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Jurisdiction	USA
Tribunal	U.S. District Court for the Western District of Michigan
Date of the decision	17 December 2001
Case no./docket no.	1:01-CV-691
Case name	*Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S.A. et al.*

Opinion

Richard Alan Enslen, United States District Judge

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction, which was heard on December 11, 2001. The Court now enters this written decision for the purpose of summarizing and publishing its previous findings.

I. PROCEDURAL BACKGROUND

Plaintiff Shuttle Packaging Systems, L.L.C. («Plaintiff») filed this action against Defendants Jacob Tsonakis, INA S.A. («INA») and INA Plastics Corp. («INA Plastics») on October 24, 2001. Plaintiff's sole member is Calvin Diller, who is a citizen of Michigan. This decision refers in many parts to East Jordan Plastics, Inc. («EJP»), which company is related to Plaintiff by its ownership and operation.

On October 24, 2001, Plaintiff filed motions for a temporary restraining order and preliminary injunction. By Order of October 25, 2001, this Court denied the Motion for Temporary Restraining Order on the ground that Plaintiff had not shown that it was likely to sustain irreparable harm before the Motion for Preliminary Injunction could be heard. The Order also set the Motion for Preliminary Injunction for hearing on December 6, 2001. Due to scheduling problems, the date was later scheduled for December 11, 2001 at 2:30 p.m. Briefing of the Motion was somewhat delayed owing to the fact that Defendant INA is a Greek corporation with its principal place of business in Athens, Greece. (See Stip. and Order of Dec. 5, 2001, allowing delayed briefing). As such, some of the legal materials mentioned below were not received until December 10, 2001, the last of them being submitted at 5:00 p.m. Nevertheless, the Court thoroughly reviewed the materials in advance of the hearing by reading them through midnight December 10, 2001.

II. FACTUAL BACKGROUND

A. Allegations of Complaint and Answer

Plaintiff's Verified Complaint alleges that on November 1, 2000, it agreed to a purchase agreement with Defendants. Plaintiff alleges that under the purchase agreement Defendants were required to supply thermoforming line equipment for the manufacture of plastic gardening pots together with the technology and assistance to use the equipment. (Plaintiff's Complaint at p. 8.) The equipment included a «double line» having an annual output capacity of 1,800,000 lbs. and a «trade gallon line» having an annual output capacity of 3,270,000 lbs. (*Id.* at p. 9.) The aggregate purchase price for the equipment was $1,200,000 for the double line and $1,800,000 for the trade gallon line. (*Id.* at 10.) The Contract also included other terms relating to payment schedules, non-competition, warranties, notices, expenses, interest, and an integration clause. (*Id.,* Exhibit A – purchase agreement.) The non-competition term did not include the specific terms for non-competition, but required the further execution of a non-competition agreement. (*Id.*) Although it was not alleged in the Complaint, the Court notes for clarification sake that, based on other exhibits filed by the parties and their briefing, the trade gallon line was intended to manufacture 2.5 liter pots and the double line was intended to manufacture 11 centimeter pots on one line and 4 inch pots on the other line.

According to the Complaint, on November 2, 2000, the parties entered into a non-competition agreement which contained various covenants of the seller not to engage in selling its equipment and processes within the «Restricted Area,» not to disclose its technical manufacturing processes to others, and not to disclose or use trade information and customer lists of the buyer. (See Complaint, Exhibit B – Non-competition Agreement.) The non-competition agreement contained no covenants for the buyer, but listed the payment of the purchase price under the purchase agreement as the consideration. (*Id.*) The «Restricted Area» was defined as «any jurisdiction throughout the world where the Company is, or in which Seller has reason to know the Company expects to engage in, the Business. The jurisdictions included in the Restricted Area as of the date of this Agreement are listed on Schedule I hereto.» (*Id.* at p. 1a.) No Schedule I was attached to the document. Plaintiff interprets the «Restricted Area» as North America. The non-competition agreement also stated that it was to be interpreted and enforced in accordance with the laws of the State of Michigan. (*Id.* at p. 11.)

Plaintiff's Complaint is stated in three state law counts, each premised on diversity jurisdiction. Count One alleges breach of the non-competition agreement and specifically that Defendants are soliciting customers of Plaintiff in North America for the purpose of selling equipment subject to the agreement. Count Two alleges breach of the purchase agreement and more specifically both that Defendants have not provided all of the services required under the agreement and that the equipment has not performed as promised. Count Three alleges a breach of warranty as to the equipment in that the equipment was not in good working order, did not manufacture to the contract specifications and failed to meet industry standards for manufacturing. Count One is pertinent to the request for Preliminary Injunction since it includes the request that the Court temporarily and permanently enjoin violation of the non-competition agreement.

Defendants have also answered the Complaint. The Answer contests most of the factual allegations, but admits jurisdiction and venue. The Answer also contends that Defendant INA Plastics has dissolved and is no longer in business. Plaintiff, during hearing, further clarified that jurisdiction was proper in that Plaintiff had only one member, Calvin Diller, who is a citizen of Michigan.

B. Plaintiff's Affidavits and Exhibits

Plaintiff's Complaint was verified by Calvin Diller, the President and CEO for Plaintiff. Nevertheless, the Complaint does not contain many specific factual allegations which are helpful to understand the factual background for this controversy. Plaintiff has, however, filed other affidavits, including the affidavits of Gary Gurizzian, Mark Lercel, Wayne DeCamp, and Alan Druskin. The affidavits include other attachments.

Gary Gurizzian is the CFO for Plaintiff and the Financial Projects Manager at EJP. (Gurizzian Aff. at p. 1.) EJP is located in East Jordan, Michigan, which is also Plaintiff's principal place of business. (Complaint at p. 3.) Gurizzian states in his affidavit that Jacob Tsonakis, the President of INA, made representations to him, Calvin Diller and Al Druskin concerning the plastic technology manufacturing equipment sold by his company in July 2000. (*Id.* at pp. 3 and 4.) Gurizzian further states that EJP then provided a loan or advance of funds of $600,000 with the idea that the parties, EJP and INA, would form a joint venture. (*Id.* at p. 5.) The joint venture did not occur, but Shuttle was formed in place of EJP as a possible participant in the joint venture. (*Id.* at pp. 5–6.) The parties eventually settled on a purchase agreement for the equipment instead of a joint venture. (*Id.* at pp. 6–8.) At the time of the purchase agreement, a contract term requiring non-competition was critical to Plaintiff. (*Id.* at p. 9.) Plaintiff has made payments on the equipment consistent with the payment schedule in the contract. (*Id.* at p. 17.) The double line was delivered on January 25, 2001, which was after its scheduled date of December 18, 2000. (*Id.* at p. 19a.) Upon delivery, Plaintiff discovered that the equipment had been damaged in shipping. (*Id.* at p. 19b.) These circumstances required Plaintiff to order pots from INA for sale to its customers instead of manufacturing the pots itself. (*Id.* at p. 19c–d.) Due to constant failure of the equipment, Plaintiff suspended payment to INA. (*Id.* at pp. 20–21.) Gurizzian believes (for unspecified reasons) that INA is competing in the North American market and underselling Plaintiff, so as to cause Plaintiff an undeterminable financial loss and so as to threaten Plaintiff's business viability. (*Id.* at pp. 23–28.)

Mark Lercel is the manufacturing engineer for EJP and has served as a consultant for Plaintiff relating to the performance of the purchased equipment. (Lercel Affidavit at pp. 1–2.) In his Affidavit, Lercel catalogs a long list of problems concerning the equipment. He lists and describes problems in some 19 sub-paragraphs concerning the trade gallon line's installation, delivery, documentation, tooling, working condition and performance. (*Id.* at p. 3.) He lists and describes problems in some 13 sub-paragraphs relating to the double line's design, working condition, guarding, tooling, documentation and performance. (*Id.* at p. 4.) He lists and describes problems in 7 sub-paragraphs relating to the training and instructions provided as to both lines. (*Id.* at p. 5.)

Wayne DeCamp was the Director of Manufacturing at EJP and is now the Director of Manufacturing for Plaintiff. (DeCamp's Affidavit at 1.) Like Lercel, DeCamp provides a catalog of the

problems experienced by Plaintiff with the equipment. (*Id.*) This catalog, for the most part, reiterates the problems described by Lercel in his Affidavit. (See id. at pp. 3–5).

Alan Druskin is the Vice President of Marketing of EJP and by an administrative agreement also manages the marketing of Plaintiff. (Druskin Affidavit at p. 1.) Druskin worked with Jacob Tsonakis to solicit sales for Plaintiff. (*Id.* at p. 2.) Druskin claims «on information and belief» that Tsonakis solicited customers of Plaintiff for his own business beginning in February 2001 and made his products available to these customers at prices which undercut Plaintiff's prices. (*Id.* at pp. 4–6.) According to Druskin, he has been told by his customers that they will buy from INA instead of Plaintiff because of the cost difference. (*Id.* at p. 9.)

C. Defendants' Affidavit and Exhibits

Defendants have filed the very lengthy Affidavit of Jacob Tsonakis, which includes some 185 numbered paragraphs and some 67 attachments. The attachments are mostly either documents pertinent to the case or email communications between the corporate actors involved in this case. Paragraphs 1–9 of the Affidavit give Tsonakis' general education and background and describe his development of the thermoforming technology and its use by INA to make gardening pots at more competitive prices. (Tsonakis Affidavit at pp. 1–9.) Paragraphs 10–26 of the Affidavit describe the manner in which Tsonakis has developed thermoforming manufacturing lines for the production of the pots, including descriptions of the equipment used in the lines. (*Id.* at pp. 10–26.) Paragraphs 27 through 33 describe the events giving rise to the approval of the purchase agreement. Those paragraphs describe those events in a similar manner to Plaintiff's representatives' descriptions. However, one important difference is that Defendant indicates that he engaged in tele-facsimile correspondence with Calvin Diller on September 28, 2000 in which he indicated that the lines might not be completed until January 15, 2001. (*Id.* at p. 32 and Exhibit 1.) The January date was used because much of the described equipment, which was quite large, needed to be shipped by container ship from Greece to the port of Charleston and then shipped by truck to the Plaintiff's plant in Forest City, North Carolina.

Paragraphs 34 through 44 of the Affidavit provide Tsonakis' version of events relating to the approval of the purchase agreement. Most notably Tsonakis attaches a copy of the purchase agreement which he approved, initialed and telefaxed to Plaintiff. Tsonakis' version consists of 9 nine pages, including a Schedule A and C. Tsonakis asserts that Plaintiffs' version of the Agreement, which included replacement pages, was not approved by him as indicated by his failure to initial the replacement pages. Tsonakis also asserts that there never was agreement as to a Schedule B (which Tsonakis did not want to approve) nor as to a Schedule D (which was not created at that time). (*Id.* at pp. 34–44 and Exhibit 2.)

Paragraphs 45 through 54 of the Affidavit describe the approval of the non-competition agreement. According to Tsonakis, he inquired of Gurizzian why the balance of the down payment of $450,000 had not been sent. When he asked this question, Gurizzian told him that the balance would not be paid until he agreed to the terms of a non-competition agreement. When he reviewed the proposed agreement, he told Gurizzian that the term relating to the «Restricted Area» was unreasonable because it referred to any jurisdiction in the whole world.

Gurizzian responded that he should not be concerned since the document was «simply something 'for the file.'» Tsonakis then faxed a signed and initialed copy to Gurizzian. The copy referenced did not include a Schedule I, the schedule describing more particularly the jurisdictions referenced in the agreement. After receiving the balance of the down payment from Plaintiff, Tsonakis turned over his customers in the United States to Plaintiff (though he did not deem himself required to do so). (*Id.* at pp. 45–54 and Exhibit 3.)

Paragraphs 55 through 66 of the Affidavit provides Tsonakis' version of events relating to the delivery of the trade gallon line in the Forest City plant in early 2001. (*Id.* at pp. 55–66.) Paragraphs 67 through 74 also relate to the installation of the trade gallon line. According to those paragraphs, certain accessory equipment was not part of the contract and Tsonakis advised Plaintiff of this, without objection, upon his arrival to install the equipment. According to Tsonakis, the only defect in the machinery, a bent cabinet from damage in shipping, was quickly repaired. (*Id.* at pp. 64–74.)

Paragraphs 75 to 91 of the Affidavit relate to the negligent operation of the trade gallon line, which Tsonakis claims to have witnessed during his assistance at the plant. According to Tsonakis, the machinery was unsafe and inefficient due to Plaintiff's refusal to purchase necessary accessories for the machinery. (*Id.* at p. 75.) Also, according to Tsonakis, Plaintiff attempted to use the machinery without a mixer by having employees attempt to manually mix 700 pounds per hour of molten plastic with a shovel over the hot extruder of the line. (*Id.* at pp. 78–81.) These compromises caused problems with the homogeneity of the plastic, lack of quality control, and other production problems. (*Id.* at pp. 75–91.) Plaintiff's production also suffered from high turnover of the work force and the drug addiction of one key employee who operated the lines. (*Id.* at pp. 85–89.) According to Tsonakis, there was a shortage of employees to operate the second line when it arrived in March 2001. (*Id.* at p. 90.) Tsonakis also explained in paragraphs 92 through 99 that Plaintiff had some production problems because its workers ignored his production engineer's advice to use some virgin material in mixtures and to avoid contaminants. (*Id.* at pp. 92–99 and Exhibits 17–22.)

Paragraphs 100 to 115 of the Affidavit describe the training by INA. This training included the employment of two Greek engineers in the Forest City plant for a five-month period. (*Id.* at p. 100.) Tsonakis includes in his various statements relating to training references to email by employees of Plaintiff, which email acknowledge the adequacy of the training. (*Id.* at pp. 104–114 and Exhibits 26–29.) Tsonakis also offered more training, though the offer was not accepted. (*Id.* at p. 115.)

Paragraphs 116–120 contain Tsonakis' complaint that Plaintiff wrongly deducted repair costs for the machinery from contract payments due his company. Tsonakis communicated with Plaintiff on this subject and instructed Plaintiff that the deductions were wrongful in light of paragraph 11 of the purchase agreement – which allocated the buyer's «expenses» to the buyer.

Paragraphs 121 to 137 contain Tsonakis' complaint that Plaintiff failed to make timely payments for pots Plaintiff ordered from INA for Plaintiff's customers. Tsonakis claims that Plaintiff has not made payments when due and now owes $116,344.51 for the pots sold. (*Id.* at p. 38.) Tsonakis also claims in paragraphs 138–171 that Plaintiff, after the last equipment

line was delivered in April 2001, stopped making the progress payments required under the Purchase Agreement despite his many requests for payment. According to Tsonakis, Gary Gurizzian sent an email to him on July 6, 2001 which requested that there be a 90-day moratorium on progress payments in light of issues concerning performance. (*Id.* at p. 172 and Exhibit 60.) Tsonakis responded by e-mail, requesting full payment, which was past due by three months. (*Id.* at pp. 173–174 and Exhibits 61 and 62.) Tsonakis sent other e-mail requesting payment which were not heeded. This prompted Tsonakis to send Gurizzian an email in early August 2001 advising Gurizzian that since Gurizzian had not made timely payment according to the agreement Tsonakis did not feel bound by the non-competition agreement. (*Id.* at p. 181 and Exhibit 66.) Tsonakis also points out that this lawsuit was filed at the deadline for Plaintiff to respond to a letter from the Trade Commissioner relating to the non-payment by Plaintiff. (*Id.* at p. 183.) The remainder of the Tsonakis' Affidavit seeks to discount the statements made by Plaintiff's affiants for various reasons including that the statements made were untrue, that the complaints were not premised on duties of INA under the Purchase Agreement, and that the problems were caused by negligence of Plaintiff or third-parties. (*Id.* at pp. 184–185.)

D. Defendants' Supplementary Evidence

Defendants have filed supplementary evidence for the purpose of establishing that performance payments were due on the 11 centimeter line. Defendants have also filed the depositions of Plaintiff's affiants for the purpose of cross-examining and testing their testimony.

An examination of the SPS performance documents (and email documents) generally shows that the 11 centimeter line had been twice successfully tested by Plaintiff such that the second performance payment of $90,000 was due under P 2(b)(ii) of the Purchase Agreement. (See Defendants' Attachments B and C.) The documents also reiterate that the standard for successful testing was not complete 8 hour shifts of production (which rarely occurred). Rather, the apparent standard was performance meeting or exceeding the performance of the trade gallon lines, which standard had been previously approved in an e-mail by Gary Gurizzian. (See Defendants' Attachments B and C.).

An examination of Plaintiff's affiants' testimonies show them to be generally consistent with the affidavits, but also contain many admissions helpful to the Defendants. Wayne DeCamp admitted that the high degree of manual labor associated with Plaintiff's operation of the lines made training difficult. (DeCamp Dep. at 99–100.) He also admitted that the line operated inefficiently due to employee breaks (id. at 101–106) and that the four inch line had not been set up and run by Plaintiff (which was required because of Defendants' expectation of the additional performance payment) and that the necessary part to set up the line (the extruder) had been warehoused (id. at 162). DeCamp also confirmed his authoring the e-mail attributed to him by Tsonakis, relating to the adequacy of the line training.

Gary Gurizzian's deposition is also somewhat helpful to Defendants' position. He admitted that he had not complained about late delivery or about the failure to include accessory equipment with the lines. (Gurizzian Dep. at 71–74, 22–23.) Gurizzian's credibility on other points is also undermined by his deposition testimony. For instance, his explanation of his spreadsheet analysis concerning the operation of the lines shows it to be mistaken in significant

parts. This spreadsheet analysis appears to bill Defendants for the ordinary operation of the machinery, including repair costs, and accessories which were not included within the Purchase Agreement.

E. Hearing Evidence

Parties to this matter were provided an opportunity to present additional evidence and testimony at hearing. However, no witnesses were called at hearing. In fact, the only additional evidence consisted of four exhibits, two by Plaintiff and two by Defendants. Two of these exhibits, Plaintiff's Exhibit 1 and Defendant's Exhibit 1, were admitted only as demonstrative exhibits – to summarize the testimony of witnesses. The remaining two exhibits were documents pertinent to the case. Plaintiff's Exhibit 2 contains equipment purchase terms and related correspondence between the parties near the time of the purchase agreement. Defendant's Exhibit 2 is an e-mail sent to Baucom's Nurseries by Jacob Tsonakis on March 20, 2001, which tends to prove that he had assigned this former customer to Plaintiff. The Court believes that these documents, when read in context, support the Court's factual conclusions concerning this case.

III. LEGAL ANALYSIS

In reviewing a preliminary injunction motion under Federal Rule of Civil Procedure 65, this Court is required to consider four factors: (1) Plaintiff's likelihood of success on the merits; (2) the irreparable harm that could result to Plaintiff if the injunction is not issued; (3) the possibility of substantial harm to others caused by the requested injunction; and (4) the impact on the public interest. *Basicomputer Corp. v. Scott,* 973 F.2d 507, 511 (6th Cir. 1992); *Performance Unlimited v. Questar Publishers, Inc.,* 52 F.3d 1373 (6th Cir. 1995). This evaluation allows the factors to be balanced and focuses on all four factors – rather than any particular factor. *In re De Lorean Motor Co.,* 755 F.2d 1223, 1228–30 (6th Cir. 1985).

A. Likelihood of Success

The first factor, likelihood of success, in this case relates to the likelihood of success of the merits of its claim for injunctive relief to enjoin the violation of the non-competition agreement and, more specifically, to enjoin competition in places in North America wherein Plaintiff is active in selling greenhouse pots. Jacob Tsonakis has not denied that his companies are competing in North America and his e-mail of August 2001 indicated his intent to compete in North America because of Plaintiff's non-payment. Thus, the Court regards that the substance of this dispute is not over whether Defendants are competing, but whether they are bound by the terms of non-competition agreement to not compete in North America.

To begin this discussion, the Court must make an initial and preliminary assessment of the likely source of law to be applied to this controversy. The Court's preliminary assessment is that this controversy is governed by the United Nations Convention on Contracts for the International Sale of Goods («CISG»), 19 I.L.M. 671 (May 1980), with one exception. The exception is the legal question of the enforcement of the non-competition agreement, which is governed by Michigan law under the parties' forum selection clause. This assessment is based on the several pertinent facts. The United States and Greece are signatories to the Convention.

(See Defendants' Brief, Exhibit B.) The goods sold in this case are commercial goods of the type subject to the Convention. While the purchase agreement does not specify the application of any body of law as to the purchase, the non-competition agreement specifies the application of Michigan law, but only as to the enforcement of the non-competition agreement. Also, given the law cited by the parties, they are in apparent agreement as to this choice of law.

With this backdrop, the Court must access whether Defendants now have a legal right to compete for this business in North America. Defendants make several arguments in opposition to the Motion. One argument made by Defendants is that the non-competition agreement is ineffective because of lack of consideration for the agreement. This argument fails. First of all, the non-competition agreement was made part and parcel with the purchase agreement and assumed that the consideration for the non-competition agreement was the consideration for the purchase agreement. Second, under the Convention, a contract for the sale of goods may be modified without consideration for the modification. See CISG, Art. 29; Michael Van Alstine, 37 *Va. J. Int. Law* 1 & n. 47 (Fall 1996) (reaching this conclusion based on the U.N. Secretariat's Commentary on the Draft Convention, U.N. Doc. A/Conf. 97/5 (1979)).

Another argument made by Defendant is that the non-competition agreement is unenforceable because the document failed to specify the jurisdictions in which seller was required not to compete. This argument is not apt in the context of the Convention and the facts of this case. Although the meaning of the non-competition agreement was confused because the parties never attached the schedule describing the extent of the restrictions, the parties' subsequent conduct and discussions revealed an intent to apply this restriction to the United States' market. (See Tsonakis Affidavit P 54, stating that Tsonakis turned over United States' customer list in consequence of the agreement.) Furthermore, given the wording of the Convention, federal courts have determined that international sales agreements under the Convention are not subject to the parol evidence rule and are to be interpreted based on the «subjective intent» of the parties based on their prior and subsequent statements and conduct. CISG, Articles 8 and 9; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.,* 144 F.3d 1384, 1387–1391 (11th Cir. 1998). In this case, the statements and conduct of the parties reveal an intent to require Defendants not to compete as to the United States' market. As such, the failure to specify the precise jurisdiction does not render the agreement invalid.

Defendants also make the related argument that the agreement is invalid because the extent of the non-competition clause was too broad. Under Michigan law, a non-competition clause relating to the sale of a business is generally enforceable provided that it is reasonable in scope, considering the duration, product and geography of the restriction. See *Woodward v. Cadillac Overall Supply Co.,* 396 Mich. 379, 240 N.W.2d 710, 714 (Mich. 1976) (J. Williams, dissenting) (describing general, common law rules); *Vogue Cleaners & Dryers, Inc. v. Berkowitz,* 292 Mich. 575, 291 N.W. 12 (1940). The party challenging the non-competition clause bears the burden of establishing its unreasonableness. *Alders v. AFA Corp. of Florida,* 353 F. Supp. 654, 657 (D. Fla. 1973), aff'd, 490 F.2d 990 (5th Cir. 1976). In this case, Defendants have scarcely argued this point and have made no real showing that the case law and facts of this case requires a conclusion that the non-competition clause is unreasonably broad. The scope of the clause is five years. The territory of the clause, as interpreted, is the United States. The

clause relates to the sale of a unique product – a plastics manufacturing line for specialized horticultural products. The clause is typical of agreements of this type, which by their nature intend the sale of the goodwill of the business in addition to the manufacturing machinery. The person to be enjoined – INA – is also a foreign corporation with a lesser interest in competing in the United States than a corporation chartered in the United States. Under somewhat similar facts, the Fifth Circuit in the Alders case affirmed a five-year restriction on competition in the United States, Canada and Mexico. Under these circumstances, this defense is unlikely to prevail.

Defendants have also made equitable arguments based upon laches and unclean hands. These arguments, which are not supported by case authority cited, are not persuasive. There has been no extensive delay in the filing of this suit and the Plaintiff's alleged misconduct, principally non-payment, is not such as to warrant the label of «unclean hands.» For instance, in *Cleveland Newspaper Guild v. Plain Dealer Pub. Co.,* 839 F.2d 1147, 1155 (6th Cir. 1988), the Sixth Circuit Court of Appeals rejected both defenses and described the «unclean hands» defense as limited to instances of «bad faith.» In the Court's judgment, these defenses simply do not apply on the facts of this case.

Defendants' final argument relating to likelihood of success is that the Plaintiff committed the first material breach of the contract and, as such, Defendants are no longer bound by the terms of the non-competition agreement. Defendants also make a related argument that because Plaintiff delayed in complaining about the performance of the equipment, it is not entitled to suspend payment of money owed under the purchase agreement.

This related argument concerns Articles 38 and 39 of the Convention, which require the buyer to «examine the goods ... within as short a period as is practicable in the circumstances» and which further state the 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. ... » Article 39 also provides a two-year time period as the outer limit of time for a buyer to notify the seller of a lack of conformity (unless the goods are subject to a longer contractual period of guarantee).

This related argument fails. The wording of the Convention reveals an intent that buyers examine goods promptly and give notice of defects to sellers promptly. However, it is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks. For this reason, the outer limit of two years is set for the purpose of barring late notices. In this case, there was ample reason for a delayed notification. The machinery was complicated, unique, delivered in instalments and subject to training and on-going repairs. The Plaintiff's employees lacked the expertise to inspect the goods and needed to rely on Defendants' engineers even to use the equipment. It is also wrong to say, in light of this record, that notification did not occur until July 6, 2001. Long before the July 6 correspondence, there was a steady stream of correspondence between the parties relating to the functioning of the equipment which may have constituted sufficient notice of the complaints. The international cases cited by Defendants are not apposite to this discussion because they concern the inspection of simple goods and not complicated machinery like that involved in this case.

Nevertheless, the Court does accept Defendants' contention that the Plaintiff's non-payment of progress payments on the machinery did constitute a «fundamental breach of contract.» Article 25 of the Convention defines a «fundamental breach of 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 *Delchi Carrier v. Rotorex Corp.,* 71 F.3d 1024, 1028 (2nd Cir. 1995) (discussing definition). This is a significant definition in that Article 64 provides the seller a right to declare the contract avoided due to a «fundamental breach of contract.» The Convention affords the buyer a right to avoid the contract under Article 49 for a fundamental breach. It likewise affords both buyer and seller the right to suspend or avoid an instalment contract due to fundamental breach under Articles 71–73. Article 64 is also specifically worded to give the implication that non-payment of the purchase price is the most significant form of a fundamental breach by a buyer, since, as to a serious non-payment, no additional notifications are required for avoidance of the contract.

In this case, the buyer has had some legitimate complaints concerning the machinery throughout the delivery and training process. However, on the whole, the Court concludes that the evidence submitted best supports the proposition that these complaints did not constitute either a fundamental or even a substantial breach of the contract by the seller. This is particularly true since the context for this dispute – namely, the machinery has been successfully operated with Defendants' assistance and Plaintiff is a cash-strapped business raising performance questions only after formal inquiries have been made as to non-payment – tends to show that complaints about performance were opportunistic and not genuine in character. On the other hand, the Court determines that it is likely that non-payment of the large sums due for the performance payments was a fundamental breach of contract and that it excused Defendants' performance of non-competition obligations under the purchase agreement and non-competition agreement. As such, the Court concludes that Plaintiff is unlikely to succeed on the merits.

B. Irreparable Harm to Plaintiff

Plaintiff has cited cases for the proposition that loss of goodwill and loss of business opportunities are the kinds of losses which are irreparable because they cannot later be sufficiently quantified for damage purposes. See, *e.g., Basicomputer v. Scott,* 973 F.2d 507, 511–12 (6th Cir. 1992). While the Court agrees with that legal proposition, it finds it inapplicable here. Because the Plaintiff had, most likely, committed a fundamental breach of the contract by non-payment, it has also most likely surrendered its right to seek enforcement of the non-competition agreement. As such, on the present record, the Court does not find that Plaintiff is likely to suffer irreparable harm because of Plaintiff's own fundamental non-performance of its duties under the contract.

C. Harm to Others

This factor focuses on the harm to Defendants caused by a possible wrongful injunction. The Court believes that this factor sorts out like the other factors above. Namely, since the Plaintiff has, most likely, wrongfully failed to pay amounts due under the contract, the Defendants should not be expected to honour obligations for which they have not been paid. As such, the Court determines that this factor disfavours granting relief.

D. Public Interest

Of course, the public, in the abstract, cares very little concerning which group of manufacturers should manufacture pots in the United States during the course of this lawsuit. However, the public does have an interest in seeing that these pots, which are produced at a more cost-efficient basis than other agricultural pots, are readily available in the market. Thus, the public's interest is best supported by a resolution which would cause both the parties to manufacture pots in the market pending the resolution of this suit. This is particularly true since the Plaintiff's manufacturing abilities have proven suspect such that the market might be jeopardized by licensing the market solely to Plaintiff – a producer who operates its manufacturing on a shoestring budget. Although, as Plaintiff points out, this resolution might threaten its long-term viability, it seems apparent that there are ample threats to Plaintiff's long-term viability even absent denial of this preliminary injunction motion.

IV. CONCLUSION

Accordingly, an Order shall issue denying the Motion for Preliminary Injunction.

Order. In accordance with the Opinion of this date and the Court's previous findings upon hearing of this matter on December 11, 2001; IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction (Dkt. No. 4) is DENIED.

Dated in Kalamazoo, Michigan: December 17, 2001

/s/ Richard Alan Enslen, United States District Judge