

CISG-online 6687	
Jurisdiction	USA
Tribunal	U.S. District Court for the Northern District of Georgia
Date of the decision	22 January 2013
Case no./docket no.	4:12-CV-0236-HLM
Case name	<i>Eligere Carpet & Rugs, LLC et al. v. Filature Lemieux, Inc.</i>

Order

This case is before the Court on Defendant's Motion to Dismiss Amended Complaint («Motion to Dismiss»).

1

I. Background

A. Plaintiff's Allegations

1. The Parties

Plaintiff Eligere Carpet & Rugs, LLC («Plaintiff Eligere») is a Georgia limited liability company with its principal place of business in Dalton, Georgia. Plaintiff Eligere designs and manufactures high quality floor coverings, including carpet. Plaintiff Eligere supplies its products to designers and architects.

2

Plaintiff Ecotex, Inc. («Plaintiff Ecotex») is a Georgia corporation with its principal place of business in Dalton. Plaintiff Ecotex «acquires and distributes various textile materials to third parties, including carpet manufacturers such as [Plaintiff] Eligere.»

3

Defendant is a Canadian corporation with its principal place of business in Quebec, Canada.

4

2. Factual Allegations

In May 2011, Plaintiff Eligere received an order from an entity in Toronto, Ontario, (the «Client») for wool carpet (the «Carpet»). Under its agreement with the Client (the «Client Contract»), «[Plaintiff] Eligere was to supply approximately 20,000 yards of wool carpet to the Client, which was to be manufactured in accordance with particular designs and specifications provided by the Client.» Plaintiff Eligere had to procure a substantial amount of yarn to fulfill the Client Contract.

5

According to Plaintiffs, «[Plaintiff] Ecotex agreed to assist [Plaintiff] Eligere in the purchasing and procuring of yarn for [Plaintiff] Eligere so that [Plaintiff] Eligere would be able to produce the necessary carpet and fulfill its obligations to the Client under the Client Contract.» Plaintiffs contacted Defendant, an international supplier of yarn.

6

«[Plaintiff] Ecotex sold and supplied nylon staple to Defendant.» Defendant, in turn, «blended the nylon staple with its wool and then spun the blended materials into yarn to produce a sample of yarn (the 'Sample['']).» According to Plaintiffs, «[t]he Sample was to be representative of the quality and nature of the yarn that Defendant was offering to supply to Plaintiffs.» Plaintiffs contend that they relied upon the Sample and believed that «Defendant would supply yarn that was in conformance with the quality and nature of the Sample.»

7

Plaintiff Ecotex tried to enter into a credit arrangement with Defendant that would allow it to order the yarn on credit. Plaintiff Ecotex executed a credit application with Defendant on or about June 2, 2011.

8

Plaintiffs allege that they «submitted a series of purchase orders, pursuant to which Defendant was to supply a substantial amount of yarn,» and Defendant accepted those purchase orders. Plaintiffs state, «Defendant failed to deliver the yarn ordered by Plaintiffs within a commercially reasonable time.»

9

Plaintiff Ecotex provided nylon staple for a portion of the yarn manufactured by Defendant. According to Plaintiffs, «[d]ue to subsequent problems with Defendant and the quality of its yarn, [Plaintiff] Ecotex did not provide nylon staple for the remaining portion of Plaintiffs' order with Defendant.»

10

Plaintiffs allege that the yarn Defendant supplied was unacceptable and «failed to conform to the quality and nature of the Sample.» Plaintiffs state:

11

The overall poor quality of the yarn supplied by Defendant (the «Yarn») including, but not limited to the poor blending and short staple length, resulted in very low break strength. The poor quality of the yarn supplied by Defendant resulted in excessive waste, carpet with non-uniform and excessive streaking, and bad color matches. Also, the poor quality yarn provided by Defendant had excessive knots, which resulted in poor running in tufting, overall production delays, and quality issues. As a result, Defendant's yarn caused major production delays at the dye house.

Plaintiffs allege that they «expended substantial funds to attempt to utilize the yarn supplied by Defendant to timely manufacture carpet and satisfy [Plaintiff] Eligere's obligations to the Client.» According to Plaintiffs:

12

The excessive waste and poor tufting caused by the poor quality yarn supplied by Defendant resulted in delays in the production of carpet and a much lower yield of usable carpet. Because of the poor quality yarn, [Plaintiff] Eligere was required to install and apply a soft backing to the carpet provided to the Client. The installation of soft backing, at great expense to [Plaintiff] Eligere, would not have been necessary had Defendant fulfilled its obligations under the Agreement. In addition, [Plaintiff] Eligere had to agree to cover the cost of removal and replacement of the Carpet should the Client deem the Carpet to be unsatisfactory.

Plaintiffs allege that they «lost several highly profitable projects with the Client» because of the problems associated with the yarn that Defendant provided. According to Plaintiffs, they

13

lost more than \$3,000,000 in future income from the lost projects. Additionally, Plaintiffs allege that the Client likely will assert claims against Plaintiff Eligere because of the problems caused by the yarn Defendant provided. According to Plaintiffs:

At all times material to this lawsuit, Plaintiffs provided notice to Defendant of the nonconformity of its yarn and made Defendant aware of the resulting problems relative to its production yarn. At all times material to this lawsuit, Defendant was aware that the nonconformity of the yarn placed Plaintiffs in a position of attempting to utilize Defendant's yarn to manufacture the carpet required under the Client Contract at significant additional expense to Plaintiffs. Plaintiffs and Defendant engaged in discussions relative to the deduction and/or offset of any damages and additional expenses that Plaintiffs incurred as a result of the nonconforming yarn produced by Defendant from any outstanding balance that may arguably be owed by Plaintiffs to Defendant under the terms of the Agreement.

B. Materials Submitted

1. Declaration of Serge Lemieux

Defendant submitted the Declaration of Serge Lemieux in support of its Motion to Dismiss. Mr. Lemieux is Defendant's president. According to Mr. Lemieux, in 2011, Brent Pickard contacted him on behalf of Plaintiff Eligere concerning «a voluminous yarn purchase.» Mr. Lemieux contends that Mr. Pickard executed a credit application for the yarn under Plaintiff Ecotex's name (the «Credit Application»). According to Mr. Lemieux, Mr. Pickard «represented that he was an authorized officer and/or agent of [Plaintiffs].» Mr. Lemieux alleges that «[t]he Credit Application is the standard English-language version, translated from French, of the form that is used by customers of [Defendant].» According to Mr. Lemieux, «[t]he Credit Application states that claims related to purchases from [Defendant] will be reported in the Beauce District, Quebec Province.» Mr. Lemieux states: «Beauce District is the name of the judicial district court for Saint-Éphrem-de-Beauce, the municipality in which [Defendant's] primary place of business is located.» According to Mr. Lemieux, Defendant «never anticipated litigating any dispute arising out of or relating to said Credit Application in the state [of] Georgia, United States of America.» Rather, Mr. Lemieux contends that Defendant «included a forum selection clause in its Credit Application to expressly provide that any claims arising out of or relating to these international transactions would be filed in the Beauce District, Quebec Province of Canada.»

14

2. Affidavit of Brent Pickard

Plaintiffs presented the Affidavit of Brent Pickard in support of their response to the Motion to Dismiss. The Court summarizes only the portions of that document that are relevant to the instant Motion.

15

Mr. Pickard states that Plaintiff Ecotex «attempted to negotiate a credit arrangement with Defendant, pursuant to which it would order the yarn on credit.» Plaintiff Ecotex executed the Credit Application on or about June 2, 2011. Mr. Pickard asserts that «Plaintiffs did not agree that the sole and exclusive venue for all claims arising out of the Yarn that Defendant sold

16

would be courts in the Beauce District, Quebec Province, Canada.» Further, according to Mr. Pickard, «Plaintiffs had no involvement in the drafting of the language of the Credit Application.»

3. Credit Application Form

Defendant submitted a copy of the Credit Application form in support of the Motion to Dismiss. An individual named Melissa Stephens is listed as the buyer on that document, while Mr. Pickard's signature appears on the document. The Credit Application contains the following statement: «The buyer reports in Beauce District, Prov. of Quebec for all the Items concerning this purchase.»

17

II. Procedural Background

On September 12, 2012, Plaintiff Eligere filed this lawsuit in the Superior Court of Whitfield County, Georgia. On October 5, 2012, Defendant removed the case to this Court, citing the Court's diversity jurisdiction.

18

On October 26, 2012, Defendant filed a Motion to Add Party and Motion to Dismiss. On November 16, 2012, Plaintiff Eligere filed an Amended Complaint, adding Plaintiff Ecotex as a Plaintiff. On November 28, 2012, the Court denied without prejudice the Motion to Add Party and Motion to Dismiss in light of the Amended Complaint.

19

In count one of the Amended Complaint, Plaintiffs assert a declaratory judgment claim. Plaintiffs ask the Court to:

20

declare that the Agreement between Defendant and Plaintiffs was breached by Defendant; that Defendant is obligated to compensate [Plaintiffs] for any damages arising out of such breaches; and that Plaintiffs' obligation, if any, to further compensate Defendant pursuant to the parties' Agreement has been terminated by Defendant's breaches and conduct as described herein.

Plaintiffs also «ask the Court to enter a declaratory judgment finding that, in light of the damages sustained by Plaintiffs as a result of Defendant's conduct, Plaintiffs are absolved of any and all liability to Defendant under the parties' Agreement.»

21

In count two of the Amended Complaint, Plaintiffs assert a claim for breach of the Agreement and the duty of good faith and fair dealing. Specifically, Plaintiffs allege:

22

Defendant breached the parties' Agreement and its duty of good faith and fair dealing by engaging in the conduct alleged herein, including, but not limited to, engaging in a bait-and-switch scheme relative to the quality and nature of the yarn and placing Plaintiffs in a situation of economic duress, where Plaintiffs were left with no choice but to utilize the nonconforming yarn supplied by Defendant at significant additional costs to Plaintiffs.

In count three of the Amended Complaint, Plaintiffs assert a claim for misrepresentation. In count four, Plaintiffs allege that Defendants violated the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. (the «UDTPA»). In count five, Plaintiffs assert that Defendant breached the implied warranty of fitness for a particular purpose. In count six, Plaintiffs assert a claim for breach of the implied warranty of merchantability. In count seven, Plaintiffs assert a claim for damages based on a tender of nonconforming goods. Finally, in count eight, Plaintiffs allege that Defendant violated the Convention on Contracts for the International Sale of Goods (the «CISG»), *opened for signature* April 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671, reprinted at 15 U.S.C app. (1997).

23

On December 12, 2012, Defendant filed its Motion to Dismiss. Defendant argues that the Court should dismiss this case for improper venue based on the forum selection clause in the Credit Application Form. Alternatively, Defendant argues that Plaintiffs' state law claims fail to state viable claims for relief because the CISG preempts those claims.

24

The briefing process for the Motion to Dismiss is complete. The Court therefore finds that this matter is ripe for resolution.

25

III. Motion to Dismiss for Improper Venue

A. Applicable Standard

In this Circuit, «a motion to dismiss on the basis of a forum-selection clause is brought pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure as a motion to dismiss for improper venue.» *Belcher-Robinson, L.L.C. v. Linamar Corp.*, 699 F. Supp. 2d 1329, 1333 (M.D. Ala. Mar. 31, 2010). «'A judge may make factual findings necessary to resolve motions to dismiss for ... improper venue,' so long as the resolution of the factual disputes is not an adjudication on the merits of a case.» *Id.* (alteration in original) (quoting *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008)). «Thus, in the context of a Rule 12(b)(3) motion to dismiss for improper venue 'the court may consider matters outside the pleadings such as affidavit testimony, particularly when the motion is predicated upon key issues of fact.'» *Id.* (quoting *Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1268 (S.D. Fla. Feb. 23, 2004)).

26

Plaintiffs, as the parties opposing the Motion to Dismiss under Rule 12(b)(3), bear the burden of establishing that venue is proper in this Court. *Belcher-Robinson, L.L.C.*, 699 F. Supp. 2d at 1333. The Court «'must accept all allegations of the complaint as true, unless contradicted by the defendant[']s affidavits, and when an allegation is so challenged the court may examine facts outside of the complaint to determine whether venue is proper.'» *Id.* (quoting *Wai*, 315 F. Supp. 2d at 1268). The Court «must draw all reasonable inferences and resolve all factual conflicts in favor of [Plaintiff].» *Id.* «'If the court chooses to rely on pleadings and affidavits, the plaintiff need only make a prima facie showing of [venue].'» *Id.* (alteration in original) (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005)).

27

B. Discussion

«Forum selection clauses in contracts are enforceable in federal courts.» *P&S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (per curiam). «Consideration of whether to enforce a forum selection clause in a diversity jurisdiction case is governed by federal law, ... not state law.» *Id.* When determining whether to enforce a forum selection clause, the Court applies «the usual rules governing the enforcement of contracts in general.» *Id.*

28

The Eleventh Circuit characterizes forum selection clauses «as either ‘permissive’ or ‘mandatory.’» *Slater v. Energy Servs. Grp. Int’l, Inc.*, 634 F.3d 1326, 1330 (11th Cir. 2011). «‘A permissive clause authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere,’ whereas ‘[a] mandatory clause ... dictates an exclusive forum for litigation under the contract.’» *Id.* (alteration and omission in original) (quoting *Global Satellite Commc’n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1272 (11th Cir. 2004) (internal punctuation marks omitted)). When determining whether a forum selection clause is permissive or mandatory, «the use of the term ‘shall’ is one of requirement.» *Id.* The distinction is important because a permissive forum selection clause does not require dismissal, while a mandatory forum selection clause does. *First State Bank of Nw. Ark. v. Ga. 4-6 Invs. LLP*, 715 F. Supp. 2d 1301, 1303 (N.D. Ga. Apr. 1, 2010). If a forum selection clause is ambiguous, the Court must construe it more strongly against the party that drafted it. *Id.*

29

The Credit Application Form, which Defendant drafted, contains the following statement: «The buyer reports in Beauce District, Prov. of Quebec for all the Items concerning this purchase.» As an initial matter, the Court finds that this ambiguous, vague statement does not, on its face, appear to be a forum selection clause. Further, the statement is, at most, a permissive forum selection clause. Notably, it does not include mandatory language such as «shall.» Moreover, the statement is ambiguous as to exclusivity, and, as such, the Court must construe it more strongly against Defendant, the drafting party. *AmerMed Corp. v. Disetronic Holding AG*, 6 F. Supp. 2d 1371, 1374 (N.D. Ga. July 21, 1998). The purported forum selection clause consequently does not require dismissal of this action.

30

In sum, any forum selection clause contained in the Credit Application Form is a permissive forum selection clause that does not require dismissal of this action for improper venue. The Court consequently denies this portion of Defendant’s Motion to Dismiss.

31

IV. Motion to Dismiss for Failure to State a Claim

A. Applicable Standard

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss a complaint, or portions of a complaint, for «failure to state a claim upon which relief can be granted.» Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss, the Court must take the allegations of the complaint as true and must construe those allegations in the light most favorable to the plaintiff. *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008).

32

Although the Court is required to accept well-pleaded facts as true when evaluating a motion to dismiss, it is not required to accept the plaintiff's legal conclusions. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). When evaluating the sufficiency of a plaintiff's complaint, the Court makes reasonable inferences in favor of the plaintiff, but is not required to draw the plaintiff's inference. *Id.* (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)). Similarly, the Court does not accept as true «unwarranted deductions of fact» or legal conclusions contained in a complaint. *Id.* (quoting *Aldana*, 416 F.3d at 1248).

33

Further, the Court may dismiss a complaint «if the facts as pled do not state a claim for relief that is plausible on its face.» *Sinaltrainal*, 578 F.3d at 1260. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court observed that a complaint «requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.» 500 U.S. at 555. Although factual allegations in a complaint need not be detailed, those allegations «must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).» *Id.* Moreover, «[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.» *Iqbal*, 556 U.S. at 678. The mere possibility that the defendant might have acted unlawfully is not sufficient for a claim to survive a motion to dismiss. *Id.* Instead, the well-pleaded allegations of the complaint must move the claim «across the line from conceivable to plausible.» *Twombly*, 550 U.S. at 570.

34

The Court's consideration of a motion to dismiss is generally limited to the face of the complaint itself; however, «[t]he Eleventh Circuit has held that, when considering a 12(b)(6) motion to dismiss, a court may take judicial notice of the public record, without converting the motion to one for summary judgment, because such documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.» *Davis v. Williams Commc'ns, Inc.*, 258 F. Supp. 2d 1348, 1352 (N.D. Ga. Mar. 18, 2003) (citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1279–80 (11th Cir. 1999)). Therefore, when addressing a motion to dismiss, the Court «may also consider any attachments to the complaint, matters of public record, orders, and items appearing in the record.» *Clark v. Bibb Cnty. Bd. of Educ.*, 174 F. Supp. 2d 1369, 1370 (M.D. Ga. Nov. 7, 2001); see 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1364 (3d ed. 2004) (stating that «judicial notice may be taken of prior pleadings and proceedings ... transcripts of prior court proceedings, and various documents that are matters of public record» (footnotes omitted)).

35

B. Discussion

Defendant argues that the CISG governs the relationship between the parties and preempts Plaintiffs' state law claims. The Court first determines whether the CISG applies to the parties' relationship and then discusses the preemption issues.

36

1. Whether the CISG Applies

«The CISG is an international treaty, ratified by the United States in 1986, that sets out substantive provisions of law to govern the formation of international sales contracts and the

37

rights and obligations of the buyer and seller.» *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2009 WL 5181854, at *3 (E.D. Ark. Dec. 23, 2009). «One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply.» *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998). «Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result.» *Id.*

The CISG «governs the formation of and rights and obligations under contracts for the international sale of goods.» *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1237–38 (11th Cir. 2006). «Article 1 of the CISG provides, in relevant part, that it applies to contracts of sale of goods between parties whose places of business are in different States ... when the States are Contracting States.» *Id.* at 1238 n. 5 (internal quotation marks omitted). Further, «Article 4 of the CISG provides, in relevant part, that it governs ... the formation of the contract and the rights and obligations of the seller and buyer arising from such a contract.» *Id.* (internal quotation marks omitted).

For the following reasons, the Court finds that the CISG applies to the parties' Agreement. First, the Agreement was one for the sale of goods. Second, Plaintiffs and Defendant are citizens of different States – the United States and Canada, respectively – and both the United States and Canada are signatories to the CISG. See *Sky Cast, Inc. v. Global Direct Distribution, LLC*, Civil Action No. 07-161-JBT, 2008 WL 754734, at *4 (E.D. Ky. Mar. 18, 2008) (observing that both United States and Canada are signatories to CISG). Third, nothing indicates that Plaintiffs and Defendant opted out of CISG coverage when they entered into the Agreement. See *Electrocraft Ark., Inc.*, 2009 WL 5181854, at *3 («The CISG applies to international sales contracts between parties that are located in signatory countries, and who have not opted out of CISG coverage at the time of contracting.»).

2. Preemption

«[A]s a treaty to which the United States is a signatory, the CISG is federal law; thus, under the Supremacy Clause, it preempts inconsistent provisions of state law where it applies.» *Electrocraft Ark., Inc.*, 2009 WL 5181854, at *4. As one district court recognized, «[t]he issue is one of scope,» and «[s]tate law causes of action that fall within the scope of federal law are preempted.» *Id.* «Conversely, state law causes of action that fall outside the scope of federal law will not be preempted.» *Id.*

The Court finds that the following state law claims in the Amended Complaint fall within the scope of the CISG and are preempted: (1) count two, which contains a claim for breach of contract and breach of the duty of good faith and fair dealing; (2) count five, which contains a claim for breach of implied warranty of fitness for a particular purpose; (3) count six, which contains a claim for breach of the implied warranty of merchantability; and (4) count seven, which contains a claim for damages for tender of nonconforming goods. The CISG contains provisions addressing all of those issues. See *Electrocraft Ark., Inc.*, 2009 WL 5181854, at *4

(concluding that CISG preempted breach of warranty claims asserted under Arkansas version of Uniform Commercial Code); *Sky Cast, Inc.*, 2008 WL 754734, at *4 («The CISG preempts state law contract claims.»). Indeed, Plaintiffs concede in their response that: «Plaintiffs do not dispute that, if the CISG applies, the CISG preempts Plaintiffs' breach of contract and Georgia Uniform Commercial Code claims **only**, and those claims may be dismissed.» (emphasis in original). The Court consequently grants this portion of the Motion to Dismiss and dismisses those claims.

The Court, however, finds that the CISG does not preempt Plaintiffs' claim arising under the Georgia UDTPA. At least one court has concluded that the CISG did not bar a claim under the Arkansas Deceptive Trade Practices Act («ADTPA»), noting that «the matters for which the ADTPA provides redress do not fall within the scope of the CISG as the CISG does not preempt claims for misrepresentation, fraud, betrayal and intentional harm to economic interests.» *Electrocraft Ark., Inc.*, 2009 WL 5181854, at *8 (internal quotation marks omitted). The Court agrees with that reasoning and finds that the CISG does not preempt Plaintiffs' claim under the UDTPA set forth in count three of Plaintiffs' Amended Complaint. The Court therefore denies the Motion to Dismiss with respect to that claim.

Likewise, the Court concludes that the CISG does not bar Plaintiffs' misrepresentation claim. Plaintiffs' allegations, viewed in the light most favorable to Plaintiffs, do not merely give rise to a claim for misrepresentation under the Georgia Uniform Commercial Code. Under those circumstances, the Court finds that Plaintiffs' misrepresentation claim does not fall within the scope of the CISG and that the claim is not preempted. See *Sky Cast, Inc.*, 2008 WL 754734, at *7 (observing that negligent misrepresentation claim «is not controlled by the CISG»); *Miami Valley Paper, LLC v. Lebbling Eng'g & Consulting GmbH*, No. 1:05-CV-00702, 2006 WL 2924779, at *3 (S.D. Ohio Oct. 10, 2006) (finding that CISG did not preempt plaintiff's claim for negligent misrepresentation and fraudulent inducement).

Plaintiffs' declaratory judgment claim, however, presents more difficulty for the Court. Although Plaintiffs correctly point out that Defendant failed to cite any authority indicating that the CISG preempts declaratory judgment claims, the declaratory judgment claim, in substance, asks the Court to determine issues that are governed by the CISG. Specifically, Plaintiffs ask that the Court

review the controversies enumerated hereinabove and declare the relationship between the parties. Plaintiffs ask the Court to declare that the Agreement between Defendant and Plaintiffs was breached by Defendant; that Defendant is obligated to compensate [Plaintiffs] for any damages arising out of such breaches; and that Plaintiffs' obligation, if any, to further compensate Defendant pursuant to the parties' Agreement has been terminated by Defendant's breaches and conduct as described herein. Further, Plaintiffs ask the Court to enter a declaratory judgment finding that, in light of the damages sustained by Plaintiffs as a result of Defendant's conduct, Plaintiffs are absolved of any and all liability to Defendant under the parties' Agreement.

All of the issues that the Court must determine in connection with the declaratory judgment count «are basically contractual and regulated by the CISG and its rules and remedies for international sales.» *Electrocraft Ark., Inc.*, 2009 WL 5181854, at *6. Indeed, the Court's resolution of the declaratory judgment claim will depend on the Court's resolution of the claims asserted under the CISG, or on the resolution of preempted breach of contract or Georgia Uniform Commercial Code claims. Under those circumstances, the Court finds that the CISG preempts the declaratory judgment claim set forth in count one of Plaintiffs' Amended Complaint. See *id.* (finding CISG preempted negligence/strict liability claim that was based on contract). The Court consequently grants Defendant's Motion to Dismiss as to that claim.

45

In its reply brief, Defendant argues for the first time that Plaintiffs' CISG claim fails to state a viable claim for relief. Defendant, however, waived that argument by failing to assert it in its initial brief in support of the Motion to Dismiss. See *Obester v. Lucas Assocs., Inc.*, Civil Action File No. 1:08-CV-03491-MHS-AJB, 2010 WL 8292401, at *42 (N.D. Ga. Aug. 2, 2010) («Courts generally do not consider issues raised for the first time in a reply brief.» (collecting cases)). The Court consequently does not address this argument.¹

46

In sum, the Court finds that the CISG preempts the following claims set forth in Plaintiffs' Amended Complaint: (1) count one, which asserts a declaratory judgment claim; (2) count two, which asserts a claim for breach of contract and breach of the duty of good faith and fair dealing; (3) count five, which asserts a claim for breach of the implied warranty of fitness for a particular purpose; (4) count six, which asserts a claim for breach of the implied warranty of merchantability; and (5) count seven, which asserts a claim for damages for tender of nonconforming goods. The Court grants Defendant's Motion to Dismiss as to those claims. The Court finds, however, that the CISG does not preempt count two of Plaintiffs' Amended Complaint, which contains Plaintiffs' misrepresentation claim, or count three of Plaintiffs' Amended Complaint, which contains Plaintiffs' UDTPA claim. The Court consequently denies the Motion to Dismiss as to those claims. Likewise, the Court denies any request by Defendant to dismiss Plaintiffs' CISG claim because Defendant failed to raise that issue in its initial brief in support of the Motion to Dismiss.

47

V. Conclusion

ACCORDINGLY, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion to Dismiss Amended Complaint. The Court **DENIES** the portion of the Motion that seeks to dismiss this action for improper venue. The Court **GRANTS IN PART AND DENIES IN PART** the portion of the Motion that seeks to dismiss this action for failure to state a claim for relief. Specifically, the Court **GRANTS** the Motion as to the following claims in Plaintiffs' Amended Complaint: (1) count one, which asserts a declaratory judgment claim; (2) count two, which asserts a claim for breach of contract and breach of the duty of good faith and fair dealing;

48

¹ Defendant's current Motion to Dismiss Amended Complaint is its second Motion to Dismiss. Defendant therefore had ample time and opportunity to raise its argument concerning Plaintiffs' CISG claim in its initial brief in support of the Motion to Dismiss Amended Complaint. Instead, in its initial brief, Defendant simply argued that the CISG preempted Plaintiffs' state law claims.

(3) count five, which asserts a claim for breach of the implied warranty of fitness for a particular purpose; (4) count six, which asserts a claim for breach of the implied warranty of merchantability; and (5) count seven, which asserts a claim for damages for tender of nonconforming goods. The Court **DISMISSES** those claims **WITH PREJUDICE**. The Court **DENIES** the Motion as to the following portions of Plaintiffs' Amended Complaint: (1) count two, which contains Plaintiffs' misrepresentation claim; and (2) count three, which contains Plaintiffs' UDTA claim. This case remains pending.

IT IS SO ORDERED, this the 22nd day of January, 2013.