CISG-online 2864	
Jurisdiction	U.S.A.
Tribunal	Supreme Court of the State of New York, New York County
Date of the decision	25 September 2015
Case no./docket no.	650040/2012
Case name	*Perine International Inc. v. Bedford Clothiers, Inc.*

Decision and Order

Hon. **Saliann Scarpulla**, J.

In this action, cross-claim defendants Regent Alliance Ltd. («Regent»), Na Lam («Lam»), and Linna Textiles Manufacturing Ltd. («Linna Textiles») move to dismiss cross-claims by defendants Bedford Clothiers, Inc. («Bedford») and Seena International Inc. («Seena») (motion sequence 006). Additionally, plaintiff Perine International Inc. («Perine») moves for summary judgment on its first and third causes of action; and for summary dismissal of the first counterclaim and fourth affirmative defense (motion sequence 007). Motion Sequence Numbers 006 and 007 are consolidated for disposition. 1

In its complaint, Perine alleges that Perine and defendants Bedford and Seena (collectively with Bedford, the «Buyers»), entered into a contract for the purchase of textiles. Perine alleges that it delivered and Buyers accepted certain goods («Accepted Goods»), but Buyers have not paid for those goods. Additionally, Perine alleges that Buyers have improperly refused certain goods that it delivered («Rejected Goods»). 2

Perine seeks to recover for the Accepted Goods and Rejected Goods on a breach of contract cause of action. Perine also alleges an account stated for certain invoices that it claims were not objected to within a reasonable amount of time. Additionally, Perine brings a claim for fraud against Buyers on the basis that allegedly «Defendants fraudulently induced Plaintiff into delivering at least one (1) container of textiles that was accepted by Buyers by fabricating a wire transfer confirmation report so as to make it appear as if funds had been delivered to Plaintiff when, in reality, they had not.» 3

Bedford, Seena, Ricky Singh («Singh»), and Brooklyn Xpress (collectively, «Defendants»), filed an Amended Verified Answer with Counterclaims and Cross-Claims («Amended Answer»),[1] with Bedford and Seena («cross-claimants») bringing cross-claims against Regent, J & Company Jeans LLC («J & Co.»), Lam, Linna Textiles, «and various John Does and Jane Does» for 4

[1] The proceedings are stayed against defendant Vasu Kothapally («Kothapally») pursuant to 11 U.S.C. § 362.

breach of warranty and breach of contract; violations of the Lanham Act and New York General Business Law («NYGBL» or «GBL») § 349; and common law trademark infringement and unfair competition.

Cross-claim defendants Regent, Lam, and Linna Textiles (collectively, the «dismissal movants») now move to dismiss the cross-claims under CPLR 3013, 3211(a)(1), 3211(a)(5), 3211(a)(7), and/or 3211(a)(8), arguing that (1) this Court does not have jurisdiction over Lam or Linna Textiles; (2) the cross-claims violate CPLR § 3013 because the cross-claimants group the collective cross-claim defendants together as «the 'Perine Parties' ... and allege[ ] material allegations against all of them collectively, without differentiating between them;»[2] (3) the cross-claims fail to state claims; and on the ground that Seena should be collaterally estopped from maintaining that its trademark is valid. 5

In opposition to the motion to dismiss cross-claims, defendants contend that this Court has jurisdiction over Lam and Linna Textiles, or, alternatively, that jurisdictional discovery is needed; that the cross-claims sufficiently notify the dismissal movants of the claims pursuant to CPLR § 3013; that they have sufficiently stated a claim for breach of warranty and contract and NYGBL § 349; and that Seena's mark – DITCH PLAINS – is not geographically deceptively misdescriptive. Defendants also contend that collateral estoppel is inapplicable. 6

In its summary judgment motion, Perine argues that pursuant to the U.C.C., the Buyers accepted the goods at issue and did not revoke this acceptance. It contends that the Buyers did not reject the goods within a reasonable amount of time, and, notwithstanding the Buyers' promise to pay in full for the Accepted Goods, the Buyers never paid. As to the Buyers' claim of defective goods, Perine notes that the majority of the sample of allegedly defective goods that it inspected is not part of the Accepted Goods, and the remaining goods in the sample were indisputably accepted, retained, and then sold. Perine also notes that the Buyers did not preserve other allegedly defective goods. 7

In the alternative, Perine seeks judgment on an account stated theory, arguing that Perine delivered invoices to Buyers, which Buyers received and kept without lodging an objection within a reasonable amount of time, and, in fact, Buyers promised to pay the invoices for the Accepted Goods. 8

The first counterclaim and fourth affirmative defense relate to «[t]he defective and nonconforming nature of certain of the goods sold and delivered by Perine» and that «Defendants properly rejected the goods that are the subject of the Verified Complaint, as such goods were not of merchantable quality, or were not timely delivered in accordance with the provisions of the individual purchase orders.» Perine maintains that «[t]o the extent that the First Counterclaim and the Fourth Affirmative Defense pertain to the Accepted Goods, Plaintiff is entitled to summary judgment thereon,» because «it is undisputed that Buyers retained the Accepted Goods, failed to reject them, sold them, and promised to pay for them, which, as a matter of law under the U.C.C. forecloses any claims against the Plaintiff relating to these goods.» 9

[2] The Amended Answer defines the Perine Parties as «Perine, Regent, J & Co., Lam, Linna Textiles and the Doe Parties.»

Defendants oppose Perine's motion for partial summary judgment, arguing that: (1) Perine is the incorrect plaintiff because Bedford placed orders with Regent. Defendants also ask me to search the record, deny Perine's motion for summary judgment, and grant defendants summary judgment because this action was brought by the incorrect party, or, in the alternative, to deny Perine's motion for partial summary judgment because there are questions of fact as to whom is the correct plaintiff; (2) the United Nations Convention on the International Sale of Goods («CISG») governs this dispute, not the U.C.C. as alleged by Perine; (3) factual issues make summary judgment inappropriate; (4) defendants' counterclaims make summary judgment inappropriate or should prevent the entry of summary judgment until the resolution of the counterclaims; and (5) even if I grant summary judgment, that I grant it against defendant Bedford alone, as the goods were only sold to defendant Bedford. 10

I. Dismissal Movants' Motion

a. Jurisdiction over Lam and Linna Textiles

The dismissal movants contend that dismissal of the cross-claims against Lam and Linna Textiles is required because this Court lacks jurisdiction over this individual and entity. It is undisputed that neither Lam nor Linna Textiles is a resident of New York. «While the ultimate burden of proof rests with the party asserting jurisdiction, the [cross-claimants], in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), need only make a prima facie showing that the [cross-claim] defendant was subject to the personal jurisdiction of the Supreme Court.» *Comely v. Dynamic HVAC Supply, LLC,* 44 A.D.3d 986, 986 (2d Dep't 2007) (internal citation omitted). 11

Pursuant to CPLR 302(a), «a court may exercise personal jurisdiction over any non- domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state.» CPLR 302(a)(1) «applies where the defendant's New York activities were purposeful and substantially related to the claim. 'Purposeful' activities are defined as 'those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'» *C. Mahendra (NY), LLC v. Nat'l Gold & Diamond Ctr., Inc.,* 125 A.D.3d 454, 457 (1st Dep't 2015) (citations and internal quotation marks omitted). 12

The dismissal movants argue that this Court does not have jurisdiction over Lam and Linna Textiles pursuant to CPLR 302(a)(1) because allegedly infringing goods were not delivered to New York and because the allegations in support of the breach of warranty and breach of contract counterclaim/cross-claim relate only to actions taken by Perine. The dismissal movants contend that this Court does not have jurisdiction over Lam or Linna Textiles regarding allegedly infringing goods sold to non-party One Step Up, Ltd. («OSU») because those goods were delivered to and remain in California.[3] While the goods were bought by a New York company, they never made it to their final, intended destination. 13

[3] Some cross-claims concern goods that were allegedly sold or intended to be sold to non-parties. According to the cross-claimants, pursuant to a 2011 letter, the Buyers authorized the Perine Parties to sell 293,694 pieces of

CPLR 302(a)(1) was amended in 1979 «to provide for jurisdiction when a defendant 'contracts anywhere to supply goods or services in the state.'» *Alan Lupton Assocs., Inc. v. Ne. Plastics, Inc.,* 105 A.D.2d 3, 6 (4th Dep't 1984). Following the amendment, «New York courts may now exercise jurisdiction over a nondomiciliary who contracts outside this State to supply goods or services in New York even if the goods are never shipped or the services are never supplied in New York, so long as the cause of action, as here, arose out of that contract.» *Id.*; see *APC Commodity Corp. v. Ram Dis Ticaret A.S.,* 965 F. Supp. 461, 463-65 (S.D.N.Y. 1997) (citations omitted) (applying New York law, stating «[j]urisdiction may exist even when the goods are never shipped or supplied to New York. 'The key issue is that the nondomiciliary contracted and intended to send goods to New York;'» and holding, in pertinent part, that «the plaintiff has demonstrated that its claim arises out of a contract to supply goods to New York» when «all the correspondence referred to New York as the port of discharge,» but the containers were actually shipped to New Jersey). **14**

Here, defendants submitted packing lists indicating that the goods would be shipped to OSU in New York. The fact that the goods ultimately did not make it to their intended destination does not deprive this Court of jurisdiction. See *Lupton,* 105 A.D.2d at 6.[4] Accordingly, this Court has long-arm jurisdiction over Lam and Linna Textiles with regard to the allegedly infringing goods sold to OSU. **15**

With regard to jurisdiction for the breach of warranty and breach of contract claim pled against Lam, I find that the cross-claimants have met their burden in showing that Lam is subject to jurisdiction. See id. Defendants maintain that «this contention fails as to Lam herself, who was the key force on the side of the Perine Parties with respect to the transactions with Defendants to supply goods to NY out of which those Cross-Claims arise.» In addition to arguing that the parties contracted to sell goods individually, defendants further argue that Lam and Linna Textiles contracted to supply goods «through Perine and Regent as agents.» While dismissal movants argue that the pleading does not allege any sort of agency relationship, «[cross-claimants] need not establish a formal agency relationship between [Lam] and [Perine and Regent]. [Cross-claimants] need only convince the court that [Perine and Regent] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [Lam] and that [she] exercised some control over [Perine and Regent] in the matter.» *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467 (1988) (internal citations omitted). **16**

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apparel, 166,923 of which contained DITCH PLAINS trademarks. The cross-claimants allege that the Perine Parties forged a copy of the letter so that the Perine Parties could sell unauthorized apparel items with DITCH PLAINS marks.

[4] Moreover, there are other indicia of Lam and Linna Textiles «'avail [ing] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'» *C. Mahendra,* 125 A.D.3d at 457 (citations and internal quotation marks omitted). For example, an individual from OSU testified that Lam offered to sell the goods to OSU. Lam allegedly sent OSU a letter indicating that Regent was authorized to sell goods to OSU, and Lam allegedly communicated with an individual at OSU via email. Defendants also submitted an invoice allegedly issued to OSU by Linna Textiles. I find that these contacts «were purposeful and substantially related to» the causes of action referencing allegedly infringing goods shipped to OSU. *C. Mahendra,* 125 A.D.3d at 457.

Neither Perine nor Regent are contesting personal jurisdiction within the State. Defendants allege «[u]pon information and belief that «Lam is the moving, active, dominating and controlling force behind the infringing and other wrongful activities of Perine, Regent, J & Co. and Linna Textiles, and personally participated in the transactions alleged herein.» They also submit Singh's affidavit, in which he states that Lam had a 17

> dominant role in connection with the transactions that are the subject of the parties' claims in this case. During the year in which those transactions took place it was, with few exceptions, always Lam with whom [defendants] communicated, by telephone, emails and face-to-face meetings, from buying, ordering, pricing, shipping, sampling and paying. . . . [Defendants] understood, notwithstanding different entities she used, such as Perine, Regent and Linna Textiles, that [they] were dealing with her. None of those entities, as far as [they] could see, had any function independent of her.

See *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 635 (1976) («affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims»). Thus, the defendants have put forth prima facie evidence that Lam is subject to personal jurisdiction for the breach of warranty and breach of contract claim. See *Kreutter,* 71 N.Y.2d at 467; *Comely,* 44 A.D.3d at 986.[5] 18

b. The Alleged Impermissible Grouping of Cross-Claims

The dismissal movants contend that dismissal is appropriate because the cross-claims group a number of parties together under the same term – «the 'Perine parties'» – without any differentiation between the constituent parties. Under CPLR § 3013, «[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.» «[G]enerally speaking, '[p]leadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy.'» *Foley v. D'Agostino,* 21 A.D.2d 60, 63 (1st Dep't 1964) (citation omitted). 19

Here, because of the alleged relationship among the parties, the cross-claims sufficiently provide «notice of the transactions and occurrences alleged to give rise to liability.» See id.; see also CPLR § 3013. Thus, dismissal of the cross-claims on this ground is denied. 20

c. Failure to State a Claim

1. Breach of Warranty and Breach of Contract Cross-Claims

The cross-claim for breach of express warranty against Regent and Lam must be dismissed because the cross-claimants do not plead that those parties breached any warranties. See *CBS Inc. v. Ziff-Davis Publ'g Co.,* 75 N.Y.2d 496, 503-04 (1990). As the dismissal movants note, insofar as cross-claimants' cause of action for breach of warranty includes a breach of an implied 21

[5] In the sections of their memoranda of law assessing jurisdiction for the breach of warranty and breach of contract claim, both parties reference Lam and Linna Textiles. However, I note that the first cross-claim is not brought against Linna Textiles.

warranty, that claim against Regent and Lam must similarly be dismissed for lack of an allegation that those parties breached any warranty. The cross-claimants' have also failed to state a cross-claim for breach of contract against Regent and Lam. To state a valid breach of contract claim, a party must plead «the existence of a contract, the plaintiffs performance under the contract, the defendant's breach of that contract, and resulting damages.» *JP Morgan Chase v. J.H. Elec. Of New York, Inc.,* 69 A.D.3d 802, 803 (2d Dep't 2010). The Amended Answer does not allege that Regent or Lam breached the contract. I therefore dismiss the cross-claim for breach of contract and breach of warranty against Regent and Lam.

2. Trademark Infringement and Unfair Competition Cross-Claims

With respect for the causes of action for a violation of § 43(a) of the Lanham Act, common law trademark infringement, and common law unfair competition, the dismissal movants argue that Seena has no protectable right to the DITCH PLAINS trademark because the mark is geographically deceptively misdescriptive. In particular, the dismissal movants claim that the mark refers to a beach in Montauk when Seena's primary place of business is Hauppage, New York, and the items are made in China. **22**

Determining whether DITCH PLAINS is geographically deceptively misdescriptive on this motion to dismiss would be inappropriate, as «[w]hether a mark is primarily geographically deceptively misdescriptive is a question of fact.» *In re Miracle Tuesday, LLC,* 695 F.3d 1339, 1343 (Fed. Cir. 2012); In re Save Venice New York, Inc., 259 F.3d 1346, 1351 (Fed. Cir. 2001). Similarly, analyzing the dismissal movants' unclean hands defense based on their assertion of the mark being primarily geographically deceptively misdescriptive would also be premature at this stage in the litigation. See *Japan Telecom, Inc. v. Japan Telecom America Inc.,* 287 F.3d 866, 871 (9th Cir. 2002). **23**

The dismissal movants also contend that trademark infringement and unfair competition claims must be dismissed because the Amended Answer does not allege that the dismissal movants sold or tried to sell the particular DITCH PLAINS goods. Instead, they argue, the pleading insufficiently «alleges that Revi Green and Seven Lions were 'agents' of the 'Perine Parties'» without properly providing detail about the alleged agency relationship. I find that the Amended Answer sufficiently alleges that Revi Green and Seven Lions were agents of the Perine Parties when they sold or attempted to sell DITCH PLAINS goods to Burglington Coat Factory and Ross Stores, Inc. *Kelly Masonry Corp. v. Presbyterian Hosp. in City of New York,* 160 A.D.2d 192, 193 (1st Dep't 1990) (accepting allegation of agency relationship for purposes of the motion to dismiss). Moreover, the Amended Answer alleges that the Perine Parties sold infringing goods to OSU. **24**

Finally, the dismissal movants claim that Seena is collaterally estopped from asserting that its DITCH PLAINS mark is valid because the Trademark Trial and Appeal Board («TTAB») previously denied Seena's application to register the mark, and Seena then «abandoned its appeal» in the Federal Circuit. In opposition, defendants argue that collateral estoppel is inapplicable because «[i]t is well-established that registration proceedings before the PTO and TTAB have no collateral estoppel effect in a subsequent trademark infringement action involving the same mark.» **25**

Dismissal movants claim that Anvil NY LLC («Anvil»), a non-party, owns four registered trademarks for DITCH PLAINS. In 2008, Seena filed an application for the DITCH PLAINS mark, and the United States Patent and Trademark Office («USPTO») refused to register Seena's mark, citing a likelihood of confusion between its mark and one of Anvil's marks. Seena appealed this decision, and the TTAB affirmed. In 2010, Seena appealed the TTAB's decision to the Federal Circuit, and the Federal Circuit dismissed the appeal. 26

Seena is not collaterally estopped from claiming rights to the DITCH PLAINS mark based on the TTAB's affirmance of the USPTO's refusal to register the mark because the issues in the USPTO and TTAB proceedings are not identical to those at issue here. 27

> The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. . . . What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding.

Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984).[6]

The TTAB's affirmance of the USPTO's refusal to register Seena's DITCH PLAINS mark is different from this Court's determination concerning the trademark infringement causes of action. See *Murphy Door Bed Co., Inc. v. Interior Sleep Systems, Inc.,* 687 F. Supp. 754, 759 (E.D.N.Y. 1988) («Registration gives jurisdictional and procedural advantages to the registrant. The right to trademark protection arises from use-not from registration.»); *Tonka Corp. v. Rose Art Indus., Inc.,* 836 F. Supp. 200, 213 (D.N.J. 1993) («Registration proceedings present the question of whether the applicant is entitled to register its trademark; an infringement suit presents the issue of entitlement to use a mark.»); *Volkswagenwerk Aktiengesellschaft v. Wheeler,* 814 F.2d 812, 819 (1st Cir. 1987) («A refusal by the PTO to register a mark does not preclude the owner of the mark from his right to use it.»). For all of the foregoing reasons, that part of the dismissal movants' motion seeking dismissal of trademark infringement and unfair competition cross-claims is denied. 28

3. Violation of GBL § 349

The dismissal movants next contend that the GBL § 349 claim is untenable because, amongst other arguments, the pleading does not «sufficiently allege a consumer injury or harm to the public interest.» In opposition, defendants not only maintain Seena's right to the mark and that the cross-claims sufficiently allege unauthorized sales, but also they contend that «case law . . . clearly holds that a defendant's marketing of infringing goods identical to those of the plaintiff causes confusion to the plaintiff's purchasing public and thereby causes the very type of consumer injury necessary for a claim under GBL § 349.» Section 349(a) of the GBL states, «[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.» «A plaintiff under section 29

[6] In *B&B Hardware, Inc. v. Hargis Indus., Inc.,* the United States Supreme Court considered «the application of issue preclusion in the context of trademark law.» 135 S. Ct. 1293, 1299 (2015). The Court «h [e]ld that a court should give preclusive effect to TTAB decisions if the ordinary elements of issue preclusion are met.» *Id.*

349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.» *Stutman v. Chemical Bank,* 95 N. Y.2d 24, 29 (2000). «As shown by its language and background, section 349 is directed at wrongs against the consuming public.» *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N. A.,* 85 N.Y.2d 20, 24 (1995).

Here, there is no allegation that the goods were ever marketed or sold to consumers, thus there is no alleged «consumer-oriented» act as required by the statute. See *Stutman,* 95 N.Y.2d at 29; see also *Goshen v. Mut. Life Ins. Co. of New York,* 98 N.Y.2d 314, 325 (2002) («The phrase 'deceptive acts or practices' under the statute is not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer.»). The dismissal movants' motion to dismiss the GBL § 349 claim is granted. In sum, the dismissal movants' motion to dismiss is granted as to the first and fifth cross- claims, and the motion is otherwise denied. **30**

II. Perine's Motion for Summary Judgment

«[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.» *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986). If the movant makes a prima facie showing, «the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.» *Id.* **31**

Perine's First Cause of Action for Breach of Contract

Here, plaintiff has put forward a prima facie case for breach of contract against Bedford on some of the Accepted Goods under the CISG.[7] The elements for a breach of contract cause of action are similar whether construed under the guise of the UCC or the CISG: **32**

> The elements of a breach of contract claim are the same [under the CISG and the UCC]; a [plaintiff] must show: (1) the existence of a valid and enforceable contract containing both definite and certain terms, (2) performance by . . . plaintiff, (3) breach by . . . defendant and (4) resultant injury to . . . plaintiff.

U.S. Nonwovens Corp. v. Pack Line Corp., 48 Misc.3d 211, 215 (Sup Ct Suffolk County Mar. 12, 2015) (citations and internal quotation marks omitted). «Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code («UCC»), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not per se applicable.'» *Delchi Carrier SpA v. Rotor ex Corp.,* 71 F.3d 1024, 1028 (2d Cir. 1995) (citation omitted). **33**

[7] In opposition to Perine's motion for summary judgment, defendants argue that the CISG applies because the current dispute is between two parties from different countries, both of which are signatories to the CISG. In reply, Perine argues that it should be awarded partial summary judgment even if the CISG applies. I, thus, interpret Perine's reply papers as acquiescing to the defendants' argument that I should apply the CISG.

Plaintiff has alleged, and defendants do not deny, the existence of valid contracts.[8] In support of this allegation, Perine submitted purchase orders, packing lists, and invoices for Invoice Numbers P239D, P253D, P254D, P258D, P259D, P286D, and P360D. These submissions support its allegation of performance for Invoice Numbers P253D and P254D. Perine has evidenced defendants' breach and its injury by submitting «Defendants' Response to Plaintiffs First Notice to Admit» in which defendants admitted that they have not paid for any of the Accepted Goods. 34

However, submission of purchase orders, packing lists, and invoices alone for Invoice Numbers P239D, P258D, P259D, P286D, P360D does not evidence plaintiffs performance, because these submissions indicate that the number of goods listed on invoices and packing lists did not align with the number of goods requested in purchase orders. As such, Perine failed to make out its prima facie breach of contract claim, and summary judgment is denied as to these invoices. See Alvarez, 68 N.Y.2d at 324. I also deny summary judgment on the first counterclaim and fourth affirmative defense to the extent the counterclaim and defense relate to the aforementioned invoices. 35

Regarding Invoice Numbers P253D and P254D, defendants have failed to raise material issues of fact because they waived a non-conformity defense when they promised to pay for the goods. Cf. *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.,* 7 N.Y.3d 96, 104 (2006) («Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned.»). By promising to pay for Invoice Numbers P253D and P254D in two separate emails, defendants plainly and «knowingly, voluntarily and intentionally abandoned» a non-conformity defense. See *Fundamental Portfolio Advisors,* 7 N.Y.3d at 104. Singh and Kothapally's contention in their affidavits that the offers to pay in these emails were «part of settlement discussions» is unavailing, as that contention is contradictory to the plain text of the communications.[9] 36

With respect to Seena, Perine has produced insufficient evidence on this summary judgment motion of a parent-subsidiary relationship between Seena and Bedford sufficient to impute liability to Seena. 37

Therefore, I grant summary judgment as to Invoice Numbers P253D and P254D as against Bedford on Perine's first cause of action, the first counterclaim, and the fourth affirmative defense. Entry of judgment on these invoices will be postponed however, as there may be offsets and other claims that affect the judgment. I deny summary judgment as to Invoice 38

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[8] Defendants contend that partial summary judgment is inappropriate because defendants contracted with Regent. However, as Perine notes, the defendants admit to a contract with Perine in the Amended Answer when they brought a counterclaim for breach of warranty and breach of contract against Perine. «Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made.» *GMS Batching, Inc. TADCO Constr. Corp.,* 120 A.D.3d 549, 551 (2d Dep't 2014). As such, defendants may not now argue that there was no contract with Perine. See *Id.*

[9] Cf. *Phillips v. Bronx Lebanon Hosp.,* 268 A.D.2d 318, 320 (1st Dep't 2000) (While issues of fact and credibility may not ordinarily be determined on a motion for summary judgment, where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiffs own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment.).

Numbers P239D, P258D, P259D, P286D, P360D on Perine's first cause of action, the first counterclaim, and the fourth affirmative defense.

Perine's Third Cause of Action for Account Stated

Perine has failed to make out its prima facie case for an account stated as to the remaining invoices. Summary judgment on an account stated cause of action is appropriate when a party puts forward «documentary evidence showing that defendant received and retained the invoice without objection.» *Miller v. Nadler,* 60 A.D.3d 499, 499 (1st Dep't 2009). Here, there are insufficient underlying facts to show delivery of invoices, particularly because defendants do not admit receipt. See *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980) (citation omitted) («'To obtain summary judgment it is necessary that the movant establish his cause of action or defense «sufficiently to warrant the court as a matter of law in directing judgment» in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form.'»). Accordingly, summary judgment on Perine's third cause of action is denied. **39**

In accordance with the foregoing, it is hereby **40**

ORDERED that the motion of defendants Regent Alliance Ltd., Na Lam, and Linna Textiles Manufacturing Ltd. to dismiss the cross-claims is granted as to the first and fifth-cross claims, and the motion is otherwise denied; and it is further

ORDERED that defendants Regent Alliance Ltd., Na Lam, and Linna Textiles Manufacturing Ltd. are directed to answer the remaining cross-claims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that Perine's motion for partial summary judgment on its first cause of action, the first counterclaim, and the fourth affirmative is granted as to Invoice Numbers P253D and P254D as against Bedford in accordance with the above, and the motion is otherwise denied. However, the Court reserves entering judgment on these invoices; and it is further

ORDERED that Perine's motion for partial summary judgment on its third cause of action is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on October 28, 2015, at 2:15 PM.

This constitutes the decision and order of this Court.