual cost according to the 'formula' with you is Euro 3.80/kg (this value does not cover the whole cost at Brescia plant)»).

to plaintiffs in which Sipcam refers to plaintiffs' alleged obligation to update the Brescia plant and to utilize Asian IPN.

In sum, taking into account the various extrinsic factors discussed above in interpreting the merger clause itself, the Court concludes that the merger clause must be interpreted to preclude justifiable reliance on any alleged pre-execution representations by plaintiffs regarding a promise to utilize Asian-origin IPN. 26

b. Italian Domestic Law Analysis

The Court finds that an analysis of the effect of the merger clause under domestic Italian law leads to a similar conclusion. While Italian law contains no specific provisions with regard to merger clauses, parties may freely determine the contents of a contract pursuant to Article 1322 of the Italian Civil Code. As a result, merger clauses are valid and enforceable under Italian law.[8] However, defendants' expert emphasizes that a merger clause must be interpreted with reference «to the common intent of the parties in light of their overall behavior, prior and subsequent to the execution of the contract.» De Nova Cert. at 7. This principle of contract interpretation is embodied in Article 1362 of the Italian Civil Code. The Court finds that an analysis under Article 1362 of the Italian Civil Code of the parties' common intent with regard to interpretation of the merger clause is identical to the intent inquiry already performed pursuant to Article 8 of the CISG. Accordingly, the Court finds that Italian domestic law yields the same result as that reached under the CISG: the merger clause found in Section 5.4 of the Supply Agreement acts to bar defendants' allegations of fraud based on pre-contract negotiations. 27

Also relevant is the Italian version of the parol evidence rule embodied in Article 2722 of the Italian Civil Code, which disallows witness testimony that contradicts or modifies a written agreement. See Zattoni Cert. at 14. The Italian Supreme Court has ruled that Article 2722 does not bar such witness testimony when a party offers it for the purpose of clarifying rather than challenging a written agreement. See De Nova Cert. at 9. In this case, defendants' attempt to introduce the pre-contract promises contained in the LOI can only be reasonably construed as a challenge to the Supply Agreement as an integrated document governing the parties' reciprocal obligations regarding the manufacture and purchase of CTL TG, and therefore, the rule announced by the Italian Supreme Court does not apply. By rendering inadmissible witness testimony that contradicts the written terms of the Supply Agreement, Article 2722 bolsters the Court's conclusion regarding the validity and effect of the merger clause under Italian law. 28

Defendants also argue that the merger clause in the Supply Agreement cannot bar their fraud-based claims on account of Article 1462 of the Italian Civil Code, which provides that «[a] clause providing that one of the parties cannot set up defenses for the purpose of avoiding or 29

[8] See De Nova Cert. at 5 («A clause which provides that the contract which contains such a clause supersedes any prior agreement executed by the parties to the same subject matter is valid under Italian law»); Zattoni Cert. at 13 («[G]enerally and based on the Italian fundamental rules governing the law of contracts, a 'merger clause' such as the clause contained in Article 5.4 of the Supply Agreement is valid and enforceable under Italian law and binds the contract's parties '... *with the force of law* ...'»); and Portale Cert. at 22.

delaying performance due by him has no effect on defenses based on nullity, voidability and rescission of the contract.» Defs.' Br. in Resp. to Mot. for Summ. J. at 18. While plaintiffs did not address this argument in their reply brief in support of their motion to dismiss, the Court perceives several flaws in defendants' argument. First, the merger clause does not meet the description of the prohibited type of clause because it is not a «clause providing that one of the parties cannot set up defenses.» On the contrary, the merger clause simply states that the Supply Agreement represents the entire agreement between the parties. Second, defendants have pled fraud-based claims as offensive claims and not merely as affirmative defenses. Third, under Italian law, incidental fraud, which defendants have plead in Count III of the ACC, does not result in nullity, voidability, or rescission. Article 14440 of the Italian Civil Code provides that, in an action for incidental fraud, the defendant «is liable for damages.»[9] For all of these reasons, the Court rejects defendants' argument under Italian law that Article 1462 stands in the way of dismissal of the fraud-based claims.

Finally, plaintiffs argue that defendants Twelfth Affirmative Defense based on the Italian legal doctrine of *presupposizione* should be stricken because the facts defendants have pled, taken as true, do not support all of the elements of the defense. According to plaintiffs, in order to state a viable defense of *presupposizione*, a party must allege the non-occurrence of a certain objective circumstance, whose occurrence was assumed to be certain by both parties and whose non-occurrence was independent of the will or conduct the contracting parties. See Zattoni Cert. at 18–22. Plaintiffs submit that their alleged failures to use IPN of Asian origin and to provide CTL TG at cost-competitive prices were not circumstances beyond their control, and therefore these allegations do not support the defense of *presupposizione.* Defendants have not opposed plaintiffs' interpretation of the relevant Italian law. The Court agrees with plaintiffs' presentation of the Italian law on this matter, and strikes defendants' Twelfth Affirmative Defense. **30**

Portions of Count V of the ACC, alleging breach of the implied covenant of good faith and fair dealing, are also subject to dismissal as a result of the above conclusions regarding the effect of the merger clause. To the extent that Count V is based on plaintiffs' pre-contract «misrepresentations concerning its intention and ability to use IPN of Asian origin,» this portion of the claim is dismissed. For the same reasons, the Court strikes defendants' Eighth Affirmative Defense of Unclean Hands because it is based on plaintiffs' alleged conduct «throughout the negotiations leading to the execution of the Supply Agreement.» **31**

In summary, the court grants plaintiff's motion to dismiss Counts I, II, and III and portions of Counts V of the ACC. Because the related affirmative defenses are insufficient as a matter of law, the Court also grants plaintiffs' motion to strike defendants' Fifth, Sixth, Seventh, and Eighth Affirmative Defenses. For the reasons discussed above, the Court also grants plaintiffs' motion to strike the Twelfth Affirmative Defense of *presupposizione.* In light of the above rulings, the Court declines to rule on plaintiffs' arguments regarding waiver. **32**

[9] P. Iamiceli, *Principles of European Contract Law and Italian Law* 204 (Luisa Antoniolli & Anna Veneziano eds., 2005).

Plaintiffs' Supplemental Motion to Dismiss

As stated earlier, defendants' filing of amended counterclaims after plaintiffs had already moved to dismiss the original counterclaims prompted plaintiffs to move to supplement their pending motion to dismiss in order to address the allegations of the amended counterclaims. As an initial matter, the Court rejects defendants' argument that their amendments to the counterclaims were not substantive in nature and that plaintiffs should therefore not be permitted to make new arguments for dismissal that were not included in their initial motion to dismiss/strike. Even if defendants' changes to the counterclaims could be construed as mere clarifications, the Court grants plaintiffs' request to respond to these clarified allegations and will address plaintiffs' substantive challenges to the allegations in the amended counterclaim. **33**

Plaintiffs argue that defendants' tort-based counterclaims and affirmative defenses that rely on alleged misrepresentations after the parties executed the Supply Agreement should be dismissed/stricken for two reasons. First, according to plaintiffs' interpretation of the relevant Italian legal principles, defendants are not permitted in these circumstances to allege both contractual and tort liability. This argument relies on an interpretation of Italian law by Enrico Zattoni (2nd Zattoni Cert.). Second, plaintiffs argue that defendants have not sufficiently pled their fraud claims to meet the standards of F. R. Civ. P. 9(b). In response, defendants' argue that American procedural law should apply, thereby permitting them to plead their contract and fraud claims in the alternative. Furthermore, according to their Italian law expert Giorgio De Nova (2nd De Nova Cert.), defendants contend that Italian law does not bar their claims. In support of their reply brief, plaintiffs provide yet another affidavit from Italian legal experts Giuseppe Portale and Andrea Perrone (2nd Portale Cert.), which refutes defendants' interpretation of the relevant Italian law. **34**

Although the allegations of defendants' ACC contain several references to post-execution representations, plaintiffs argue that these cursory references do not pass muster under the heightened pleading requirement of Fed. R. Civ. P. 9(b). To satisfy the particularity requirement of Rule 9(b), a plaintiff must, among other things, set for «precisely what statements were made in what documents or oral representations or what omissions were made.» *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2002). **35**

Count II of the ACC states, «After the negotiation of the Supply Agreement and even into 2006, Caffaro continued to make representations regarding Caffaro's intention to use IPN of Asian origin and to provide CTL TG at cost competitive prices. Caffaro knew these representations were false and misleading when made.»[10] ACC ¶ 133. Plaintiffs contend that the ACC does not cite any specific fraudulent «representations» that meet this description. Defendants argue that reference in the ACC to an email from Ralf Knauf at Caffaro dated March 2, 2006, amounts to one such «representation» and satisfies the pleading requirements under Rule 9(b). Reference to this email is made in paragraph 117 of the ACC, which is incorporated by reference into Counts II (Fraud) and III (Incidental Fraud). Knauf's email to Lynn Brookhouser, the President of Sipcam, states in part, «Our present IPN supplier although not the most competitive in terms of price is very cooperative and will assist us in the legal actions mentioned above. **36**

[10] The same allegation is contained in Count III alleging incidental fraud. *Id*. ¶ 139.

Nevertheless we do continue to look for far east sources of IPN and discussions/evaluations about quality are ongoing.» Ex. D to ACC. Even assuming that defendants' reference to the March 2 email meets the specificity requirements of Ziemba, the Court finds that these allegations fail to state a fraud claim for another reason.

In light of the *other* post-execution emails from Knauf alleged by defendants and incorporated by reference into Counts II and III, defendants claim that they justifiably relied on the single March 2, 2006, communication in deciding to continue ordering CTL TG through 2006 rings hollow. In emails from Knauf to Sipcam dated September 14, 2004, and October 15, 2004, Knauf indicated that Caffaro was currently unable to utilize Asian IPN and that prospects for obtaining the necessary financing to update the Brescia plant were gloomy. ACC ¶¶ 113 and 114. In fact, defendants titled the subsection of the ACC containing references to these emails: «Shortly After the Agreement is Signed, Caffaro Claims It Has Neither the Technology Nor Finances to Use Asian IPN.» Defendants' own presentation of the facts undermines their contention that they could have reasonably relied on the tentative statement in Knauf's email of March 2 that plaintiffs «continue to look for far east sources of IPN.» ACC ¶ 117. Stated another way, the March 2 email cited by defendants is simply «not a representation of the fraud alleged.» Pls.' Reply Br. in Supp. of Mot. to Amend at 6. Because the ACC contains no other specific allegations of false representations regarding «Caffaro's intention to use IPN of Asian origin and to provide CTL TG at cost competitive prices,» the ACC fails to state a claim for fraud based on post-execution representations. Accordingly, portions of Counts II and III of the ACC that are based on post-execution representations are hereby dismissed. For the same reasons, the Court also strikes the Sixth and Seventh Affirmative Defenses. **37**

Having already determined that the post-execution fraud claims and defenses are subject to dismissal, the Court declines to rule on plaintiffs' arguments under Italian law regarding the possibility of concurrent tort and contract claims. **38**

Motion for Protective Order

Also before the Court is plaintiffs' motion for a protective order staying certain discovery pending resolution of plaintiffs' motion to dismiss/strike. In that motion, plaintiffs asked the Court to stay discovery on the fraud-based counterclaims and the other claims and defenses that were the focus of their motion to dismiss/strike. Because the Court has granted plaintiffs' motion to dismiss/strike, the counterclaims and defenses that formed the subject matter of the protective order are no longer part of this suit. Accordingly, plaintiffs' motion for a protective order is moot. **39**

Motion for Separate Trial

Plaintiffs have filed a motion requesting separate trials on issues of liability and damages and a stay of discovery regarding damages pending a determination of liability. Pursuant to Rule 42(b) of Federal Rules of Civil Procedure, a district court has broad discretion to order separate trials where such order would further convenience, avoid prejudice, or promote efficiency. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1301 (11th Cir. Fla. 2001). **40**

41 The crux of plaintiffs' argument in support of bifurcation is that liability and damages issues in this case are wholly distinct and that evidence bearing on the two sets of issues is, for the most part, non-overlapping. Plaintiffs submit that the liability issues surrounding the dueling breach of contract claims are distinct from the issues surrounding damages, whether seen from the perspective of a determination of liability for plaintiffs or defendants. In presenting their respective cases with regard to breach of contract liability, plaintiffs contend that both parties will rely primarily on non-expert testimony by their respective business representatives. Although plaintiffs acknowledge that some fact witnesses will most likely be utilized by both parties to prove damages, «evidence on proof of damages is expected to be largely expert-driven.» Pls.' Br. in Supp. of Mot. for Sep. Trs. at 12. As a result of the distinct nature of the issues and probable sources of evidence supporting liability and damages, plaintiffs contend that bifurcation is practical. According to plaintiffs, their suggested streamlined approach to this case will result in savings for both parties because they will be able to avoid costly discovery regarding the non-breaching parties' damages. Plaintiffs also predict that bifurcation will be a boon to settlement negotiations.

42 Defendants take a different view of the practicality and benefits of bifurcation in this case. Defendants contend that «[p]laintiff's claim that liability and damages are separate and distinct issues in this case is directly contradicted by information provided in the parties' initial disclosures.» Defs. Br. in Resp. to Pls.' Mot. for Sep. Trs. at 6. Defendants show that each of plaintiffs' three witnesses listed in their initial disclosures is identified as a source of information on both liability and damages issues. Defendants also argue that several issues, including the circumstances surrounding the closing of the Brescia plant and the market price of CTL TG during the contract period, are relevant to both liability and damages. Furthermore, defendants suggest that preventing the parties from delving into discovery regarding damages may actually inhibit settlement negotiations.

43 In their reply brief, plaintiffs contend that defendants' discussion of overlapping issues misses the mark and that the fact that several of plaintiffs' witnesses may testify as to liability and damages issues does not undermine their position.

44 While plaintiffs have made a strong case for bifurcation, the Court cannot agree that separate trials are warranted when several key witnesses would testify as to both liability and damages, especially in light of the fact that these witnesses may reside in Italy. See *Home Elevators, Inc. v. Millar Elevator Serv. Co.*, 933 F. Supp. 1090 (N.D. Ga. 1996) (noting that «judicial economy is not served if the same witnesses have to be called at both trials»). Relatedly, requiring defendants to depose these witnesses on two separate occasions would clearly not result in cost or time savings. The Court finds that sufficient overlap exists regarding fact-based testimony such that bifurcation is not appropriate. Accordingly, the Court denies plaintiffs' motion for separate trials on liability and damages and for stay of discovery on damages. Should the parties find it mutually convenient to put off ceratin expert-based discovery on damages until after summary judgment, the Court would sanction such an approach.

Motion to Set a Scheduling and Status Conference

Plaintiffs filed a motion requesting the Court set a scheduling and status conference to address discovery and scheduling matters in light of the pending motions. Plaintiffs requested that such a conference be scheduled on or before May 12, 2008. Defendants joined in plaintiffs' request for a conference to discuss discovery. Because the time frame for the requested conference has passed, plaintiffs' motion is now moot. Provided that the parties still believe that a scheduling conference would be useful, they should present the Court with a renewed request for a conference containing an outline of the subject matter they wish to discuss and the Court will contact the parties to schedule the requested conference. 45

Summary

For the reasons discussed above, the Court GRANTS plaintiffs' motion to dismiss/strike [#25] and GRANTS plaintiffs' motion to amend the previously filed motion to dismiss/strike [#51]. As a result of the foregoing, Counts I, II, and III, of defendants' Amended Counterclaims as well as the portions of Count V of the Amended Counterclaim that are based on pre-Supply Agreement representations are DISMISSED WITH PREJUDICE. The Court also STRIKES defendants' Fifth, Sixth, Seventh, Eighth, and Twelfth Affirmative Defenses. 46

In addition, plaintiffs' motion for separate trials on liability and damages is DENIED [#33]. Plaintiffs' motion for protective order is DENIED AS MOOT [#37] and plaintiffs' motion to set a scheduling and status conference is also DENIED AS MOOT [# 63]. 47

IT IS SO ORDERED, this 15th day of July, 2008.