CISG-online 5845	
Jurisdiction	USA
Tribunal	U.S. District Court for the Eastern District of Texas
Date of the decision	29 March 2022
Case no./docket no.	4:19-cv-00216
Case name	*Shenzen Synergy Digital Co., Ltd. v. Mingtel, Inc.*

Findings of Fact and Conclusions of Law

On March 20, 2019, Plaintiff Shenzen Synergy Digital Co. Ltd., («Synergy») filed its original complaint against Defendant Mingtel, Inc. («Mingtel») (Dkt. #1). Synergy asserted that Mingtel breached a contract for the sale of computer tablets by refusing to take delivery of purchase order MT0559 and paying the balance owed under the order (Dkt. #1 ¶ 26). In its answer and counterclaim, Mingtel responded that Synergy failed to provide conforming goods under MT0559 and a previous purchase order, MT0560 (Dkt. #4 ¶ 39). 1

On January 3, 2022, the Court held a bench trial in the above-styled matter. After considering the parties' arguments and the evidence, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).[1] To the extent that any 2

[1] In preparing this memorandum opinion and order, the Court carefully considered the pretrial filings, trial testimony, trial exhibits, and post-trial briefing and subsequently applied the Fifth Circuit standard for findings and conclusions under Federal Rule of Civil Procedure 52. *See Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc*., 919 F.3d 931, 935–36 (5th Cir. 2019); *see also* 9C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2579 (3d ed.). Since the «findings of fact and conclusions of law must be 'sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached,'» *Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811, 819 (5th Cir. 2020) (quoting *Lettsome v. United States*, 434 F.2d 907, 909 (5th Cir. 1970)), the Court «need only make brief, definite, pertinent findings and conclusions upon the contested matters.» FED. R. CIV. P. 52(a), advisory committee's note to 1946 amendment. This standard does not require the Court to «expressly respond like a debate champion to every evidentiary or factual contention made by the losing side.» *Richard v. Reg'l Sch. Unit 57*, 901 F.3d 52, 59 (1st Cir. 2018); *see Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) (collecting cases).
The facts contained herein are either undisputed or the Court has made such findings based on the credibility or believability of each witness. In doing so, the Court considered all circumstances under which the witnesses testified, including: the relationship of a witness to the parties; the interest, if any, a witness has in the outcome of the case; a witness's appearance, demeanor, and manner of testifying while on the witness stand; a witness's apparent candor and fairness, or lack thereof; the reasonableness or unreasonableness of a witness's testimony; the opportunity of a witness to observe or acquire knowledge concerning the facts to which he or she testified; the extent to which a witness was contradicted or supported by other credible evidence; and whether such contradiction related to an important factor in the case or some minor or unimportant detail. When necessary, the Court comments on the credibility of a witness or the weight given to a witness's testimony.
Finally, during trial, the Court may have carried various objections made by the parties to certain pieces of evidence. To the extent the Court refers to such evidence, the objection is overruled if the Court has included and relied on it. If the evidence was not included, this means the Court either overruled the objection or determined that the evidence was unnecessary for the findings and conclusions made here.

of the findings of fact constitute conclusions of law, or any of the conclusions of law constitute findings of fact, they are adopted as such.

Findings of Fact

Having carefully reviewed the evidence and arguments presented at trial, the Court finds the following facts by a preponderance of the evidence. 3

I. Background

1. 4
Synergy is a Chinese corporation with its offices in Shenzen, China. It is a manufacturer, distributor, and exporter of computer tablets and other electronic devices. David Chan («Chan») is its President.

2. 5
Mingtel is a Texas corporation with its offices in Plano, Texas. It is an importer and distributor of electronics, including computer tablets. It also operates under the registered assumed name of Azpen Innovation. James Hu («Hu») is its President.

3. 6
Prior to the transactions that are the subjects of this suit, Synergy and Mingtel had done business for approximately three years, whereby Synergy would manufacture and sell to Mingtel computer tablets pursuant to specifications provided by Mingtel. During this time, Synergy filled multiple purchase orders from Mingtel for computer tablets. However, the original tablets were different from the tablets that are the subject of this dispute because the original tablets were Wi-Fi-only tablets. In other words, the original tablets did not have SIM cards and could not create an internet connection network by themselves.

4. 7
For these orders, Mingtel would define the specifications. Synergy would then send Mingtel a bill of materials, a document that specified the components that would be used in the tablets, and a golden sample of the tablet, which Mingtel would approve. Upon approval, Synergy would then commence purchasing raw materials and manufacturing the tablets. During their business relationship, Synergy granted Mingtel ninety-day payment terms with a ten percent deposit for its orders.

II. Purchase Orders MT0559 and MT0560

5. 8
In the summer of 2017, Mingtel acquired a contract with the Home Shopping Network («HSN») to sell 60,000–70,000 tablets on the HSN website. In furtherance of the HSN contract, Mingtel reached out to several tablet manufacturers that it worked for in the past for quotations for the tablets, including Synergy.

6. 9
On or about August 26, 2017, Synergy sent a quotation to Mingtel for two models of its tablets, the G1058S and G1058A.

7. 10
After reviewing the quotes sent by the various manufacturers, Mingtel decided to contract with Synergy. On or about August 28, 2017, Mingtel sent two written purchase orders, Order MT0559 and Order MT0560, to Synergy for tablets.

8. 11
Purchase Order No. MT0560 («Order MT0560») was for a total of 10,000 Model G1058S tablets of varying colors and 16 GB of storage at the unit price of $73.03 for a total of $730,300. Mingtel paid a ten percent deposit for this order.

9. 12
Purchase Order No. MT0559 («Order MT0559») was for a total of 10,000 G1058A tablets of varying colors and 32 GB of storage at the unit price of $76.32 for a total of $763,2000.00. Synergy accepted a five percent deposit from Mingtel for this order because Mingtel was having cash flow issues.

10. 13
Besides the storage capacity (MT0560 tablets were 16 GB, while MT0559 were 32 GB), the products' specifications were identical.

11. 14
In the market for computer tablets, there are different «tiers» for products. Shenzen Synergy tablets are considered Tier 2 tablets. The main difference between Tier 1 tablets (like Apple and Samsung) and Tier 2 tablets is the name brand, but other differences also include user experience.

12. 15
Synergy accepted Order MT0559 and Order MT0560.

13. 16
Both orders were handled in conformity with the parties' prior course of dealing. As such, Mingtel approved a bill of materials and golden sample for the orders.

14. 17
Both orders MT0559 and MT0560 were sold pursuant to FOB Hong Kong terms. Pursuant to the parties' agreement and course of dealing, when the tablets were ready for shipment from Synergy's factory, it would notify Mingtel. Mingtel would handle all the logistics of shipping, from sending a shipping container to Synergy's factory for pickup of the tablets, to then shipping the tablets to the United States.

15. 18
Mingtel provided Synergy with SIM cards and a software for cellular data called Freedom Pop to be installed in the tablets. Freedom Pop is a SIM card company which provides 500 megabytes of free data access, after afterwards charges for excess data. Synergy installed the SIM cards and Freedom Pop software as instructed by Mingtel.

A. Order MT0560

16. 19
In late October 2017, Synergy notified Mingtel that Order MT0560 was ready. Mingtel inspectors, through a company owned by Hu's brother, inspected randomly selected samples of the tablets in Order MT0560 at Synergy's factory in Shenzen, China, and approved them as in conformity with the specifications ordered by Mingtel. The inspectors issued written inspection approvals on behalf of Mingtel to Synergy, indicating what functions were inspected and stating that the tablets had passed. Mingtel's inspection involved cosmetic examinations of the tablets, *i.e.,* assessments on the size of the screen and the placement of the buttons, etc., as well as functional tests, *i.e*., turning on the tablets, testing the memory, and checking the Wi-Fi.

17. 20
However, because Wi-Fi networks and SIM cards for use in the United States do not function in China, if the Wi-Fi works in China, it does not mean it will function in the United States. In other words, the SIM cards could not be tested in China because they were meant for a U.S. cellular-based network. Mingtel and Synergy both knew, prior to inspection at Synergy's factory, that neither the Wi-Fi nor the SIM cards and Freedom Pop software could be tested in China by either Synergy or Mingtel to see if they would work in the United States.

18. 21
On or about October 25 and 31, 2017, after Mingtel inspectors approved the tablets, Synergy delivered to Mingtel at Synergy's factory in China 9,900 tablets from Order MT0560.

19. 22
Chan testified that the shipping time from China to the United States takes around twenty days. Hu, however, testified that it takes fifty days for goods to ship from China to the United States.

20. 23
There is no evidence Synergy was aware of any defects relating to any perceived quality issues when it delivered the tablets to Mingtel.

21. 24
Mingtel paid Synergy in full for Order MT0560.[2]

22. 25
Mingtel did not inspect or examine the tablets in Order MT0560 upon their arrival in the United States. Instead, Mingtel shipped the tablets from Order MT0560 directly to HSN, and the tablets were then sold by Mingtel through HSN. Mingtel only inspected and tested the tablets after HSN and HSN customers returned the tablets to Mingtel.

23. 26
Shortly after the HSN sale, Mingtel received generalized complaints from HSN and customers regarding defective issues with the tablets. Specifically, Mingtel received complaints about the tablets' slow processing speeds and issues with the screens.

24. 27
Mingtel, through Larry Hartman, its Vice President of Sales, sent an email on November 3, 2017 to Tina Curran of HSN. It stated:

> We are having difficulty replicating the issues you describe and your/our customers referencing. Jim sent you an email with a video of both the 16 and 32 Gb units running side by side, with no difference between the two.
>
> We ran the same unit on Amazon, only 8 Gb, not 16 or 32GB and the average rating was 3 star. About 45% were 5 Star … Our tests were done with decent WiFi connections and 4G Network connection. If the WiFi is not strong or the Network is 3G instead of 4G the tablet will run slow and perhaps freeze. That is not a tablet issue it's a WiFi or network issue. What have we done? We've done extensive testing both in China and at our Dallas office and can find no issues with the tablets. We have just finished doing random testing on about 500 units and they performed well … .

25. 28
Hu also stated in an email to Tina Curran of HSN on January 17, 2018:

> We compare Azpen tablet with other tier 2 tablets, side by side comparison.
>
> This tablet is not slow at all. The key is freedompop network slow in certain area (3G coverage, not 4G LTE coverage) causing bad user experience.
>
> Some customers do not know if it's tablet itself slow or network data speed slow.

26. 29
Hu testified that both emails were truthful. Both emails pertained to the tablets received by Mingtel from Synergy in Order MT0560 and sold on HSN.

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[2] The parties did not provide the exact dates of payment for Order MT0560. Presumably, Mingtel paid Synergy the ten percent deposit in early September – right after the purchase order was placed. As for when the balance of the order was paid, it was presumably paid sometime within 90-days after shipment of the order – in conformity with the payment terms.

27. 30
Mingtel did not give Synergy notice of any quality or conformity problem with the tablets delivered for Order MT0560 until several months after delivery. Mingtel waited until after the tablets in Order MT0560 had been delivered to HSN and sold, and after Synergy informed Mingtel that the first 5,000 tablets from the next Order, Order MT0559, were ready for delivery, to give Synergy notice.

28. 31
Mingtel contacted Synergy sometime in 2018, requesting a solution to fix the problems. The two companies attempted to fix the problems for several months.

29. 32
The primary problem with the tablets delivered under Order MT0560 was their slow processing speed. For example, Hu testified that other tablets on average take about 35 to 45 seconds to boot up. By contrast, he testified that the tablets in Order MT0560 took around 55 seconds to boot up.

30. 33
Several factors can cause tablets to run slowly. For example, if there is poor cellular signal coverage for the SIM cards contained in the tablets, the tablets can become slow. The software in a tablet or a defective motherboard can also cause it to run slowly. However, there was no expert testimony on the normal or customary processing speeds of tablets, nor did the purchase orders specify a particular processing speed.

31. 34
Ultimately, of the 9,900 tablets sent to HSN for sale from Order MT0560, only 2,700 were sold and 37% of those were returned by the consumer. Hu testified that in his experience, the acceptable return rate for products sold on sites like HSN was three to five percent.

32. 35
Customers can return products to HSN for various reasons, including simply because the customer did not like the color of the product.

33. 36
Because of the percentage of returns and Mingtel's inability to resolve the issues complained of, HSN returned the 7,200 tablets to Mingtel from Order MT0560 that had not yet been sold. Mingtel was able to resale a few of the 7,200 tablets, however, leaving approximately 7,000 tablets remaining in Mingtel's warehouse.

B. Order MT0559

34. 37
As to Order MT0559, while it did not progress as quickly as Order MT0560, Synergy also made progress on it. For example, after Mingtel approved the bill of materials and golden sample, Mingtel sent a contract to Synergy, confirming the order, which Synergy signed on November 28, 2017. As a result, Synergy commenced purchasing raw materials and began manufacturing the first 5,000 tablets of the order.

35. 38
In the first few months of 2018, Synergy informed Mingtel that the first 5,000 tablets in Order MT0559 were ready at Synergy's factory for Mingtel to collect.

36. 39
However, because of the issues in Order MT0560, Mingtel informed Synergy it would not pick up the tablets nor otherwise accept delivery of the tablets. Mingtel also requested that Synergy cease production on the next 5,000 units.

37. 40
Mingtel, outside of the five percent deposit it paid in 2017 for $38,160.00, did not pay any more toward the balance owed under Order MT0559, which was $725,040.00.

38. 41
After Mingtel refused delivery of the 5,000 completed tablets in Order MT0559, Synergy sold them for an estimated $30 per tablet, yielding $150,000.

39. 42
At the time Mingtel refused delivery of the first 5,000 tablets in Order MT0559, Synergy had already purchased the motherboards for the remaining 5,000 tablets in Order MT0559.

Chan testified that the cost of the motherboards represents approximately fifty percent of the tablet price, around $38. Synergy produced no other evidence on its other variable costs to make the tablet.[3] Further, Synergy produced no evidence concerning its expected profit under Order MT0559.

40. 43
As of the date of the trial, Synergy still had around 4,800 motherboards.

Conclusions of Law

I. Jurisdiction, Venue, and Governing Law

1. 44
The Court has two bases for subject matter jurisdiction: diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1331.

2. 45
The Court has diversity jurisdiction because the parties are completely diverse. Synergy is a citizen of a foreign state, the People's Republic of China, and Mingtel is a citizen of Texas. Further, the amount in controversy exceeds the sum of $75,000.

[3] Though Synergy offered into evidence the bill of materials, which shows the costs for all of the components in Order MT0559, the bill of material reflects the costs *charged* to Mingtel for the components – not the cost Synergy paid for the goods. For example, the bill of materials totals $76.32, which is how much Mingtel agreed to pay Synergy for one tablet under Order MT0559.

3. 46
The Court has federal question jurisdiction because Synergy's and Mingtel's respective countries of citizenship – the People's Republic of China and the United States – are signatories to the U.N. Convention on Contracts for the International Sale of Goods («CISG»). The CISG, ratified by the Senate in 1986, creates a private right of action in federal court. *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003).

4. 47
Venue is proper in this action pursuant to 28 U.S.C. § 1391(b)(1) because the Defendant, Mingtel, is a resident of the Eastern District of Texas.

5. 48
Both parties agree that the CISG applies to the transactions between the parties. *See* CISG art. 1(1)(a) («This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . [w]hen the States are Contracting States.»); *see also BP Oil Int'l, Ltd*, 332 F.3d at 337 («As incorporated federal law, the CISG governs the dispute so long as the parties have not elected to exclude its application.»).

II. The Parties' Contentions

6. 49
To begin, the Court finds it helpful to summarize the parties' contentions. On March 20, 2019, Synergy filed suit, asserting a breach of contract claim against Mingtel for failing to take delivery of the tablets and pay the balance owed under Order MT0559, the second order. In response, Mingtel counterclaimed that Synergy breached Order MT0560 (the first order) by failing to provide conforming goods. Thus, Mingtel contends it did not breach Order MT0559, but rather rightfully rejected the goods. Because Mingtel claims its refusal of the second order, Order MT0559, was justified in light of Synergy's failure to deliver nonconforming goods under the first order, Order MT0560, the Court begins with Order MT0560.

III. Whether Synergy Breached Order MT0560

7. 50
The parties do not dispute that they had a valid and enforceable contract pertaining to Order MT0560. It is also undisputed that Mingtel fully paid for Order MT0560. However, the parties dispute three issues relating to Order MT0560: (1) whether Synergy breached its obligations by delivering nonconforming goods; (2) whether Mingtel examined the tablets within as short a period as is practicable under the circumstances; and (3) whether Mingtel gave Synergy notice of any nonconformity of the tablets within a reasonable time. The court will address these matters in turn.

A. Whether Synergy Breached the Contract by Failing to Deliver Conforming Goods

8. 51
The CISG defines a fundamental breach as one that «results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless

the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.» CISG art. 25.

9. **52**
Additionally, Article 35 defines the seller's obligations:

> (1) The seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract.
>
> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
>
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract . . .
>
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample of model … .

Id. art. 35. The CISG further states that «[t]he seller is liable in accordance with the contract **53**
and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.» *Id*. art. 36(1).

10. **54**
Importantly, «[u]nder the CISG, 'the buyer is allocated the burden of proving that the goods were defective prior to the expiration of the seller's obligation point.'» *Hefei Ziking Steel Pipe Co., v. Meever & Meever,* No. 4:20-cv-00425, 2021 WL 4267162, at *6 (S.D. Tex., Sept. 20, 2021) (quoting *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005); *see also Norfolk S. Ry. Co. v. Power Source Supply, Inc*., No. 06- 58 J, 2008 WL 2884102, at *4 (W.D. Pa. July 25, 2008) («Whether Defendant's assertions are treated as defenses or counterclaims, Defendant has the burden of showing that the goods Plaintiff delivered did not conform to the terms of the Parties' agreement.»); *Berry v. Ken M. Spooner Farms, Inc*., No. C05-5538, 2009 WL 927704, at *3 (W.D. Wash. Apr. 3, 2009) («The burden of proof is on the buyer to prove that the product was defective at the time of delivery.»).

11. **55**
Though Mingtel claims Synergy failed to provide conforming goods under Order MT0560, Mingtel's evidence on the matter was sparse at trial. Indeed, Mingtel offered pictures of some of the defective tablets, some communications between the two parties, and lay testimony from Hu.[4]

[4] Mingtel also attempted to offer screenshots of customers' reviews of the tablets that were posted on the HSN website, which Synergy objected to on the grounds that the reviews were hearsay. At trial, Mingtel maintained that the records qualified as business records. However, the Court disagrees. First, the reviews are hearsay. They

12. 56
More specifically, Hu testified that 37% of the tablets sold by HSN were returned by consumers. Hu also testified that the main issue with the tablets was their slow speed and estimated that they took about 15–20 seconds longer to boot up than similar tablets. Further, Hu stated that tests run on the Wi-Fi of the tablet without the SIM cards show that the tablets' slow processing speed was a result of problems with the tablet itself and not the SIM card or Freedom Pop software. Besides Hu's conclusory statement, Hu did not provide any more details regarding any tests Mingtel performed or the results of such tests.

13. 57
Mingtel also did not offer expert testimony concerning the conformity of the subject goods or how fast the Wi-Fi on a tablet should customarily be. Though Hu made a general reference to tests that Mingtel had performed, Mingtel did not offer evidence of any quantitative tests that compared the Order MT0560 tablets' processing speed to other similar tablets.

14. 58
Synergy's rebutted evidence included testimony from Chan that Mingtel defined the exact specifications of the tablets, selected the components in the bill of materials, and approved a golden sample of the tablets. Further, Order MT0560 did not specify a particular processing speed for the tablets. Additionally, Chan testified that after the 10,000 tablets were completed, Mingtel inspected a random sample of them and approved them as in conformity with their specifications.

15. 59
Further, Chan testified that the tablets' SIM cards and FreedomPop application affected the processing speed of the tablets and caused problems with the tablets. Tellingly, emails sent from Mingtel to HSN confirmed this is true. In the emails, Hu and Hartman explain to HSN that customers' Wi-Fi connections and the Freedom Pop network coverage were causing the tablets to run slowly. Further, Hartman's email states that the slow speed «is not a tablet issue» but «a WiFi or network issue.» And Hu's email states that the «tablet is not slow at all.»

16. 60
Similarly, Synergy pointed out that the 37% return rate does not indicate that the tablets were nonconforming goods. For example, customers might have been dissatisfied with the tablets

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are out-of-court statements offered for the truth of the matter asserted – the matter asserted being the matter complained of in the reviews, *i.e*. that the products were defective due to various issues. Second, the reviews are not covered by any hearsay exception and thus are inadmissible. While Mingtel argued that the reviews qualify as business records, they do not comply with all the requirements of Federal Rule of Evidence 803(6). *See Williams v. Remington Arms Co*., No. 3:05-cv-1383, 2008 WL 222496, at *9–*10 (N.D. Tex. Jan. 28, 2008) (holding that customer complaints were hearsay and did not qualify as business records under Rule 803(6) because the supplier of the information, the person making the complaint, was not acting in the course of regularly conducted business activity when he made the complaint). Further, even if the Court were to consider the reviews to be part of Mingtel's record of customer complaints, «the court would still face a double hearsay problem.» *Mary Kay, Inc. v. Weber*, 601 F. Supp. 2d. 839, 851 (N.D. Tex. 2009). Although the record of the reviews would be covered by the Rule 803(6) exception, the reviews themselves would still have to be covered by another hearsay exception. *Id.* They are not. As such, the customer reviews on the HSN website are inadmissible hearsay, and the Court did not consider them in its ruling.

for a variety of reasons that were not the fault of Synergy – including frustration with the FreedomPop software or the fact that consumers did not like the tablets' features or colors.

17. 61
Here, because of the limited evidence that was successfully rebutted, Mingtel has failed to satisfy its burden of proof that Synergy breached its obligations under Order MT0560 by delivering nonconforming goods. *See Berry*, 2009 WL 927704, at *7 (finding plaintiff failed to satisfy her burden of proof where there were several possible causes for the alleged defect); *see also Hefei*, 2021 WL 4267162, at *6 (finding buyer did not carry its burden of showing that the goods were defective when its sole evidence of nonconformity consisted of lay testimony regarding a photo).

18. 62
Further, though Mingtel also argued the tablets were nonconforming because they were unfit for their known particular purpose – resale via HSN to consumers in the United States – the Court disagrees. As other courts interpreting the CISG have recognized, «the 'purpose' of reselling a consumer good ... is a general or 'ordinary' purpose for consumer electronic products, rather than a 'particular purpose.'» *Goodview Elec. (Nanjing) Co. v. Digital Spectrum Sols., Inc*., No. SACV 09-00530-CJC (ANx), 2011 WL 13224872, at *5 (C.D. Cal. Apr. 25, 2011). Thus, such a broad purpose as «reselling a consumer good» is not a basis for a claim of breach of an express or implied warranty of fitness for a particular purpose under the CISG. *See id*.

19. 63
In sum, because the Court finds that Mingtel did not prove that the tablets were nonconforming goods, Mingtel's counterclaim fails. However, to be sure, even if Mingtel had proved that the tablets were nonconforming, its counterclaim would fail for additional reasons – Mingtel failed to timely adequately inspect the goods and timely notify Synergy that the goods were nonconforming.

B. Mingtel Failed to Examine the Goods Within as Short a Period as is Practicable Under the Circumstances

20. 64
Under Article 38 of the CISG, «[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.» CISG art. 38(1).

21. Further, «[t]he determination of what period of time is 'practicable' is a factual one and depends on the circumstances of the case.» *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d. 702, 712 (N.D. Ill. May 21, 2004), *aff'd*, 408 F.3d 894 (7th Cir. 2005). In *Chicago Prime Packers*, an Illinois district court found that a buyer who had examined pork approximately ten days after it was delivered had failed to demonstrate that it examined the goods, or caused them to be examined, within as short a period as is practicable under the circumstances. 320 F. Supp. 2d. at 713–14. The court found it notable that no evidence or testimony was presented as to why the pork, or a portion of it, was not and could not have been examined by the company when the shipment was delivered. *Id*. at 713. 65

22. 66
Here, the Court finds that Mingtel did not examine the tablets within as short a period as practicable under the circumstances. *See* CISG art. 38(1).

23. 67
As an initial matter, Mingtel's inspection of the tablets in China is of no consequence. Both parties agree that due to the Wi-Fi and server configurations differences between China and the United States, neither the Wi-Fi nor the SIM cards and Freedom Pop software could be tested in China by either Synergy or Mingtel. Thus, because the nonconformity was not reasonably discoverable upon Mingtel's examination in China, the time period for conducting the examination did not begin until the tablets arrived in the United States – when the defects could have revealed themselves.

24. 68
However, upon the tablets' arrival in the United States, Mingtel was required to make a timely examination of the goods «within as short a period as is practicable in the circumstances.» CISG, art. 38(1). But Mingtel has failed to demonstrate that it examined the goods or caused them to be examined within as short a period as practicable under the circumstances. Indeed, like the buyer in *Chicago Prime Packers*, Mingtel did not present any testimony or evidence as to why the tablets or a portion of them were not and could not have been examined by Mingtel upon their arrival in the United States. *See id*. Instead, Hu admitted that Mingtel shipped the tablets directly to the HSN warehouse. But even upon delivery at the HSN warehouse, Mingtel failed to examine the tablets then. Rather, Mingtel only examined the tablets after they were sold on HSN and then returned to Mingtel by HSN customers, which was likely months after the tablets had arrived in the United States.

25. 69
While the exact timing of when Mingtel finally inspected the tablets is murky, it is clear that the examination was not done «within as short a period as is practicable in the circumstances.» CISG art. 38(1). To be sure, Hu admitted that he did not inspect the tablets until after they were returned for refunds by customers – sometime in 2018. Yet, even averaging Hu's estimate on the shipping time for goods between China and the United States (50 days) and Chan's estimate (20 days), the tablets should have arrived in the United States in early December 2017. Indeed, as Synergy delivered the tablets to Mingtel in China around October 30, 2017, thirty-five days later from then would have been early December 2017. Yet Hu admitted that Mingtel did not examine the tablets around that time – even though Mingtel was aware that the tablets' Wi-Fi and SIM card capability in the United States could not be tested in China.

26. 70
Accordingly, because Mingtel did not examine the tablets upon their arrival in the United States, the Court finds that Mingtel did not examine the tablets, or cause them to be examined, within as short a period is practicable in the circumstances. *See* CISG art.38.

While Article 38 of the CISG provides no independent consequence for a failure to examine 71
the goods, «if the buyer fails to do so and there is a lack of conformity of the goods that an examination would have revealed, the notice period in article 39 commences from the time

the buyer 'ought to have discovered it.'» CISG Advisory Council, *CISG Advisory Council Opinion No. 2: Examination of the Goods and Notice of Nonconformity Articles 38 and 39*, 16 Pace Int'l L. Rev. 377, 378 (2004). Thus, the Court now turns to Article 39 to consider whether Mingtel gave notice to Synergy of the lack of conformity within a reasonable time.

C. Whether Mingtel Gave Notice of the Alleged Lack of Conformity Within a Reasonable Time

27. **72**
Pursuant to Article 39 of the CISG, «[t]he buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.» CISG art. 39(1). And, «[i]n any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer … .» *Id*. art. 39(2). However, «if the lack of conformity relates to facts of which [the seller] knew or could not have been unaware and which he did not disclose to the buyer[,]» then the buyer is excused from the consequences of failing to make timely examination of the goods and give notice of the nonconformities. *Id*. art. 40.

28. **73**
Here, neither party disputes that Mingtel provided notice to Synergy of the tablets' slow speeds within two years from the date the goods were received, and thus within the maximum time permitted under the CISG. *See id*. art. 39(2). Further, as the Wi-Fi and SIM cards could not be tested in China, the Court finds that Synergy did not know or was otherwise unaware of any nonconformity related to these issues prior to notice from Mingtel. *See id*. art. 40. Thus, Mingtel is not excused from the CISG's examination and notice requirements under Articles 38 and 39 for the tablets' operational defects.

29. **74**
However, in its post-trial brief, which was filed more than three years after Synergy delivered the tablets to Mingtel, Mingtel for the first time claims that Synergy breached the contract by only delivering 9,900 of the 10,000 tablets in Order MT0560. Nevertheless, because Mingtel failed to raise insufficient quantity as a defect within two years from the date the goods were delivered, Mingtel has the lost the right to rely on this breach. *See id.* art. 39(2); *see also Shantou Real Lingerie Mfg. Co. v. Native Grp. Int'l, Ltd*., No. 14CV10246, 2016 WL 4532911, at *4 (S.D.N.Y. Aug. 23, 2016) (finding that where the alleged breach would have been apparent on the date of delivery, a one-year delay was unreasonable under the CISG). Further, Mingtel is not excused for its untimely notice to Synergy under Article 40. While the trial testimony only briefly touched on the fact that Synergy only delivered 9,900 of 10,000 units, the Court finds that the evidence shows that Synergy disclosed the insufficient quantity to Mingtel upon delivery. To be sure, Mingtel's own inspection reports from its inspection in China indicate that Mingtel inspected two batches totaling 9,900 units – the first batch being 2,700 units and the second being 7,200 units.

30. 75
Accordingly, because Mingtel failed to notify Synergy of the insufficient quantity within two years from the date of delivery, it has lost the right to pursue a remedy for this nonconformity. As such, the only question is whether Mingtel provided notice of the tablets' operational defects to Synergy within a reasonable time after it discovered the nonconformity or ought to have discovered it. *See* CISG art. 39(1).

31. 76
As with Article 38, under Article 39, «[the] buyer bears the burden of showing that notice of nonconformity has been given within a reasonable time.» *Chi. Prime Packers*, 320 F. Supp. 2d. at 714. Likewise, «the determination of what time period is reasonable for a party to alert the other party of an alleged nonconformity is fact sensitive, and must be determined on a case by case basis.» *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting Gmbh*, No. 1:05-CV-00702, 2009 WL 818618, at *8 (S.D. Ohio Mar. 26, 2009).

32. 77
In *Chicago Prime Packers*, the district court noted that other courts had found «the reasonableness of the time for a notice of non-conformity provided in Article 39 [to be] strictly related to the duty to examine the goods within as short a period as is practicable in the circumstances set forth in Article 38.» 320 F. Supp. 2d at 714 (citation omitted). Thus, because the court had found that the buyer failed to examine the shipment in as short as time as practicable, it held that «it follows that [the buyer] also failed to give notice within a reasonable time after it should have discovered the alleged non-conformity.» *Id*. at 715.

33. 78
Similarly, here, in addition to Mingtel failing to examine the tablets within as short as time as practicable, Mingtel also failed to provide Synergy notice of any nonconformity of the tablets within a reasonable time after it ought to have discovered it under CISG Article 39.

34. 79
Like other courts, the Court finds that the period when the defect should have been discovered relates to the article 38 CISG examination period. *See id.* at 714 (noting that time for when the buyer ought to have discovered the defect should be determined by reference to Article 38); *see also* Adam M. Giuliano, *Nonconformity in the Sale of Goods Between the United States and China: the New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods*, 18 Fla. J. Int'l L. 331, 347 (2006) («According to the draft commentary, '[t]he time when the buyer is obligated to examine the goods under article [38] constitutes the time when the buyer 'ought to have discovered' the lack of conformity under article [39] unless the non-conformity is one which could not have been discovered by such examination.'») (citing to the Secretariat Commentary to the 1978 Draft United Nations Convention on Contracts for the International Sale of Goods).

35. 80
Accordingly, the Court evaluates the reasonableness of the timing for Mingtel's notice from the date when Mingtel should have discovered the alleged nonconformity – not when it actu-

ally discovered it. The court uses this time frame because Mingtel had an obligation to examine the goods within as short a period as is practicable, and the evidence showed that an examination would have revealed the lack of conformity that Mingtel complains of – slow speeds of the tablets' Wi-Fi. Indeed, that an examination by Mingtel upon the tablets' arrival in the United States would have revealed the alleged nonconformity is underscored by the fact that Mingtel's inspection in China, as indicated by its Inspection Report, encompassed tests on the tablets' major functions, including the tablets' Wi-Fi and SIM cards. Accordingly, if Mingtel had performed the same inspection as it did in China in the United States (*i.e.* tests on the Wi-Fi and SIM card service), then the defects regarding the slow speeds of the tablets would have revealed themselves. Moreover, that consumers experienced immediate problems with the tablets as soon as they put them to use also shows that an examination of the tablets upon their arrival in the United States would have revealed the defects.

36. **81**
Mingtel's argument concerning whether it provided notice of the nonconformity to Synergy within a reasonable time suffers from two flaws. First, Mingtel argues, without explaining why, that the defects could not have been discovered until consumers from HSN used tablets (Dkt. #71 at p. 4). The Court disagrees – sales to consumers via HSN was not a prerequisite to discovery of the defects. Instead, the Court finds that any of the perceived defects could have been discovered if Mingtel had performed a reasonable inspection of the tablets upon their arrival in the United States. This «reasonable inspection» would have required no more than the inspection Mingtel undertook in China – tests on the Wi-Fi and SIM cards.

37. **82**
Second, Mingtel bases the reasonableness of the timing of its notice on its actual discovery of the perceived defects – not when Mingtel «ought to have» discovered the defects (*see* Dkt. #71 at p. 14 («Therefore, the required notices were made within a reasonable time after the discovery was made. ...»)). But, like *Chicago Prime Packers*, the question here is not whether notice was given within a reasonable time after discovery of the nonconformity, but whether notice was given within a reasonable time after Mingtel *should have discovered* the non-conformity. *See* 320 F. Supp. 2d at 714. And, here, the evidence shows that Mingtel should have discovered any nonconformity in mid-December – around the time the tablets arrived in the United States.

38. **83**
Thus, if Mingtel should have discovered the nonconformity in early to mid-December (around the time the tablets arrived in the United States), the question becomes: Did Mingtel provide notice to Synergy specifying the lack of conformity within a reasonable time from this date?

39. **84**
Again, here, Mingtel bears the burden of proving that it provided notice of the alleged lack of conformity within a reasonable time. *Chi. Prime Packers*, 320 F. Supp. 2d. at 714.

However, the date that Mingtel provided notice to Synergy is unclear. Hu testified that Mingtel began selling the tablets on HSN in January 2018, so presumably notice was given after this date – after the tablets were sold, delivered and consumers began experiencing problems with **85**

the tablets. This date aligns with Chan's testimony, which provided that Mingtel first gave Synergy notice three or four months after the tablets shipped – which would have been around late January or February 2018. Further, Mingtel's post-trial briefing confirms this timeline. In its briefing, Mingtel argues that notice was given «weeks after the first HSN sale» (Dkt. #71 at p. 13) and «3–4 months after [the tablets] shipped» (Dkt. #71 at p. 13).

40. **86**
Nevertheless, the Court finds that Mingtel did not provide notice of the tablets' alleged nonconformity to Synergy within a reasonable period of time. Again, while the exact timing of the notice is unclear, it was likely around late January or early February 2018.

Yet, as stated previously, had Mingtel inspected the tablets once they arrived in the United States – in early to mid-December 2017 – the alleged defects would have been apparent then. Thus, the Court finds that Mingtel's notice was untimely. Again, there was no explanation for the delay. While the Court recognizes that tablets are complex machines and several factors affect the speed of a tablet's Wi-Fi, the Court finds that an examination should have alerted Mingtel to any perceived nonconformity. Indeed, crediting Hu's testimony – that tests without the SIM card reveal that the manufacturing of the tablets was the cause of the slow Wi-Fi speed – it is hard to see why notification of any nonconformity would take longer than one month. Further, given that Mingtel was granted 90-day payment terms after shipment, and Mingtel fully paid for the tablets, Mingtel's failure to communicate notice of any nonconformity before it paid the remaining balance seems unreasonable. **87**

41. **88**
In sum, the Court finds that Mingtel has not met its burden of proving that Synergy breached Order MT0560 by failing to deliver conforming goods. Nor did Synergy breach any express or implied warranties for a particular purpose under Article 35 or 36 of the CISG. Further, even if Mingtel had proved that Synergy breached Order MT0560, Mingtel lost the right to pursue a remedy because it failed to examine the tablets within as short a period as is practicable under Article 38 and failed to provide sufficient notice within a reasonable time under Article 39. The Court now turns to Order MT0559 and Synergy's claim that Mingtel breached the contract by failing to pay the remaining balance.

IV. Whether Mingtel Breached Order MT0559

42. **89**
Turning to Order MT0559, it is undisputed that there existed a valid contract for the purchase of 10,000 tablets at the price of $76.32 per tablet, totaling $763,200.00. It also undisputed that Mingtel only paid $38,160.00 as a deposit for the goods and nothing more toward Order MT0559. However, the parties dispute: (1) whether Order MT0559 was orally modified by the parties to 5,000 units, and (2) whether Mingtel breached the contract by failing to pay the balance of Order MT0559 or whether it rightfully rejected the goods based on the alleged nonconformities in Order MT0560. The Court examines these issues in turn.

A. Was Order MT0559 Orally Modified by the Parties to 5,000 Units?

43. 90
As an initial mater, the CISG does not require contract modifications to be reduced to writing. *See* CISG art. 29 («A contract may be modified or terminated by the mere agreement of the parties.»). Indeed, Articles 8 and 9 explicitly direct courts to consider extrinsic evidence of the parties' intent. For example, under Article 8, in determining the parties' intent, «due consideration is to be given 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.» *Id*. art. 8(3); *see also MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998) («Given article 8(1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.»). Further, under Article 9, «[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.» CISG art. 9(1).

44. 91
Accordingly, though Mingtel acknowledges that Order MT0559 states 10,000 units at the price of $76.32 per tablet, it argues that the number of units was later verbally reduced to 5,000 units. In making this argument, Mingtel relies heavily on the fact that it was Synergy's normal practice, as well as the normal course of dealing between Synergy and Mingtel, for Synergy to receive a ten percent deposit on all orders. Consequently, according to Mingtel, its payment of $38,160.00 towards Order MT0559 reflected a ten percent deposit for 5,000 units and shows that the purchase order was modified to 5,000 units.

However, the Court disagrees. 92

45. 93
The Court finds that the parties did not orally modify the quantity of units under Order MT0559. In reaching this conclusion, the Court finds Chan's testimony credible: that the only modification of Order MT0559 that Synergy agreed to was to accept a five percent deposit, instead of its customary ten percent deposit, because Mingtel was having cash flow issues. Indeed, Chan testified unequivocally that the purchase order was never modified to a quantity of 5,000 units. The Court's conclusion that the quantity of tablets was not modified under Order MT0559 is bolstered by the fact that no change purchase order or other document reflects the change of quantity. Further, Hu's testimony did not address who from Synergy agreed to the modification or even when the contract was allegedly modified. In short, there is no evidence that Synergy agreed to modify the quantity of tablets in Order MT0559. *See Solae, LLC v. Hershey Canada, Inc*., 557 F. Supp. 2d 452, 458 (D. Del. 2008) («A parties' multiple attempts to alter an agreement unilaterally do not so effect.») (internal quotation marks and citations omitted).

B. Whether Mingtel Breached Order MT0559

46. 94
Turning to whether Mingtel breached Order MT0559, it is undisputed that Mingtel did not pay any more money towards the balance of Order MT0559 after it paid the five percent deposit. However, Mingtel claims that because Order MT0560 and Order MT0559 were identical except for the memory space, it was justified in relying on its belief that allegedly defective tablets in Order MT0560 would likewise mean defective tablets in Order MT0559.

47. 95
If a fundamental breach occurs or is likely to occur, the non-breaching party may seek to suspend performance under Article 71 or to avoid the contract under Article 72. *See* CISG art. 71; *id.* art. 72. Accordingly, Mingtel claims its refusal of Order MT0559 based on the defects in Order MT0560 was justified under the CISG. However, because the Court has found that Synergy did not breach Order MT0560, Mingtel's argument that its anticipatory breach of MT0559 was justified fails. Mingtel had no right to suspend it performance or avoid the contract.

48. 96
However, Mingtel did have other obligations under Order MT0559. For example, under Article 53 of the CISG, «[t]he buyer must pay the price for the goods and take delivery of them … .» *Id.* art. 53*; see also id*. art. 60(2). Moreover, under Article 58, «[i]f the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and [the CISG].» *Id*. art. 58; *see also id*. art. 69(1).

49. 97
Here, after being notified that the first 5,000 tablets of Order MT0559 were ready for shipment in the first few months of 2018, Mingtel refused delivery. Further, though the payment terms between the parties required Mingtel to pay the balance of Order MT0559 ninety days after being tendered delivery of the tablets, Mingtel also failed to pay the balance of MT0559. Accordingly, Mingtel fundamentally breached the contract. To be sure, Mingtel's payment of only a small fraction – five percent – of the purchase price substantially deprived Synergy of the performance that it had a right to expect from Mingtel, *i.e*., full payment within 90 days of delivery. *See id*. art. 25 (defining a fundamental breach of the contract as one which «results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract … .»); *see also Doolim Corp. v. R Doll, LLC*, No. 08 Civ. 1587, 2009 WL 1514913, at *6 (S.D.N.Y. May 29, 2009) (holding that buyer committed fundamental breach by only paying less than twenty percent of the purchase price); *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, No. 1:01-cv-691, 2001 WL 34046276, at *9 (W.D. Mich. Dec. 17, 2001) (finding that buyer committed a fundamental breach when it failed to make substantial payments).

50. 98
Thus, Mingtel is liable to Synergy for breach of contract under Order MT0559.

V. Synergy's Damages

51. 99
As a result of determining that Mingtel breached its contract with Synergy, the Court must now determine the appropriate award of damages. Under the CISG, «[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.» CISG art. 74. This provision is «designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.» *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d. Cir. 1995) (internal quotations omitted). Once actual loss, including lost profits, are calculated under Article 74, the Court next looks to either Article 75 or 76. Article 75 applies when the seller has resold the goods within a reasonable time, and Article 76 applies when there has been no resale of the product. CISG art. 75; *id*. art. 76. Further, Article 77 also requires a party claiming breach of contract to «take such measures as are reasonable in the circumstance to mitigate the loss.» *Id*. art. 77.

52. 100
Synergy seeks $575,400.00 plus prejudgment interest as a result of Mingtel's breach of Order MT0559 (Dkt. #69 at p. 12). In reaching this amount of damages, Synergy's reasoning is as follows: (1) Under Order MT0559, Mingtel agreed to purchase from Synergy 10,000 tablets at the price of $76.32 per tablet, totaling $763,200.00; (2) Mingtel paid a five percent deposit on Order MT0559, which was $38,160.00, and thus the balance owed under Order MT0559 is $725,040.00; (3) After Mingtel refused delivery, Synergy mitigated its damages by selling 5,000 tablets at $30 per tablet for the sum of $150,000; (4) Thus, Synergy is entitled to the balance owed under MT0559, $725,040.00, minus the sum Synergy received for selling 5,000 tablets at $30 per tablet, $150,000, which equals $575,400.

53. 101
Here, the Court finds that Synergy's argument on the matter is flawed. Rather than an award of $575,400 plus prejudgment interest, which Synergy seeks, the Court finds that Synergy is entitled to damages in the amount of $373,840.00 plus prejudgment interest.

54. 102
While Synergy acknowledges that it is entitled to damages that will put it in the same position as if Mingtel had performed its contractual obligations (*see* Dkt. #70 at p. 4), the damages Synergy seeks would put Synergy in a better position that it would have been had there been no breach. That is because Synergy's expectation damages are incorrectly based on its gross revenue (*i.e.* Synergy seeks the balance owed under MT0059) – though the measure of damages should be based on Synergy's lost profit under MT0559. *See Al Hewar Env't & Pub. Health Establishment v. Southeast Ranch, LLC*, No. 10-80851-cv, 2011 WL 7191744, at *2 (S.D. Fla. Nov. 8, 2011) (finding that under the CISG the plaintiff's lost profit was the appropriate amount of damages to put the plaintiff in the same position had the contract been performed as expected). Further, though Chan admitted that Synergy only manufactured 5,000 of the 10,000 tablets under MT0559, Synergy fails to deduct its avoided costs because of Mingtel's breach. *See id*. (deducting expenses of performance that were saved as a result of the other party's breach). In other words, Synergy would receive what Mingtel promised without the

cost of performing its return promise. Indeed, Synergy would receive the full benefit of the contract even though it did not incur some of the costs expected under the contract. But «[a]n injured party cannot be put in a better position than it would have enjoyed if the contract had been properly performed.» CISGAC Opinion No. 6, Calculation of Damages under CISG Article 74, Cmt. 9;[5] *see also Sunrise Foods Int'l v. Ryan Hinton Inc*., No. 1:17-cv-00457, 2019 WL 3755499, at *7 (D. Idaho Aug. 8, 2019) (finding that under the CISG a party cannot be put into a better position than it would have had the contract been performed fully).

55. **103**
Accordingly, as to the first 5,000 tablets which Synergy manufactured, Synergy is entitled to $231,600. Under the terms of the contract, Synergy expected to receive $76.32 for each of the 5,000 tablets it manufactured, totaling $381,600. However, as a result of Mingtel's breach, Synergy only received $30 per tablet, totaling $150,000. Thus, under Article 76, Synergy «may recover the difference between the contract price and the price in the substitute transaction … .» CISG art 76. As such, Synergy is entitled to the difference between these amounts, or $231,600 ($381,600 less $150,000). This amount of damages puts Synergy in the same position it would have been in economically had Mingtel fully performed the contract. *See id.* art. 74.

56. **104**
However, as for the remaining 5,000 tablets, the Court cannot fully calculate the loss suffered by Synergy as a result of Mingtel's breach. First, as stated, Synergy only provided evidence of its total lost revenue as a result of Mingtel's breach (i.e., the amount Mingtel owed Synergy under the contract). For example, the evidence showed that at a price of $76.32 per tablet, the loss of revenue under the contract for 5,000 tablets was $381,600.

But that is not the measure of Synergy's loss from Mingtel's breach. Rather, «the proper measure of damages in a breach of contract case is the loss of contractual *profit*.» *Amigo Broad., L.P. v. Spanish Broad. Sys., Inc*., 521 F.3d 472, 482–83 (5th Cir. 2008) (emphasis added). And calculating lost profit requires the non-breaching party to deduct from the anticipated contract revenue the costs incurred in performing the contractual services. Here, however, Synergy provided no evidence of its lost profits under Order MT0559. Nor did it provide evidence of its costs or expenses under the contract.[6] Instead, the only cost that Synergy provided evidence of was the cost of the motherboard, which Chan testified was $38. Without evidence **105**

[5] Given that there is little American caselaw interpreting the CISG, «U.S. courts have relied heavily on the [CISG] Advisory Council opinions.» *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co*., No. 06 Civ. 3972, 2011 WL 4494602, at *5 n.5 (S.D.N.Y. Sept. 28, 2011) (collecting cases). The CISG Advisory Council «is a private initiative which aims at promoting a uniform interpretation of the CISG.» *See* CISG ADVISORY COUNCIL, https://www.cisgac.com/home/ (last visited Mar. 24, 2022). It is composed of legal scholars from all over the world. *Caffaro Chimica S.R.L v. Sipcam Agro USA*, No. 1:07-CV-2471-MHS, 2008 WL 11407388, at *5 n. 4 (N.D. Ga. July 15, 2008).

[6] Again, while Synergy offered the bill of materials for Order MT0059, which reflects the components in a tablet and the corresponding prices for each component, into evidence, this does not help the Court. As noted earlier, the bill of materials reflects the costs *charged* to Mingtel for the components – not the cost incurred by Synergy in performing the contract. The Court reaches this conclusion because the bill of materials totals $76.32, the price charged to Mingtel for each tablet. Further, the contract between the parties that confirmed Order MT0559 makes clear that the bill of materials reflects the unit price charged to Mingtel.

of other costs or direct evidence of lost profit, the Court cannot calculate the loss Synergy suffered because of Mingtel's breach of the contract – Synergy's lost profit.

57. 106
However, Synergy did provide evidence of an expense that it incurred on the remaining 5,000 units as a result of Mingtel's breach that it is entitled to recover. For example, Chan testified that Synergy purchased 5,000 motherboards at a cost of around $38 before it received notice that Mingtel was refusing delivery of the first 5,000 tablets. Moreover, Mingtel did not offer any testimony or evidence that would suggest Chan's testimony of the cost was inaccurate. Further, Chan testified that Synergy still had 4,800 of these motherboards. And though Mingtel argued that Synergy failed to mitigate its damages, the Court disagrees. *See Goodview*, 2011 WL 13224872, at *6 (noting that breaching party bears the burden of proof of showing that non-breaching party failed to take reasonable measures to mitigate the loss and the amount by which non-breaching party's damages should be reduced as a result). Mingtel did not present any evidence regarding whether Synergy could, with reasonable efforts, resell the motherboards. *See id*. Nor did it present any evidence regarding the resale value of the motherboards. *See id*. Thus, Mingtel failed to establish «the amount of the loss that should have been mitigated» in order to claim a reduction in damages. *See* CISG art. 77. Accordingly, as Synergy spent $38 for each of the 4,800 motherboards, or $182,400.00 in its performance under the contract, it is entitled to recover for this loss.

58. 107
Therefore, the Court finds that Synergy suffered losses in the sum of $182,400.00 + $231,600.00, which totals $414,000.00. However, Mingtel paid a five percent deposit ($38,160.00) and should be credited for this sum. Thus, subtracting the five percent deposit from $414,000.00, Synergy's total damages as a result of Mingtel's breach of the contract are: $375,840.00.

59. 108
Synergy also seeks prejudgment interest (Dkt. #69 at p. 12). Under the CISG, parties are entitled to prejudgment interest. *See* CISG art. 78.[7] Accordingly, the Court awards prejudgment interest. *See Hefei*, 2021 WL 4267162, at *9 (awarding prejudgment interest on a breach of contract claim under the CISG).

[7] Notably, «[f]ederal law governs the allowance and rate of interest where, as here, a cause of action arises out of a federal law.» *Hefei*, 2021 WL 4267162, at *9 n.6 (citing *Carpenters Dist. Council of New Orleans & Vicinity v. Dillar Dep't Stores, Inc*. 15 F.3d 1275, 1288 (5th Cir. 1994)). Further, the Court has discretion in choosing the prejudgment rate of interest. *Id.*

VI. Conclusion

Based on the foregoing analysis and discussion, the Court finds as follows: **109**

1. Defendant, Mingtel, is liable to Plaintiff, Synergy, for breach of contract in the total amount of $375,840.00, plus prejudgment interest.

IT IS SO ORDERED.