CISG-online 2923	
Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Southern District of New York
Date of the decision	28 March 2014
Case no./docket no.	11 Civ. 4405(ALC)(FM)
Case name	*Weihai Textile Group v. Level 8 Apparel, LLC et al.*

Memorandum & Order

Andrew L. Carter, Jr., District Judge.

I. Introduction

Plaintiff Weihai Textile Group Import & Export Co., LTD («Weihai») operates factories in China that produce and export garments. Level 8 Apparel, LLC («Level 8»), World Cross Culture, Inc. («WCC»), and Sam Kim (collectively «Defendants») purchase and import garments from overseas factories to sell to retailers in the United States. Weihai entered into agreements for the manufacture and sale of garments to Defendants in 2009 and 2010. The parties dispute whether an agreement was made in 2011. Plaintiff alleges Defendants failed to pay outstanding balances, and therefore, Plaintiff refused to manufacture garments for Defendants in 2011. Defendants argue there were frequent problems with Plaintiff's goods, including quality issues and shortages in shipments, and Defendants are entitled to credits for the costs associated with these problems. Further, Defendants contend the parties had a binding agreement in 2011, and Plaintiff's failure to perform under that agreement caused Defendants to suffer losses. Plaintiff moves for summary judgment with respect to its claims and Defendants' counterclaims. 1

II. Background

Weihai, incorporated in China, manufactures and exports clothing. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 1.) An associated entity, Dishang Group Co., Ltd. («Dishang»), maintains some of the same shareholders, but the parties dispute the full extent of the relationship between Weihai and Dishang. (*Id.* ¶ 2.) Li Hua Zhu is the CEO of Weihai, and Shuli Li is an Executive Vice President that oversees import and export operations. (*Id.* ¶¶ 3, 4.) Within Weihai, Department 7 handles orders for wool coats and wool sweaters. (*Id.* ¶ 5.) Niu Shumei is a Vice President and Manager of Department 7, and Xiao Yu Lou («Rainie») is an Interpreter and Merchandiser also in Department 7. (*Id.* ¶¶ 5, 6.) 2

Level 8 and WCC are New York corporations that purchase and import clothing from abroad and sell the items to retailers in the United States. (*Id.* ¶¶ 8–10.) Scott Kim a/k/a Sam Kim is the President of the Korea Division of Level 8 and the President and sole shareholder of WCC. (*Id.* ¶ 11.) Kim's wife is the sole shareholder of Level 8. (*Id.* ¶ 12.) Missy Moon is the President 3

of Level 8, but she has also been described as Kim's assistant, as well as handling bookkeeping and finances for the company. (*Id.* ¶ 13.) Stuart Edelman was the President of Sales for the Tumi Division of Level 8 until July or August of 2012 and oversaw the sales for Tumi, Aeropostale, and Express. (*Id.* ¶ 14.) Lastly, Tae Kyu Kim («Stanley») manages inspections for Defendants' Korea office, and Mija Park («Kate») is the Director of the Korea office. (*Id.* ¶¶ 15, 16.)

4 Pursuant to WCC's standard procedures, it would send its Korean-based inspectors to the factories to inspect the garments once during production and once at the end of production. (*Id.* ¶ 17.) Plaintiff contends goods are not shipped from the factory unless they pass inspection or a «Letter of Guarantee» is executed. (Pl.'s L.R. 56.1 Stat. ¶ 17.) Defendants dispute this, claiming «WCC and Level 8 do not inspect all of the garments, and therefore do not approve the shipment.» (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 17.) Another practice in the garment industry includes retailers claiming «chargebacks» from their suppliers, whereby the retailer takes deductions against the purchase price after the goods are received for defects in quality or short or late shipments in accordance with the terms of the contract. (*Id.* ¶ 31; «Estee» Kim Decl. ¶ 4.)

5 Seung Taek Kim («Estee»), a non-party to this litigation, is the principal of Estee Corporation a/k/a Estee Amerimade International Trading Co., Ltd. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 18.) Estee would place orders for clothing with factories and assist with making arrangements for the production and shipment of the clothing to the Unites States in return for a 3% commission on the purchase price to be paid by the supplier. (*Id.* ¶¶ 19, 24.) In 2011, Estee sold most of the assets of his business to Weihai, and some of his former employees began working for Plaintiff. (*Id.* ¶ 21.) Estee capitalizes on a direct affiliation with Weihai in an effort to generate more business and holds himself out as operating the «Dishang Estee Department.» (*Id.*) One of Weihai's current employees, Dan Sun («Sunny»), was a former assistant of Estee, and Sunny continued to take directions from Estee after she started working for Plaintiff. (*Id.* ¶ 23.) She also holds herself out as working for the «Dishang Estee Department,» though the parties dispute who Sunny was working for in 2011 and 2012. (*Id.*)

6 Estee introduced Weihai to Defendants and brought the purchase orders («POs») to Plaintiff that are the subject of this case. (*Id.* ¶ 25.) In fact, in 2009, Estee assisted WCC in placing orders with Weihai for certain garments to be sold to Aeropostale, Inc. («Aeropostale») and GUI Apparel Group Ltd. («GUI»). (*Id.* ¶¶ 26, 27.) Issues arose between the parties surrounding the 2009 orders, which were ultimately settled by an agreement on December 15, 2009. (*Id.* ¶ 34.) After the execution of the December 15, 2009 settlement agreement, all outstanding debts were paid, and the parties agree all issues up to that point were completely resolved. (*Id.* ¶ 35.)

7 Plaintiff and Level 8 entered into three new contracts in May and August of 2010 for wool coats to be supplied to GUI and Aeropostale. (*Id.* ¶ 42.) The total purchase price for the coats was $2,062,859.45. (*Id.*) The 2010 contracts contained provisions for payments and the procedures to be utilized if there was a quality or quantity discrepancy. (*Id.* ¶ 43.) Defendants inspected the coats at Plaintiff's factory, and they were shipped in October of 2010. (*Id.* ¶ 44.) There were shortages in the shipment and quality issues, leading to chargebacks of over $970,000 from Aeropostale, according to Defendants. (*Id.* ¶ 46.) The parties dispute who is at

fault for the shortages and the amount, if any, Defendants are owed; however, Plaintiff did credit Defendants $2007.00 under the May contract and $31,598.00 under the August contracts. (*Id.*)

8 On December 29, 2010, Plaintiff and WCC entered into a signed agreement, whereby WCC acknowledged an outstanding balance owed to Plaintiff of $1,547,764.68, which included a credit of $12,639.20 for «Aero Non Delivery Claim Amounts.» (*Id.* ¶ 48; Trexler Decl. Ex. 5, Pl.'s Ex. 8.) Level 8 executed a signed «Guarantee of Payment» on January 20, 2011, agreeing to pay Plaintiff $1,547,764.68 in three installments due in January, February, and March of 2011. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. 149; Trexler Decl. Ex. 5, Pl.'s Ex. 9.) Plaintiff contends these agreements represented the full settlement of the 2010 contracts, including any credits for quantity or quality issues. (Pl.'s L.R. 56.1 Stat. ¶ 51.) On the other hand, Defendants claim these agreements, as a full settlement of the 2010 contracts, were conditioned upon Plaintiff's production of more garments for Defendants in 2011. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. 151.)

9 Beginning in January of 2011, the parties discussed entering into additional contracts for clothing to be sold to GUI, Tumi, and Express. (*Id.* ¶ 52.) On March 17, 2011, Kim traveled to Weihai, China to meet with Niu and discuss the 2011 orders. (*Id.* ¶ 53.) Plaintiff maintains Kim was repeatedly told Weihai would not provide any garments in 2011 unless Defendants paid the outstanding balance for 2010. (Pl.'s L.R. 56.1 Stat. ¶ 54.) Defendants argue Plaintiff agreed to produce the 2011 orders, as a condition of the December 29, 2010 and January 20, 2011 agreements, so long as Defendants made payments in accordance with the schedule. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 54.)

10 On May 3, 2011, WCC agreed to open a line of credit for the 2011 GUI orders before May 30, 2011. (*Id.* ¶ 59.) That same day, WCC executed a guaranty of payment for Plaintiff in the amount of $1,560,000.00. (*Id.* ¶ 63.) Over the next two days, WCC and Level 8 signed agreements promising to pay Plaintiff $1,560,000.00 in five installments – $100,000.00 before May 15, 2011; $100,000.00 before May 30, 2011; $384,000.00 before July 5, 2011; $488,000.00 before August 5, 2011; and $488,000.00 before September 10, 2011. (*Id.*) The parties concur that these agreements resulted from a meeting at Kim's New York office between Defendants, Niu, Li, and Estee. (*Id.* ¶¶ 62–63.)

11 Also in May of 2011, Estee signed various POs for Defendants' 2011 orders. (*Id.* ¶ 55.) The parties dispute who prompted Estee to ratify the POs and for what purpose it was done. Plaintiff believes Kim asked Estee to sign the POs so he could use them to obtain financing after Niu refused to sign them. (Pl.'s L.R. 56.1 Stat. ¶¶ 55–57.) Defendants claim Estee signed the POs on behalf of Weihai because Plaintiff had agreed to proceed with the 2011 orders. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 55.) The parties further dispute whether Estee had the authority to sign any documents on behalf of Weihai. (*Id.* ¶¶ 56–57.) Thereafter, Defendants sent samples, materials, and fabrics to Plaintiff for the 2011 orders. (*Id.* ¶ 61.)

12 The payment by Defendants due on May 15, 2011 was not timely made. (*Id.* ¶ 65.) Plaintiff argues as such, Defendants were in default of the May 5 and 6, 2011 agreements. (Pl.'s L.R. 56.1 Stat. ¶¶ 65–66.) Defendants claim they were not in default because Plaintiff agreed to waive the late payment if Defendants paid a $1,000 interest penalty. (Def.'s Resp. to Pl.'s L.R.

56.1 Stat. ¶¶ 65–66.) On May 19, 2011, Plaintiff received a wire transfer from Defendants in the amount of $102,000.00. (*Id.* ¶ 67.) At the prompting of Estee, Kim wrote a letter to Zhu dated May 27, 2011. (*Id.* ¶¶ 68–69.) The letter reassured Weihai it would be paid in full and apologized for Defendants' inability to maintain the payment schedule as planned. (*Id.* ¶ 70.) The payment for May 30, 2011 was not timely made as well. (*Id.* ¶ 72.) On June 3, 2011, Defendants sent $100,000.00 to Plaintiff by wire transfer. (*Id.* ¶ 73.) Additionally, Defendants failed to open a line of credit by May 30, 2011 for the 2011 GUI orders. (*Id.* ¶ 74.)

Weihai claims by the end of June of 2011, it had little confidence in Defendants' ability to pay the balance due and therefore, initiated the instant action. (Pl.'s L.R. 56.1 Stat. ¶ 75.) Once the lawsuit was filed on June 29, 2011, Kim ceased payments to Weihai. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 80.) Prior to the suit, Estee and Sunny arranged a visit to Plaintiff's factory for a representative of Express and WCC employees. (*Id.* ¶¶ 81, 83.) Plaintiff gave the scheduled tour to the Express representative on July 8, 2011. (*Id.* ¶ 84.) During the tour, Plaintiff contends it told Express that the production of the clothing would not move forward because Defendants had defaulted on their payment obligations. (Pl.'s L.R. 56.1 Stat. ¶ 84.) Defendants assert Kim was told Weihai kicked the Express representative out of the factory because it was not going to fill the orders. (Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 84.) **13**

During the parties' negotiations surrounding the 2011 orders, Defendants sent Plaintiff fabrics and materials to be used for testing and samples of the garments. (*Id.* ¶ 87.) On July 12, 2011, Defendants requested Plaintiff return the samples, patterns, and materials they had shipped to Weihai. (*Id.* ¶ 90.) Plaintiff refused to return the items, claiming Defendants still owed it outstanding debts. (*Id.*) **14**

In the First Amended Complaint, Plaintiff's initial cause of action alleges breaches of the three contracts entered into for the 2010 orders and the subsequent guarantees acknowledging Defendants' unpaid balance for those orders. The second cause of action seeks a declaratory judgment finding that Plaintiff does not owe Defendants any money and Plaintiff has not breached the terms of any contract. The third cause of action alleges unjust enrichment, and the fourth cause of action alleges fraud based on «Defendants knowingly and intentionally induc[ing] Plaintiff into entering a business relationship with them ... and wrongfully and illegally fail[ing] to make payments ....» (First Am. Compl. ¶ 46.) Lastly, the fifth cause of action alleges WCC and Level 8 were *alter egos* of Kim such that Plaintiff should be permitted to pierce the corporate veil. **15**

Defendants bring four counterclaims against Plaintiff in their Amended Answer. The first counterclaim alleges breach of contract for quality and quantity issues with the 2010 orders. The second counterclaim alleges breach of contract for Plaintiffs refusal to manufacture the 2011 orders. The third counterclaim alleges breach of the implied covenant of good faith and fair dealing for Plaintiff's continued possession of Defendants' materials. The fourth counterclaim alleges intentional infliction of temporal damages based on Plaintiff's intentional withholding of Defendants' property thereby depreciating the value of Defendants' good will, diminishing their revenue, and impairing their business prestige. **16**

III. Discussion

Plaintiff argues Defendants executed several agreements that settled the obligations of the parties under the 2010 contracts. Further, these agreements were not conditioned on Plaintiff accepting additional orders from Defendants in 2011. Since Plaintiff never accepted Defendants' offer to manufacture garments in 2011, there is no binding agreement under which Plaintiff was obligated to fulfill those orders. Defendants claim the settlement of the 2010 contracts was conditioned upon Plaintiff producing the 2011 orders. Since Plaintiff failed to do so, there is no enforceable settlement of the 2010 contracts. With respect to the 2011 orders, Defendants argue there is a genuine dispute of material fact as to whether a binding contract was formed. Weihai now moves for summary judgment on its claims and Defendants' counterclaims. 17

A. Standard of Review

A party moving for summary judgment has the burden of establishing there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Scott v. Harris,* 550 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Ford v. Reynolds,* 316 F.3d 351, 354 (2d Cir. 2003). Material facts are those that may affect the outcome of the case. *Anderson,* 477 U.S. at 248. An issue of fact is considered «genuine» when a reasonable finder of fact could render a verdict in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) («Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'») *(citation omitted)*. 18

In considering a summary judgment motion, «the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.» *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir. 1986) (citing *Anderson,* 477 U.S. at 248). If the court recognizes any material issues of fact, summary judgment is improper, and the motion must be denied. *Eastway Constr. Corp. v. City of N.Y.,* 762 F.2d 243, 249 (2d Cir. 1985). 19

If the moving party discharges its burden of proof under Rule 56(c), the non-moving party must then «set forth specific facts showing that there is a genuine issue for trial.» Fed.R.Civ.P. 56(e). The non-moving party opposing a properly supported motion for summary judgment «may not rest upon mere allegations or denials of his pleading.» *Anderson,* 477 U.S. at 256. Indeed, «the mere existence of some alleged factual dispute between the parties» alone will not defeat a properly supported motion for summary judgment, and «[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.» *Id.* at 249–50. Rather, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. See *Gallo v. Prudential Residential Servs., Ltd.,* 22 F.3d 1219, 1224 (2d Cir. 1999) («When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.»). 20

B. Breach of Contract Claims

The parties agree the breach of contract claims are governed by the United Nations Convention on Contracts for the International Sale of Goods, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671, reprinted at 15 U.S.C. app. (1997) [hereinafter CISG], «a self-executing treaty, binding on all signatory nations, that creates a private right of action in federal court under federal law.» *Hanwha Corp. v. Cedar Petrochemicals, Inc.,* 760 F.Supp.2d 426, 430 (S.D.N.Y. 2011). «The [CISG] 'automatically applies to international sales contracts between parties from different contracting states unless the parties agree to exclude [its] application.'» *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co., Ltd.,* No. 06 Civ. 3972(LTS)(JCF), 2011 WL 4494602, at *3 (S.D.N.Y. Sept. 28, 2011) *(citation omitted)*; CISG, *supra* p. 9, arts. 1.1(a), 6. Weihai is located in China and Defendants are located in the United States, both of which are signatories to the CISG. See *Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd.,* No. 10 C 1174, 2012 WL 962698, at *4 (N.D.Ill. Mar. 21, 2012) (noting both the United States and China are CISG signatories). 21

The CISG differs from contract principles under New York law in a few important ways. First, «the CISG has no statute of frauds, and does not require contracts for sale to be concluded in writing, instead allowing a contract to be 'proved by any means, including witnesses.'» *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH,* No. 1:05–CV–00702, 2009 WL 818618, at *5 (S.D.Ohio Mar. 26, 2009) (quoting CISG, *supra* p. 9, art. 11); accord *TeeVee Toons, Inc. v. Gerhard Schubert GmbH,* No. 00 Civ. 5189(RCC), 2006 WL 2463537, at *7 (S.D.N.Y. Aug. 23, 2006). Similarly, a contract may be modified without a writing. CISG, *supra* p. 9, art. 29. Second, «the CISG contains no parol evidence rule but allows the Court to consider statements or conduct of a contracting party to establish, modify, or alter the terms of a contract.» *Miami Valley Paper,* 2009 WL 818618, at *5 (citing CISG, *supra* p. 9, art. 8(2)). 22

Under Article 96 of the CISG, certain contracts may be excepted from Article 11, which provides that no writing is required: 23

> A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

CISG, *supra* p. 9, art. 96. In turn, Article 12 states, 24

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention....

Id. at art. 12. While the United States has not made an Article 96 declaration, China has, opting out of Article 11.[1] *China N. Chem. Indus. Corp. v. Beston Chem. Corp.,* No. Civ.A. H–04–0912, 2006 WL 295395, at *6 n. 6 (S.D.Tex. Feb. 7, 2006). 25

Where one State has made an Article 96 declaration and the other State has not, courts have taken different approaches to determining Article 11's applicability. For example, in a Florida case also involving American and Chinese parties, the court concluded since China had opted out of Article 11, an enforceable contract must be in writing. *Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Group Corp.,* No. 06–22608–CIV, 2008 WL 2098062, at *3 (S.D.Fla. May 19, 2008). When confronted with the same question, the Third Circuit rejected Microflock's reasoning in favor of a choice of law analysis under the rules of the forum state. *Forestal Guarani S.A. v. Daros Int'l, Inc.,* 613 F.3d 395, 400 (3d Cir. 2010). The Third Circuit noted at the outset, «Our research has turned up almost no case law from courts in the United States informing how to address a case, such as this one ....» *Id.* at 399. Indeed, our Circuit has not yet rendered a decision on this issue. 26

Here, the Court need not choose between the *Microflock* and *Forestal Guarani* approaches because under either approach the contracts at issue must be in writing. Although *Microflock* defaults to that conclusion, New York's choice of law rules, as the forum, result in the same outcome. As the Second Circuit has stated, 27

> In contract cases, New York courts now apply a 'center of gravity' or 'grouping of contacts' approach. Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. New York courts may also consider public policy 'where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests.' The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis.

Brink's Ltd. v. S. African Airways, 93 F.3d 1022, 1030–31 (2d Cir. 1996); accord *Forest Park Pictures v. Universal Television Network. Inc.,* 683 F.3d 424, 433 (2d Cir. 2012). Many of the factors present here do not point to one State as the «center of gravity» over the other. The record, for instance, indicates the various agreements made by the parties were executed in both China and the United States. The same is true for the site of negotiations. Additionally, one party is located in New York, and one party is located in China. The place of performance, however, focused on the factory's location in China, which is where the garments were manufactured and the inspections took place, and the Court is directed to afford this factor «the 28

[1] At the time this case was filed and when the alleged events occurred, China's declaration excepting its residents from Article 11 was in force. Effective as of January 16, 2013, however, China withdrew its declaration to Article and is now bound by its content. See United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx? src=TREATY & mtdsg_no=X–10 & chapter=10 & lang=en# 12 (last visited Mar. 10, 2014); see also Ministry of Commerce People's Republic of China, http://english.mofcom.gov.cn /article/newsrelease/significantnews/201302/20130200038302.shtml (last visited Mar. 10, 2014).

heaviest weight.» Taking the spectrum of significant contacts into account, China was the center of gravity for the agreements at issue, and therefore, its laws requiring an enforceable contract to be in writing would be applied under *Forestal Guarani*.

i. The 2010 Orders

For the 2010 orders, the parties executed a series of three contracts – one on May 5, 2010 totaling $833,551.70 for 74,758 pieces, one on May 5, 2010 totaling $704,853.75 for 46,525 pieces, and one on August 25, 2010 for 37,461 pieces. (Trexler Decl. Ex. 5, Pl.'s Ex. 5.) After the garments were produced, Kim signed a document on behalf of WCC entitled «2010 Outstanding Payment,» which stated, «We will issue L/C for the below amounts by Jan/15 Jan/30» and reflected a total payment due of $1,547,764.68 as of December 29, 2010. (*Id.* at Pl.'s Ex. 8.) Kim signed another document on behalf of Level 8 entitled «Guarantee of Payment» on January 20, 2011, stating, «We, Level 8 Apparel, hereby guarantee that regarding the above total amount payment of USD 1,949,807.85 which we have paid 389,305.97, for the unpaid portion of USD 1,547,764.68[.]» (*Id.* at Pl.'s Ex. 9.) On May 3, 2011, Kim signed a «2010 Pending Payment Schedule» on WCC letterhead indicating an outstanding balance of $1,560,000.00 was due to Weihai. (*Id.* at Pl.'s Ex. 10.) Two days later, Kim signed another «2010 Pending Payment Schedule» this time on Level 8 letterhead indicating both WCC and Level 8 guarantee payment to Weihai in the amount of $1,560,000.00. (*Id.* at Pl.'s Ex. 12.) Lastly, a document dated May 6, 2011 was sent to Weihai reflecting an unpaid balance of $1,547,764.68 from Level 8 and also on behalf of WCC. (*Id.* at Pl.'s Ex. 13.) **29**

According to Estee's testimony, the various agreements reflect revisions the parties agreed to make in an attempt to settle the unpaid debt from the 2010 orders. He stated, **30**

> A. We have, you know, the payment agreement. They revised it three times. They revised three times the payment. When Ms. Niu and when Ms. Li was here in New York with me and we visited, you know, the – Sam Kim's office, we made a final agreement at that time. We – they reported to Mr. Zhou, this is the final – you know, the final payment agreement, like this. And maybe after that, then Ms. Niu told me that Mr. Zhou gave her a warning, this is the final – you know, the final settlement for the payment.

(Trexler Decl. Ex. 2, Pl.'s Ex. 5 at 114:3–19.) The «final payment agreements» entered into at Kim's New York office include the «2010 Pending Payment Schedule» dated May 3, 2011, the «2010 Pending Payment Schedule» dated May 5, 2011, and the «Guarantee for 2010 Pending Payment Schedule» dated May 6, 2011, all of which are indisputably in writing.

Defendants claim the May 2011 agreements represented a full settlement of the 2010 orders, thereby requiring Defendants to forego any future claims for chargebacks based on those orders, only if Plaintiff produced the 2011 orders. «As a result, the outstanding 2010 payments became part of the agreement in May of 2011 for Plaintiff to produce the 2011 POs in exchange for the Defendants making the payments pursuant to the payment plan for the 2010 balance.» (Def.'s Opp. at 18–19.) The sole evidence Defendants point to in a record replete with numerous exhibits and depositions is an affidavit from Kim, which alleges: (i) «Implicit in the [May 2011] agreements ... was a compromise whereby in exchange for Level 8 and WCC **31**

forfeiting certain chargebacks to settle claims related to the 2010 orders, Weihai's [sic] would produce the March 2011[POs]» (Kim Decl. ¶ 6), and (ii) «The only reason that I executed the guarantee on behalf of WCC was so that Weihai would produce the 2011 POs. It was expressly agreed at the meeting that in exchange for WCC signing the guarantees, Weihai would produce the 2011 POs so long as WCC and Level 8 met the payment schedule.» (*Id.*)

Although the alleged contracts must be set forth in writing as previously discussed, the other principles of the CISG are still applicable. Particularly relevant here, Article 8 directs courts to consider extrinsic evidence of the parties' intent. **32**

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

CISG, *supra* p. 9, art. 8; see *also MCC-Marble Ceramic Ctr., Inc., v. Ceramica Nuova d'Agostino, S.p.A.,* 144 F.3d 1384, 1389 (11th Cir.1998) («Given article 8(1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.»); *TeeVee Toons,* 2006 WL 2463537, at *7 («[T]he CISG, unlike American contract law, includes no parol-evidence rule, and 'allows all relevant information into evidence even if it contradicts the written documentation.'» *(citation omitted)*). Therefore, under the CISG, any conduct and statements made between Weihai and Kim that show the written guaranties do not reflect the entire agreement between the parties must be evaluated. **33**

When considering motions for summary judgment, the Second Circuit has routinely cautioned district courts to refrain from weighing the evidence and assessing the credibility of witnesses. See, e.g., *Jeffreys v. City of N.Y.,* 426 F.3d 549, 553–54 (2d Cir. 2005); *Rule v. Brine, Inc.,* 85 F.3d 1002, 1011 (2d Cir. 1996); *United States v. Rem,* 38 F.3d 634, 644 (2d Cir. 1994). It is equally well settled, however, that «a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony,» *Hayes v. N.Y. City Dep't of Corr.,* 84 F.3d 614, 619 (2d Cir. 1996), unless the subsequent testimony «amplifies or explains, but does not merely contradict, [the party's] prior testimony, especially where the party was not previously asked sufficiently precise questions to elicit the amplification or explanation.» *Rule,* 85 F.3d at 1011. **34**

In this case, Defendants turn to Kim's affidavit to support their contention that the parties intended to incorporate the settlement of the 2010 orders into the guarantees only if Plaintiff **35**

produced the 2011 orders. (See Def.'s Mem. at 17–19; Def.'s Resp. to Pl.'s L.R. 56.1 Stat. ¶ 51.) The Court's independent review of the record reveals no other evidence showing this was Kim's, or anyone else's, understanding. A study of Kim's deposition reveals the following testimony touching upon this issue:

> Q: When [the 2011] orders were discussed, was there any discussion about amounts which were still due from prior orders?
>
> A: I don't understand it.
>
> Q: Well, there were discussions about these 2011 orders, right?
>
> A: Yes.
>
> Q: Between the parties. When these were being discussed, was there any other discussion about amounts still owed for prior orders from 2010? **36**
>
> A: At the time we gave our planning. That is going out to talk to each other. You know, we're going to keeping end of May, July 5th. We know. This is normal. This is not only one time we did business with Dishang. We did a couple of years too much, money back and forth with each other. This is normally we owe $2 million, $3 millions, then we payoff and then getting down up to $1.2. Then we start again. Something like that.
>
> Q: Think back to the meeting where these 2011 orders were discussed.
>
> A: Yes.
>
> Q: At that meeting did you indicate that you would meet the payment plan for the 2010 orders? **37**
>
> A: We didn't have a chance to talk about schedule stuff. We were busy with start by start to get the price done.

(Trexler Decl. Ex. 3, Pl.'s Ex. 6 at 137:1–138:4.)

The Court finds this testimony sufficiently vague, and not overtly contradictory, so as to create a genuine issue as to whether the guarantees executed by WCC and Level 8 were based on an understanding between the parties that in exchange for Defendants waiving any further chargebacks than those already reflected in the agreements, Plaintiffs would produce the 2011 orders. While Plaintiff argues Kim's deposition testimony and declaration are plainly inconsistent, the Court is required to «draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment[,]» *Rule,* 85 F.3d at 1011, no matter how unlikely Defendants' recitation may seem.[2] See *Lipton v. Nature* **38**

[2] Plaintiff reluctantly admits, «[I]t may be true that Kim thought signing the May 2011 guaranties might induce Plaintiff to trust him and not give up on the 2011 order they were discussing. But, there was no agreement, implicit or explicit, to provide acceptance of [sic] 2011 POs as an additional term.» (Pl.'s Reply Mem. at 2 n. 5.)

Co., 71 F.3d 464, 472 (2d Cir. 1995) («Determinations of credibility are within the province of the jury and may not be resolved on summary judgment.»). As such, the Court finds there is a genuine issue of material fact as to the terms of the agreements between Plaintiff and Defendants for the payment of the 2010 orders, and in turn, whether Plaintiff or Defendants breached those agreements. Plaintiff's Motion for Summary Judgment with respect to its first claim and Defendants' first counterclaim is denied.

ii. The 2011 Orders

The second breach of contract issue, as manifested by Defendants' second counterclaim, concerns whether there was a binding contract for the 2011 orders. Defendants argue the POs signed by Estee served as an enforceable, written agreement between the parties, obligating Weihai to manufacture the 2011 orders. Plaintiff asserts Estee was not authorized to enter into contracts on behalf of Weihai, and Plaintiff repeatedly told Defendants it would not produce the 2011 orders until Defendants paid the outstanding balance on the 2010 orders. Moreover, even if there was an agreement regarding the 2011 orders, Defendants breached the conditions precedent of making timely payments in accordance with the payment schedule and opening a line of credit for the GUI orders by May 30, 2011. 39

The first step in analyzing this claim is to determine whether a binding agreement existed for the production of the 2011 orders by virtue of the 2011 POs. It is undisputed that Estee signed the 2011 POs; the effect of his signature is highly disputed. The record contains the following evidence to elucidate the relationship between Plaintiff and Estee: (i) Estee describes himself as «not an employee, but an agent [of Weihai]» (Trexler Decl. Ex. 2, Pl.'s Ex. 5 at 26:4–5); (ii) his commission is paid by Weihai (*Id.* at 37:20–25); (iii) he advertises himself as affiliated with Weihai (*Id.* at 73:8–22); and (iv) he sold his business to Weihai and continued to give direction to Sunny in 2011, a Weihai employee, though when exactly she became a Weihai employee is disputed. (*Id.* at 71:7–22.) When asked about signing the 2011 POs, Estee testified: 40

> Q: Whose signature is that [on the bottom of one of the 2011 POs]; if you know? 41
>
> A: That's mine.
>
> Q: Why did you sign this?

This statement makes clear Plaintiff disputes Defendants' account of the facts, which does not provide an appropriate basis for the Court to grant summary judgment. See *Rule,* 85 F.3d at 1011 («Any weighing of the evidence is the prerogative of the finder of fact, not an exercise for the court on summary judgment.»). Plaintiff makes a secondary argument that Kim signed the December 2009 and January 2010 guaranties, so if there was an additional term added to the May 2011 guaranties (i.e. Plaintiff's production of the 2011 orders), there was no additional consideration. The Court notes, however, the December 2009 and January 2010 guaranties called for Defendant to pay $1,547,764.68, but two of the three May 2011 guaranties called for Defendant to pay $1,560,000.00. Compare (Trexler Decl. Ex. 5, Pl.'s Exs. 8, 9) with (*Id.* at Pl.'s Exs. 10, 12.) Moreover, Defendants were supposedly agreeing to forego seeking additional chargebacks. Lastly, Plaintiff suggests the guaranties could not have relied on production of the 2011 orders because the POs continued to change. The Court rejects Plaintiff's conclusion that the parties could not possibly have agreed the May 2011 guaranties required the production of the 2011 orders until the exact specifications for all of the 2011 orders were fixed.

A: I am going to, you know – I accepted their order. That's it.

Q: By you signed it, does that signify that Weihai accepted the order?

A: After, you know, I told them – you know, actually, I pushed Ms. Niu to sign this, because they needed a signature on the PO. But she said to me, but I have to get to her the payment schedule. So I told her, okay, the payment schedule is the payment schedule. Anyway, you know, it is a long time to go and I need this order to be accepted.... Usually, habitually, I signed it and I sent it back to WCC. Anyway, we accepted. Even if it is conditionally, we accepted. That's it.

(*Id.* at 55:7–56:4.) When asked about whether Weihai accepted the 2011 orders from Defendants, Estee stated: **42**

Q: Do you know whether or not [the 2011] orders were, in fact, placed with Weihai in 2011?

A: Yes, I do.

Q: When you say «yes,» did you place these orders with Weihai?

A: Yes.

Q: Who did you place these orders with at Weihai?

A: Ms. Niu.

Q: When were these orders placed, sir, with Ms. Niu?

A: The beginning of 2011, maybe....

Q: Did Ms. Sumei [sic] Niu accept these orders on behalf of WCC from you?

A: Yes.

Q: And how do you know that she accepted them? **43**

A: Because she prepared it. We have a bunch of e-mails and just, you know, talking about this order. At the time she told me that she conditionally, because she is an employee ... so she cannot get the order by herself, because it was a really hard issue at the time. Legally, maybe she could not accept this order, but I persuaded her to please accept this order, even if it was conditionally. That's linked to the payment schedule.... She told me that we – she is going to accept this order, you know, in this condition....

(*Id.* at 49:24–51:24.) Lastly, Estee noted the following about the production of the 2011 orders: **44**

Q: ... Do you know if Weihai completed the order?

A: They were supposed to.

Q: But did they complete it?

A: No.

Q: Do you know why they did not complete it?

A: They complained that they did not get the payment schedule of money on time.

So her owner, Mr. Zhou, he disagreed. I was there, and he clearly disagreed. You cannot do this order. Forget about it and just, you know, that happened.

(*Id.* at 56:8–21.)

45 The evidence in the record, particularly Estee's testimony, demonstrates a genuine issue of material fact as to whether the 2011 POs represented a binding agreement reached by the parties for the production of the 2011 orders. Although Plaintiff argues Estee does not have the authority to sign contracts on behalf of Weihai and had never done so in the past, (Trexler Decl. Ex. 1, Pl.'s Ex. 3 at 217:24–218:1), the evidence shows he had a substantial relationship with Plaintiff, and he «habitually» signed POs and sent them to Defendants during the parties' course of dealing. He was heavily involved in the negotiations of the parties, and the precise nature of his relationship with Weihai, as well as Defendants' understanding of that relationship in light of former practices and deals between the parties, depends on selecting between various versions of the facts, which the Court is not permitted to do at this stage. See *Herman v. Provident Mut. Life Ins. Co. of Philadelphia,* 886 F.2d 529, 536 (2d Cir. 1989) (finding error where the district court adopted the more plausible of two competing accounts of the facts).

46 Additionally, to show Plaintiff had accepted their offer to manufacture the 2011 orders, Defendants point to the arrangements that were made by the parties, including the exchange of materials, the samples produced by Plaintiff, and the production schedules. (Ruta Decl. Exs. T, U, V, X, Y, Z, AA, BB, CC.) Plaintiff argues it routinely requests materials and makes samples before consummating a binding agreement as preparatory work during negotiations. (Trexler Decl. Ex. 1, Pl.'s Ex. 2 at 96:21–100:3.) There are also numerous occasions where Plaintiff stated it would not produce the 2011 orders until it was paid for the 2010 orders. (Sun Decl. Ex. 1; Trexler Decl. Ex. 1, Pl.'s Ex. 3 at 86:17–23, 124:11–125:1, 198:23–199:2, 252:10–15.) Yet, in light of the CISG's directive to give «due consideration ... to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties[,]» CISG, *supra* p. 9, art. 8, the arguments by both sides highlight remaining questions of material fact as to whether Plaintiff accepted Defendants' offer for the 2011 orders.

47 Plaintiff further contends even if there was a binding contract, Defendants clearly breached the conditions precedent thereof, including making timely payments under the May 2011 guaranties. The evidence plainly shows the May 15, 2011 and May 30, 2011 payments were not made on time, (Ruta Decl. Ex. R), however, Kim contends Weihai waived the untimeliness. Specifically, instead of making the agreed upon payment amount of $100,000.00, Defendants

paid $102,000.00, which included a $2,000.00 late fee the parties agreed Defendants would pay. (Kim Decl. ¶ 9.) Kim's version of the events is not wholly implausible, considering the payment was $2,000 .00 more than the amount agreed upon in the payment schedule. It is, thus, up to the fact-finder to determine whether the untimeliness of the payments was in any way voluntarily waived by Plaintiff.[3]

Relying on Articles 71 and 72 of the CISG, Plaintiff asserts assuming arguendo there was a contract for the 2011 orders, it had the right to suspend and/or cancel performance because it was apparent Defendants could not make timely payments. Article 71 permits a party to suspend performance: **48**

> (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
>
> (a) a serious deficiency in his ability to perform or in his creditworthiness; or
>
> (b) his conduct in preparing to perform or in performing the contract.
>
> ...
>
> (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

CISG, *supra* p. 9, art. 71. Cancellation of the contract is permissible pursuant to Article 72: **49**

> (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
>
> (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
>
> ...

CISG, *supra* p. 9, art. 72. Notably, both Articles have notice provisions if a party utilizes them. **50**

In this case, Plaintiff claims Defendants repeatedly defaulted on their commitments to Plaintiff and other factories, and Kim's May 27, 2011 letter describes imminent financial difficulties resulting from a fall-out in a deal with a potential investor. (Trexler Decl. Ex. 5, Pl.'s Ex. 14.) Citing to *Doolim Corp. v. R Doll, LLC,* No. 08 Civ. 1587(BSJ)(HBP), 2009 WL 1514913 (S.D.N.Y. **51**

[3] Plaintiff also points out Defendants failed to open a line of credit by March 30, 2011, which would have been a condition precedent to the production of the 2011 orders. (Trexler Decl. Ex. 5, Pl.'s Ex. 11.) The document itself indicates it is only applicable to the GUI orders.

May 29, 2009), Plaintiff argues it had no reason to believe Defendants would make payments pursuant to the schedule and therefore, suspended its performance and/or cancelled any alleged contract. Nevertheless, unlike *Doolim*, Defendants made the first two payments in the May 2011 guaranties, albeit several days late in both instances. See 2009 WL 1514913, at *4 (stating when plaintiff suspended its performance in mid-January of 2008, defendants had failed to make payments on December 14 and 28, 2007 and January 11, 2008). Since a reasonable jury could find that Plaintiff either was not entitled to the protections of Articles 71 and 72 or did not comply with the notice provisions, the Court cannot conclude Plaintiff was entitled to discontinue performance as a matter of law.

In light of the foregoing, the Court finds issues of fact remain as to whether there was a binding agreement between the parties to manufacture the 2011 orders and whether Plaintiff may have any potential liability under this alleged agreement for not producing the garments in accordance therewith. Consequently, summary judgment is denied with respect to Defendants' second counterclaim. **52**

C. Remaining Claims

Plaintiff's remaining counts include its second claim for a declaratory judgment finding that Plaintiff does not owe Defendants any money and Plaintiff has not breached the terms of any contract, its third claim for unjust enrichment, its fourth claim for fraud, and its fifth claim for piercing the corporate veil. Defendants' remaining counts include their third counterclaim for breach of the implied covenant of good faith and fair dealing for Plaintiff's continued possession of Defendants' materials, and their fourth claim for intentional infliction of temporal damages based on Plaintiff's intentional withholding of Defendants' property. **53**

Although Defendants did not cross-move for summary judgment, «the Court may search the record and grant summary judgment to either party whose claim has been proved or disproved.» *4Kids Entm't, Inc. v. Upper Deck Co.,* 797 F.Supp.2d 236, 241 (S.D.N.Y. 2011) (citing *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.,* 193 F.3d 109, 114–15 (2d Cir.1999)). Where the parties' claims are duplicative or preempted by the CISG, the Court will dismiss them *sua sponte*. **54**

Regarding Plaintiff's second claim for declaratory judgment, it is axiomatic that district courts have broad discretion to refuse to exercise jurisdiction over a declaratory action. *Dow Jones & Co., Inc. v. Harrods Ltd.,* 346 F.3d 357, 359 (2d Cir.2003). The Second Circuit has outlined five factors that should be considered: **55**

> (i) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (ii) whether a judgment would finalize the controversy and offer relief from uncertainty; (iii) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (iv) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (v) whether there is a better or more effective remedy.

N.Y. Times Co. v. Gonzales, 459 F.3d 160, 167 (2d Cir. 2006) (citing *Dow Jones,* 346 F.3d at 359–60) *(internal quotation marks omitted)*.

The *Gonzales* factors counsel against adjudicating the declaratory judgment claim here. Even though declaratory relief will settle the parties' liability with respect to the 2010 and 2011 orders and remove any uncertainty, resolving the breach of contract claims by both parties would have the same effect. The request for a declaratory judgment is simply duplicative insofar as it seeks clarification of the same rights and obligations at the center of the alleged agreements.[4] See, e.g., *Intellectual Capital Partner v. Institutional Credit Partners LLC,* No. 08 Civ. 10580(DC), 2009 WL 1974392, at *6 (S.D.N.Y. July 8, 2009) (finding «declaratory relief would serve no useful purpose as the legal issues will be resolved by litigation of the breach of contract claim»); *Soft Classic S.A. de C.V. v. Hurowitz,* 444 F.Supp.2d 231, 249–50 (S.D.N.Y. 2006) («Plaintiffs' declaratory judgment claim seeks resolution of legal issues that will, of necessity, be resolved in the course of the litigation of the other causes of action. Therefore, the claim is duplicative in that it seeks no relief that is not implicitly sought in the other causes of action.»); *Camofi Master LDC v. Coll. P'ship. Inc.,* 452 F.Supp.2d 462, 480 (S.D.N.Y. 2006) (dismissing claims for declaratory judgment where they are duplicative of a breach of contract claim). Moreover, the breach of contract claims provide a more effective remedy through the availability of damages. See *Intellectual Capital,* 2009 WL 1974392, at *6 (noting the availability of damages favors resolving the parties' contractual rights through breach of contract claims). Since the issues of whether Plaintiff owes Defendants money or whether Plaintiff breached the terms of any contract can be best resolved through the other causes of action, the Court declines Plaintiff's invitation to issue a declaratory judgment. **56**

Similarly, Defendants' third claim for the implied covenant of good faith and fair dealing for Plaintiff's continued possession of Defendants' materials is also duplicative of Defendants' breach of contract claims. «[T]he weight of authority in this district strongly supports the dismissal of an implied covenant claim based on the same underlying facts as a breach of contract claim.» *RST (2005) Inc. v. Research in Motion Ltd.,* 597 F.Supp.2d 362, 367 (S.D.N.Y. 2009) (citing *Goldblatt v. Englander Commc'ns LLC,* No. 06 Civ. 3208, 2007 WL 148699, at *5 (S.D.N.Y. Jan. 22, 2007) (collecting cases)). Defendants' allegations that Plaintiff has wrongfully withheld materials are rooted in Plaintiff's contention that Defendants have not made payments in accordance with the parties' agreements so Plaintiff held these goods.[5] Thus, the same underlying conduct, namely non-payment for the 2010 orders, is at issue. **57**

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[4] Plaintiff's counsel acknowledged at oral argument in response to the Court's inquiry that resolution of Plaintiff's breach of contract claims and Defendants' breach of contract counterclaims will resolve the issues regarding the 2010 and 2011 orders, including Plaintiffs retention of the samples and materials Defendant sent to it, thereby eliminating any need for a declaratory judgment. (Mar. 13, 2014 Tr. at 17:17–18:23.)

[5] Plaintiff has attempted to reframe this claim as one for bailment. As the Court previously noted at oral argument, there is no bailment claim:

Plaintiff has its position that this 2010 contract is the 2010 contract and that that contract did not encompass any separate obligation on the part of the plaintiff to continue to manufacture goods for the defendants.... Defendants have an opposite view of that.... And because the plaintiff has this view, the plaintiff is trying to couch defendants' counterclaim as a bailment claim and defendants' claim is not one of bailment. The defendants' claim is not that there was a lien. The defendants' claim is that the 2010 contract encompassed the understand-

Defendants noted during oral arguments, however, the damages being sought by this claim – damages incurred when Plaintiff retained Defendants' materials and samples – were not pled as part of the breach of contract counterclaims, which sought damages solely for Plaintiffs' failure to produce the 2011 orders. (Mar. 13, 2014 Tr. at 12:9–15, 30:18–24.) Defendants acknowledged that if the damages they are seeking for Plaintiff's retention of their goods were included in the breach of contract claims, the implied covenant of good faith and fair dealing claim would be duplicative. (*Id.* at 31:15–19.) Because Defendants initially pled damages resulting from retention of their materials as part of their counterclaims, they will still be permitted to seek those damages in connection with the breach of contract counterclaims. See, e.g., *Lorterdan Props. at Ramapo I, LLC v. Watctower Bible and Tract Soc'y of N.Y., Inc.,* No. 11 Civ. 3656(CS), 2012 WL 2873648, at *9 (S.D.N.Y. July 10, 2012) (allowing plaintiff to seek a remedy in conjunction with the surviving claims where plaintiff pled that remedy as a separate cause of action); *Tierney v. Omnicom Group Inc.,* No. 06 Civ. 14302(LTS)(THK), 2007 WL 2012412, at *10 (S.D.N.Y. July 11, 2007) *(same)*; *Pace v. Schwartz,* 680 F.Supp.2d 591, 594 (S.D.N.Y. 2010) (noting where plaintiffs pled specific relief as a separate cause of action, it «in no way disentitle[d] them to seek that relief»). Nevertheless, Defendants' third counterclaim for breach of the implied covenant of good faith and fair dealing is dismissed. **58**

Plaintiff's unjust enrichment claim cannot stand because it is preempted by the CISG. This cause of action is based on the production of the 2010 orders for which Plaintiff has not received full payment from Defendants. But, Defendants do not dispute that valid contracts existed for the 2010 orders; rather, they dispute which party breached them.[6] (Mar. 13, 2014 Tr. at 10:24–11:8.) Nor do they seek rescission of the 2010 contracts. (*Id.*, at 28:21–25) Since the parties agree there were enforceable contracts with respect to the 2010 orders, Plaintiff's third cause of action is preempted by its breach of contract claim under the CISG, see *Electrocraft Ark., Inc. v. Super Elec. Motors. Ltd.,* No. 4:09 cv 00318(SWW), 2009 WL 5181854, at *7 (E.D.Ark. Dec. 23, 2009) (finding if «valid contract [exists], the unjust enrichment claim is preempted by the CISG»); *Semi-Materials Co., Ltd. v. MEMC Elec. Materials, Inc.,* No. 4:06 CV 1426(FRB), 2011 WL 65919, at *3 (E.D. Mo. Jan. 10, 2011) («[I]f express contracts are found to exist between the parties, the CISG would preempt plaintiff's claim of unjust enrichment.»), and is, in turn, dismissed. **59**

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ing that under that contract plaintiff would continue to manufacture goods for the 2011 orders for the defendants and, therefore, their claim is that the plaintiff breached the contract.... And the resolution of that is going to clarify everything else. The defendants' position, and again, I'll give the defendants an opportunity to clarify this if I'm wrong, but I think that's why there's confusion between the parties in terms of defendants claiming that they don't understand why the plaintiff keeps claiming that this is a bailment cause of action.... And defendants are not claiming that this is bailment. That's contrary to the defendants' position regarding the 2010 contract.

(*Id.* at 21:6–22:16.) Thus, the Court need not address Plaintiff's arguments under its bailment theory.

[6] During oral argument, Plaintiff's counsel conceded, «If the Court finds that the parties have enforceable 2010 contracts, and I don't see why they wouldn't, the CISG would actually apply and unjust enrichment would be preempted by the CISG.» (*Id.* at 4:6–9, 29:11–17.)

Next, both parties bring tort claims – Plaintiff's fourth count for fraud and Defendants' fourth counterclaim for intentional infliction of temporal damages.[7] While tort claims are generally not preempted by the CISG, *Semi-Materials Co.,* 2011 WL 65919, at *3 n. 2, «a tort that is in essence a contract claim and does not involve interests existing independently of contractual obligations ... will fall within the scope of the CISG regardless of the label given to the claim.» *Electrocraft,* 2009 WL 5181854, at *5; see also *Skouras v. Brut Prods., Inc.,* 45 A.D.2d 646, 647 (App. Div. 1st Dep't 1974) («As a general rule, a breach of contract does not give rise to a tort action. 'To justify a tort action, there must be a breach of duty separate and distinct from a breach of contract.'» *(citation omitted)*). **60**

With respect to Plaintiff's fourth count, at oral arguments, Plaintiff's counsel attempted to redefine the fraud claim as a claim for fraudulent inducement, thereby avoiding the CISG preemption issue. (Mar. 13, 2014 Tr. at 5:12–24.) Essentially, the gravamen of the allegations in the First Amended Complaint is Defendants entered into a contract where they promised to pay for goods produced by Plaintiff but never intended to pay. (First Am. Compl. ¶ 46.) Despite the characterization of these allegations as fraudulent inducement, they are pled as an action sounding in breach of contract. See *Wall v. CSX Transp., Inc.,* 471 F.3d 410, 416 (2d Cir. 2006) («[A]s a general matter, a fraud claim may not be used as a means of restating what is, in substance, a claim for breach of contract. Thus, general allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support [a fraud] claim.» *(internal quotation marks and citation omitted)*); *Astroworks, Inc. v. Astroexhibit, Inc.,* 257 F.Supp.2d 609, 616 (S.D.N.Y. 2003) («An action for fraud 'cannot exist when the fraud claim arises out of the same facts as a breach of contract claim with the sole additional allegation that the defendant never intended to fulfill its express contractual obligations.'» *(citation omitted)*). **61**

Defendants' tort claim fares no better. It is not based on an independent duty but rather, is supported by the same factual allegations as the breach of contract claims and not otherwise distinct from the contractual issues.[8] It can, therefore, be concluded that both tort claims are preempted by and subsumed within the breach of contract claims, regardless of their nomenclature. See *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.,* 201 F.Supp.2d 236, 286 n. 30 (S.D.N.Y. 2002), *aff'd in part, rev'd in part on other grounds,* 386 F.3d 485 (2d Cir. 2004) («Just because a party labels a cause of action a 'tort' does not mean that it is automatically not preempted by the CISG. A tort that is actually a contract claim, or that bridges the gap between contract and tort law may very well be pre-empted.»). Accordingly, Plaintiff's fourth cause of action and Defendants' fourth counterclaim are dismissed. **62**

The only remaining cause of action is Plaintiff's fifth count for piercing the corporate veil. The parties only mentioned this claim briefly in their papers and gave the Court no meaningful argument with respect thereto. Because of their complete failure to address the merits, the **63**

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[7] Intentional infliction of temporal damages is more commonly referred to as prima facie tort under New York law. See *Avigliano v. Sumitomo Shoji Am., Inc.,* 473 F.Supp. 506, 515 (S.D.N.Y. 1979), vacated on other grounds *sub nom*. *Sumitomo Shoii Am., Inc. v. Avagliano,* 457 U.S. 176 (1982).

[8] Defendants' counsel agreed during oral argument that the intentional infliction of temporal damages was supported by the same underlying facts as Defendants' third counterclaim. (Mar. 13, 2014 Tr. at 36:10–14.)

Court cannot grant Plaintiff summary judgment on this claim. On the other hand, even though Defendants point out the lack attention to this claim, the Court also rejects their request to dismiss it, considering Defendants did not cross-move for summary judgment.

IV. Conclusion

The remaining arguments of the parties are without merit and therefore, are not addressed. For the reasons set forth above, Plaintiff's Motion for Summary Judgment is GRANTED in-part and DENIED in-part. The following claims survive this Motion and remain at issue in this litigation: Plaintiff's first count for breach of contract, Plaintiff's fifth count for piercing the corporate veil, Defendants' first counterclaim for breach of contract, and Defendants' second counterclaim for breach of contract. **64**

The parties shall file their Joint Pretrial Order within thirty (30) days of entry of this Order. The Clerk of Court is respectfully directed to terminate the Motion at Dkt. No. 41.

SO ORDERED.