Court of Appeal, Second District, Division 3, California.
AMPAC JV GROUP, INC. etc., dba C and L Global Warehouse Distributor; John Chang; Vincent Lam; Sophia Chang; and Pauline Lam, Plaintiffs and Appellants,
v.
GENERAL MOTORS CORPORATION, etc., dba AC Delco; T.P.C. Autoparts Co., Defendant and Respondent.
No. B149043.
(Super. Ct. No. BC 205583 cons. w/ BC 206274).

Nov. 21, 2002.

Auto parts manufacturer sued distributor and guarantors for money owed for good provided to distributor. Distributor sued manufacturer and third-party distributor for breach of contract, fraud and unfair business practices, and intentional interference with contract. As consolidated actions, the Superior Court, Los Angeles County, Nos. BC205583 and BC206274, entered summary judgment in favor of manufacturer and third-party distributor. Distributor appealed. The Court of Appeal, Croskey, Acting P.J., held that: (1) there was a genuine issue of material fact as to whether distributor had standing to sue; (2) there was a genuine issue of material fact as to whether manufacturer acted in bad faith in breach of contract; (3) there was a genuine issue of material fact as to whether manufacturer misrepresented that all distributors would be treated equally; and (4) there was a genuine issue of material fact whether third party distributor received favorable treatment over distributor.

Reversed and remanded with directions.

Appeal from a judgment of the Superior Court of Los Angeles County. Paul Gutman, Judge. Reversed and remanded with directions.Robert M. Silverman, a Professional Law Corporation and Robert M. Silverman; Law Offices of Brian McMahon and M. Brian McMahon for Plaintiffs and Appellants.

Manning, Leaver, Bruder & Berberich, Robert D. Daniels and Christian J. Scali for Defendant and Respondent General Motors Corporation.

CROSKEY, Acting P.J.

***1** General Motors Corporation, Special Parts Operation, dba AC Delco, (GMC) sued Ampac JV Group, Inc., dba C and L Global Warehouse Distributor (Ampac); [FN1] and John Chang, Sophia Chang, Vincent Lam, and Pauline Lam, Ampac's principals and their spouses (collectively, Principals) [FN2] for money owed for goods provided to Ampac by GMC, and on written guaranties of payment made by the Principals. (LASC No. BC 205583.) Thereafter, Ampac and Principals (collectively, Plaintiffs) sued GMC and T.P.C. Autoparts Co. (TPC) for breach of contract, fraud and unfair business practices allegedly committed by GMC, and for unfair business practices and intentional interference with contract allegedly committed by TPC. (LASC No. BC 206274.)

FN1. GMC actually sued C & L Global Trading, Inc., not Ampac. However, there is a triable issue of material fact as to whether C & L Global Trading, Inc. was reorganized in 1997 as Ampac. For purposes of this appeal, we shall call the entity with whom GMC originally contracted as Ampac. There is also a triable issue of material fact as to whether both C & L Global Trading, Inc. and Ampac used the fictitious business name of C & L Global Warehouse Distributor; for purposes of this appeal, we assume that Ampac did use this fictitious name.

FN2. Actually, only Vincent Lam and John Chang were officers of Ampac, but GMC required all four individuals to give personal guaranties that payment would be made for parts purchased from GMC. For ease of reference, we shall, as indicated, refer to all four as Principals.

The two cases were consolidated. Ultimately, the trial court entered a single judgment in favor of GMC on its complaint and in favor of GMC and TPC on Plaintiffs' complaint, following multiple successful motions for summary judgment filed by GMC (and, as to Case No. BC 206274, joined in by TPC). In other words, GMC prevailed on its cause of action for collection against Ampac and on its action against Principals to enforce their guaranties (LASC No. BC 205583) and also prevailed against Plaintiffs on their causes of action against GMC for breach of contract, fraud, and unfair business practices. TPC also prevailed against Plaintiffs as to their cause of action for unfair business practices via its joinder in GMC's successful motion for summary judgment as to such cause of action; thereafter, Plaintiffs dismissed the only remaining cause of action against TPC for intentional interference with contract.[FN3]

> FN3. Plaintiffs filed a premature appeal, from a non-final judgment, in Appeal No. 141043, which appeal was dismissed. Plaintiffs resolved this problem by dismissing one cause of action against TPC to allow for a final, appealable judgment. We take judicial notice of the volumes of Appellants' Appendix filed in connection with that earlier appeal.

Plaintiffs have appealed the judgment in its entirety. However, they have briefed only those issues related to the granting of summary judgment to GMC and TPC on their causes of action for fraud, breach of contract, and unfair business practices. They contend that summary judgment was improper, because there were triable issues of material fact. After a review of the record, we conclude that triable issues of material fact do exist, as GMC and TPC failed to negate Plaintiffs' allegations of fraud and unfair business practices. Therefore, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND[FN4]

> FN4. Because this is an appeal from a summary judgment, we recite facts taken from the operative pleading (the First Amended Complaint (FAC) by Plaintiffs) and from the evidence and separate statements of disputed and undisputed facts in support of GMC's motion for summary judgment and Ampac's and Principals' opposition thereto. Because we do not need to reach the issue of whether the trial court abused its discretion by denying Ampac's and Principals' requests for continuance, we do not refer to the acts related to that issue.

Ampac is a California corporation. It is in business as an automotive-parts warehouse doing business in California and "the Orient." Ampac conducts business under the fictitious business name, C & L Global Warehouse Distributor or C and L Global Warehouse Distributor. John Chang is the Chair of Ampac's Board of Directors, and its treasurer. Vincent Lam is Ampac's president.

In 1993, Ampac was contacted by Peter Gutierrez and Jerry Wilson, representatives of General Motors Corporation's wholly-owned subsidiary, AC-Delco (GMC). Gutierrez and Wilson solicited Ampac to become an AC-Delco warehouse distributor specializing in sales to the Asian community. Their proposal included the following requirements:

***2** (1) Ampac would double its warehouse space;

(2) it would devote at least half of its storage inventory to AC-Delco products;

(3) it would install shelving and gondolas in this area;

(4) it would employ an outside salesperson to develop AC-Delco business;

(5) it would hire a driver and purchase a vehicle to perform deliveries;

(6) it would make an initial purchase of $100,000 in AC-Delco parts inventory;

(7) it would execute a standard Warehouse Distributor Supply Agreement (WDSA) with AC-Delco; and

(8) it would execute a security agreement and UCC-1 filings to cover the AC-Delco products being sold to it.

GMC's representatives told Plaintiffs that the WDSA was a standard agreement and that all AC-Delco

warehouse distributors "must sign without exception." They also told Plaintiffs that all AC-Delco warehouse distributors, without exception, were required to (1) obtain and maintain sufficient warehouse space as dictated by AC-Delco; (2) hire a sales force; (3) maintain adequate inventory; and (4) participate in AC-Delco promotions.

GMC, through its representatives, explained that sufficient warehouse capacity was important, because it allowed a distributor to stock the required amount of AC-Delco inventory. This in turn allowed distributors to be eligible for certain credit terms for payment, and discounts for stock, inventory, advertising and volume that would be offered as a distributor's annual sales of AC-Delco products increased. These beneficial credit terms represented as being tied to the warehouse capacity, future volume orders of inventory, and annual sales, and all other requirements imposed by the standard WDSA.

In addition to representing that Ampac would be entitled to additional credit terms and discounts for stock, inventory, advertising and volume as Ampac's annual sales of AC-Delco products increased, GMC's representatives also represented and warranted that Ampac would be treated fairly and equally with competing distributors, and would not be discriminated against in anyway.

In reliance on these representations, Ampac executed an AC-Delco Warehouse Distributor Supply Agreement (WDSA), dated March 17, 1994. In August 1994, Ampac executed an AC-Delco Direct Account Supply Agreement (DASA), which imposed the same requirements and restrictions as the WDSA. It also acquired additional space, purchased a vehicle for delivery of AC-Delco parts, and eventually increased its sales force, thus dramatically increasing its overhead in anticipation of the future sales of AC-Delco parts and the promised favorable credit terms and discounts. At the time Ampac and GMC's representatives were discussing the possibility of Ampac becoming an AC-Delco distributor, Plaintiffs told GMC that Ampac would dedicate a major portion of its sales efforts to exporting AC-Delco parts to Asian markets, such as Taiwan.

In 1994, after executing the WDSA and DASA, Ampac sold approximately $1.72 million of AC-Delco parts. In 1995, it sold $3 million; in 1996, it sold $3.5 million; in 1997, $3.75 million; and in 1998, $3 million. In addition to these AC-Delco sales, it sold other automotive parts to its customers in Taiwan and California, as GMC knew it would. Ampac's total sales went from $8 million in 1994 to a high of $9 million in 1996, and then dropped to $6.6 million in 1998.

***3** In 1995, Ampac learned that GMC also had entered into an AC-Delco warehouse distribution agreement with TPC. TPC was in direct competition with Ampac in the Taiwanese market, and sold AC-Delco parts to the same or similar customers. Ampac complained to GMC that TPC was undercutting Ampac's prices, because GMC allowed TPC to operate as a warehouse distributor even though TPC had no warehouse facility, and did not comply with the standard warehouse distributor agreement requirements. Thus, TPC had virtually little overhead, but still benefited from GMC's sales discounts, inventory discounts, and volume discounts associated with GMC's standard warehouse distribution agreement.

From 1995 until Plaintiffs filed their complaint, GMC repeatedly assured Ampac that GMC would correct the TPC problem by terminating TPC or imposing the same standard warehouse distributor obligations upon TPC that GMC had imposed on Ampac. Ampac alleged that such representations by GMC were false when made, and continued to be false. It alleged that GMC fraudulently concealed its true intent to continue to favor TPC over Ampac, to continue to discriminate against Ampac, and to continue to support TPC's unfair competitive edge over Ampac. In fact, despite GMC's repeated assurances that this injustice would be corrected, which assurances Plaintiffs relied upon, it took no corrective action whatsoever. TPC continued and continues to function as an AC-Delco warehouse distributor, enjoying all of the benefits therefore, including favorable financing terms and discounts, without the burdens of the standard warehouse distributor obligations and requirements.

In addition to signing the DASA and the WDSA, Ampac also signed related written security agreements, UCC-1 filings and personal guarantees in favor of GMC. Although Ampac performed all its obligations under these agreements, except to the extent performance was excused or prevented by GMC, GMC breached the parties' agreements by failing to live up to the terms and conditions of the agreements,

in that it failed to provide Ampac with the same benefits and conditions promised to every AC-Delco warehouse distributor, by requiring it to sell AC-Delco products in ever-increasing volume to maximize and increase Plaintiffs' financing obligations to GMC.

According to Plaintiffs, GMC "*breached the covenant of good faith and fair dealing* and denied Plaintiffs the ability to earn a profit on AC-Delco product sales." (Italics added.) GMC used its financing, volume discounts, inventory requirements and overhead requirements imposed upon Ampac to hold Ampac captive, to squeeze its profit margins to a negative loss, while reaping the benefits of its own sales and financing terms and conditions.

As a direct and proximate result of GMC's "breach and bad faith," Ampac suffered damages of at least $13 million, which sum included, but was not limited to, loss of anticipated profits, loss of profits from 1994 to the present on not only AC-Delco product sales but also sales of other brand name automotive parts to its customers.

***4** As to Plaintiffs' fraud cause of action, they alleged that GMC made intentional, fraudulent representations to Plaintiffs to induce them to enter into the financing arrangement, guarantees and warehouse distributor agreements with GMC, and that thereafter, GMC continued to make intentional misrepresentations from 1994 to the date the complaint was filed. Such misrepresentations were that:

(1) Ampac would be treated fairly and equally along with other AC-Delco warehouse distributors, and GMC would not discriminate against it;

(2) Ampac would have the same standard warehouse distributorship obligations and benefits imposed upon it as did all AC-Delco distributors;

(3) all warehouse distributors like Ampac were required to:

(a) maintain a warehouse or warehouse facility satisfactory and adequate to size, appearance and layout to perform the functions of a warehouse distributor for GMC;

(b) purchase sufficient quantities of AC-Delco's products that, in GMC's opinion, made it commercially justifiable to continue the warehouse distributorship;

(c) maintain an inventory of products properly assorted and adequate in quantity to meet the usual and expected demands in the trade area serviced by the warehouse distributorship;

(d) employ a full-time sales force including counter and outside sales personnel;

(e) participate in AC-Delco sales promotions;

(f) advertise AC-Delco products and display its trademark;

(g) purchase a vehicle for deliveries; and

(h) take advantage of the inventory, quantity and other discounts offered by AC-Delco to maximize sales.

GMC represented, from 1995 until the complaint was filed, that it would either terminate TPC or impose and enforce the same above-referenced AC-Delco warehouse distributor obligations on TPC. However, such representations were knowingly false when made, and were made with the intent to defraud Plaintiffs and to induce them to rely on such misrepresentations.

In fact, in reliance on these false representations, Plaintiffs executed warehouse distribution agreements, security agreements, UCC-1 and personal guarantees, expanded their facilities, staff and inventory and other business assets, thus dramatically increasing their overhead, fixed and variable costs. Plaintiffs were justified in relying on the misrepresentations and had no way of knowing they were untrue, especially since GMC continuously assured them that any problems that might have been created by the unequal and favorable treatment of TPC would be rectified.

As a direct result of this fraud, Plaintiffs were damaged in excess of at least $13 million. Furthermore, GMC acted maliciously, oppressively, with spite and ill will toward them, and therefore Plaintiffs are enti-

tled to recover punitive damages.

Plaintiffs also alleged that GMC and TPC had engaged in unfair competition within the meaning of various Business and Professions Code section, including section 17045 (the only section applicable to this appeal).Section 17045 provides, "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful."Plaintiffs alleged that GMC sold goods to TPC below cost, used loss leaders, secret payments or allowances, refunds, commissions or rebates or unearned discounts, or secretly extended special services or privileges not extended to all purchasers purchasing under like terms and conditions, and engaged in other discriminating practices from 1994 until the complaint was filed, again, all to Plaintiffs' damage.

***5** GMC ultimately responded to these claims by a motion for summary judgment (joined in by TPC). It argued that there was no merit to any of Plaintiffs' causes of action, and that, for purposes of its motion for summary judgment, it was appropriate to break each of Plaintiffs' causes of action into separate "causes of action" or "claims," one for each separate wrongful act. Thus, for example, GMC treated Plaintiffs' cause of action for fraud as six separate claims for fraud, based on six specific misrepresentations allegedly made by GMS's employees. It filed a separate statement of material undisputed facts in support of this motion, along with supporting evidence. TPC joined in this motion as to Plaintiffs' cause of action for unfair business practices against TPC.

Plaintiffs opposed the motion for summary judgment, but also sought a continuance so that they could complete discovery before being required to oppose the motion. The trial court denied the request for a continuance, and granted the motion for summary judgment, finding that there were no triable issues of material fact.

Thereafter, GMS also successfully moved for summary judgment on its complaint against Ampac and Principals, and a single judgment was entered on the consolidated cases on January 30, 2001. This judgment was in favor of GMC as to its complaint against Ampac and Principals, and in favor of GGMC and TPC and against Ampac and Principals as to Ampac and Principals' complaint against GMC and TPC. Ampac and Principals filed timely notice of appeal.

CONTENTIONS ON APPEAL

Ampac contends that material issues of fact preclude summary judgment on its contract, fraud, and unfair business practices cause of action (Bus. & Prof.Code, § 17045). It also contends that the trial court committed reversible error by failing either to (1) grant Ampac the continuance it requested to allow it to complete discovery before being required to oppose the motion, or (2) deny the motion for summary judgment.

GMC contends that Ampac's various causes of action have "absolutely no merit." It contends that (1) Plaintiffs lack standing to assert the breach of contract causes of action, (2) they cannot establish breach of any express contract term, and, because they failed to plead a cause of action for breach of the covenant of good faith and fair dealing, they cannot bring up that alleged breach to defeat summary judgment, (3) Plaintiffs failed to establish the damages element of a fraud cause of action, (4) they failed to raise any triable issue of material fact as to the alleged misrepresentations on which the fraud cause of action was based, and (5) the trial court did not abuse its discretion by denying the request for a continuance.

DISCUSSION

1. *Standard of Review*

An appellate court reviews summary judgments de novo (*Manibog v. MediaOne of Los Angeles, Inc.* (2000) 81 Cal.App.4th 1366, 1369, 98 Cal.Rptr.2d 297), and, as would the trial court, applies the following rules in its review. First, a defendant is not entitled to summary judgment unless, as the moving party, it negates all theories of liability pleaded by the plaintiff. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 397, 97 Cal.Rptr.2d 12; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717, 52 Cal.Rptr.2d 821.)To negate a given theory of liability, it must make a prima facie showing that there is a complete defense to the plaintiff's action or an absence of an essential element of plaintiff's case.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493(*Aguilar*).) It may do so either by presenting evidence that "would require [the] trier of fact not to find any underlying material fact more likely than not" or by pointing out, without presenting any evidence, that the plaintiff does not possess, and cannot reasonably obtain, evidence that would allow a trier of fact to find any underlying material fact more likely than not. (*Aguilar, supra,* 25 Cal.4th at p. 845, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

***6** Second, once a defendant meets that burden, the plaintiff must show that there is a triable issue of material fact as to such defense or as to the absence of an element of plaintiff's cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) The plaintiff must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (*Ibid.*)"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof."(*Aguilar, supra,* 25 Cal.4th at p. 845, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. omitted.)

If, after applying these rules, an appellate court determines either that the defendant did not satisfy its initial burden of disproving all theories of liability (or establishing some complete defense), or that the plaintiff *did* satisfy its burden by raising a triable issue of material fact, then it must reverse a judgment in favor of the defendant.

2. *Standing*

[1] GMC contends that Ampac has no standing to assert a cause of action for breach of contract, because it was not a party to the contracts.[FN5]It contends that *C & L Global Trading, Inc.*, not Ampac, the plaintiff here, was the party with which it contracted. GMC anticipates a possible argument by Ampac that C & L Global Trading, Inc. *assigned* its contractual rights to Ampac by noting that the WDSA, the main agreement between GMC and Ampac (under Ampac's pre-reorganization name of C & L Global Trading, Inc.), provides that it cannot be assigned without GMC's prior written approval-which approval was never given.

FN5. Principals did not sue GMC for breach of contract, but only for fraud, so this discussion of standing, contrary to GMC's understanding, actually relates only to *Ampac's* standing to sue for breach of the agreements between GMC and C & L Global Trading, Inc.

Ampac contends it *does* have standing because Ampac is the same entity as C & L Global *Warehouse Distributor.*In its FAC, Ampac alleged that "Ampac conducts business under the fictitious business name, C & L Global Warehouse Distributor or C and L Global Warehouse Distributor (C & L)," and that "[o]n or about September 25, 1997, C & L Global Trading, Inc., a California corporation, reorganized its operations under the corporation known as Ampac JV Group, Inc. Ampac succeeded to all the assets, rights, obligations, duties, responsibilities and liabilities of C & L Global Trading, Inc. Until September 1997, C & L Global Trading, Inc. did business under the fictitious business name, C & L."

In other words, Ampac alleged that C & L Trading, Inc., a corporation, became Ampac (so there was no assignment of the contracts in question; Ampac simply succeeded to all of C & L Global Trading, Inc.'s assets and liabilities) and alleged that Ampac, like C & L Global Trading, Inc., did business under the fictitious name of C & L Warehouse Distributor. Besides these allegations in the FAC, Ampac also presented evidence, via the statements of John Chang, that Chang, one of Ampac's officers, even told GMC's representatives in 1997 that C & L Global Trading, Inc. had changed its name to Ampac, and the representatives told him it was fine with them.

***7** In its motion for summary judgment, GMC specifically asserted, as undisputed fact, that (1) C & L Global Trading, Inc. is a California corporation (citing its responses to form interrogatories), and (2) Ampac is a California corporation *separate and distinct* from C & L (citing the deposition of John Chang). However, its own evidence showed that its assertion was unsupported by the cited evidence.

The single set of form interrogatories was directed to *both* Ampac and C & L Global Trading, Inc. Asked if "you are a corporation," Ampac & C & L Global Trading, Inc. jointly replied "yes." Asked, "if you are a corporation, list the name used in the current arti-

cles of incorporation and all other names you have used in the past ten years," they answered that the name currently used in the articles of incorporation was Ampac JV Group, Inc., and that the other names used in the past ten years were C & L Global Trading, Inc. and C & L Global Warehouse Distributor. In response to another interrogatory, they responded that they originally had been incorporated as C & L Global Trading, Inc. in September 1990, in California. Asked "[h]ave you done business under a fictitious name during the past ten years," and, if so, under what fictitious names, they responded yes, they had used the name C & L Global Warehouse Distributor.

The portion of John Chang's deposition testimony cited by GMC did not contradict this information. Chang had been asked an ambiguous, compound question: "Okay. My question is, why was Ampac formed at that point in time? You already had C and L Global as a corporation to do business with, and then in 1997 Ampac is formed as a separate corporation; correct?"He replied, "Correct," and any further explanation he may have given was not included in GMC's evidence. It is not possible to tell whether the "C and L Global" referred to in the question was C and L Global Trading, Inc. or C and L Global Warehouse Distributor. Nor is it possible to tell whether Chang meant it was correct *both* that (1) "C and L Global" (whichever one it was) was a corporation, *and* (2) Ampac was formed as a separate corporation from either or both "C and L Global Trading, Inc. and/or C and L Global Warehouse Distributor, or that one of these two situations was correct.

In Ampac's opposition to GMC's motion for summary judgment, Ampac asserted that it was disputed that "Ampac is a separate and distinct corporation from C & L." It cited the declaration of John Chang, in which he alleged that from 1993 to the present, he had been the president and CEO of "Plaintiff C & L Global Trading, Inc. *and of that company's successor, assignee, Ampac JV Group, Inc.*" (Italics added.) Chang's declaration referenced a document that was an assignment of contract, dated September 25, 1997, between C & L Global Trading, Inc. and Ampac JV Group, Inc., as well as the September 30, 1997 minutes of a shareholder meeting for C & L Global Trading, Inc., which he testified confirmed that all assets and rights possessed by C & L Global Trading, Inc. were assigned to Ampac, the successor-in-interest to C & L Global Trading, Inc. He further testified that (1) the shareholders and purpose of Ampac were the same as those of C & L Global Trading, Inc.; (2) the business had simply changed its name to attract a potential investor; and (3) in 1997 he had explained this to GMC's representatives, who had stated that the change was fine with them. He also declared that *both* C & L Global Trading, Inc. *and* Ampac had filed a fictitious business statement for C & L Global Warehouse Distributor, and that this fictitious business name appeared on all AC-Delco invoices.

***8** Notably, GMC, in its reply, dropped this issue, in other words, it did not assert, as it now does on appeal, that the above-noted transaction constituted a contractually-forbidden assignment, or that such assignment was void.[FN6]

> FN6. GMC's belated reliance on standing at the summary judgment stage is telling. Although GMC filed a general denial to every allegation in the FAC, notably, when GMC filed *its* FAC about five months after Ampac filed its FAC, it named Ampac JV Group, Inc. dba C and L Global Warehouse Distributor as a defendant in addition to C & L Global Trading, Inc. and Principals. While it made no specific allegations about Ampac dba C and L Global Warehouse Distributor, it specifically included it as a defendant in the caption, as well as in the headings under the causes of action for goods sold and delivered and open book account, thus recognizing that although such entity had not signed the written contract, it was nonetheless responsible in some way for the resulting debt. And the written agreements between GMC and Ampac themselves indicated that GMC knew there was some "play" as to the names used by the business with which it was contracting. The Warehouse Distributor Supply Agreement, dated March 17, 1994, was between GMC and "C & L Global Trading Inc.", while the Service Parts Operations/AC-Delco Direct Account Supply Agreement, dated August 15, 1994, was between GMC and "C & L Global Whse Dist."

Based on this record, we conclude that GMC failed to establish, as an undisputed fact, that Ampac has no

standing to bring this action for breach of the contracts between GMC and C & L Global Trading, Inc. The evidence indicated that Ampac is the successor to C & L Global Trading, Inc., and as such succeeded to the rights that accompany the obligations to which it succeeded (e.g., the right to sue for breach of such contracts). (See 9 Witkin, Summary of California Law (9th ed. 1990) Corporations, § 19, p. 532 and cases cited there.) Furthermore, GMC failed to pursue the issue of the legality of the assignment of the contracts in question in its motion for summary judgment, and also failed to address the related issue of whether, allegedly knowing of the change, and continuing to supply parts to Ampac, it implicitly agreed to such an assignment.

3. *Summary Judgment as to Breach of the Implied Covenant of Good Faith and Fair Dealing*

[2] GMC also contends that Ampac may not rely on an alleged breach of the implied covenant as a basis for creating a triable issue of fact as to whether GMC breached any of the written contracts with Ampac. It takes the position that because Ampac's FAC did not contain a separate cause of action for breach of the implied covenant, Ampac was foreclosed from asserting breach of that covenant in its opposition to GMC's motion for summary judgment.

GMC is wrong. The allegations of Ampac's FAC clearly show that Ampac was alleging, as part of its breach of contract cause of action, that GMC, to the extent it had discretion under the terms of the written contracts, for example, in connection with "discounts, payment terms and volume purchase orders," was behaving "unreasonab[ly]" and "not in good faith." (FAC, ¶ 22, lines 10-12.) Although the written contracts allowed GMC to impose certain sales conditions, GMC breached the written agreements because the "sales conditions [it imposed on Ampac] were not standard, as promised, were discriminatorily enforced and were unreasonable."(FAC, ¶ 22, lines 17-20.)

As this Court noted in *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394, 272 Cal.Rptr. 387(*Careau*),"[a] ' "breach of the implied covenant of good faith and fair dealing involves something beyond *breach of the contractual duty itself* " and it has been held that "[b]ad faith implies *unfair dealing* rather than mistaken judgment .... [Citation.]" [Citation.]' [Citation.]" A breach of the implied covenant involves "a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement."(*Ibid.*) Ampac's FAC clearly alleges just such acts and results.

***9** The fact that Ampac did not allege a separate cause of action for breach of the implied covenant does not mean that it may not assert breach of the implied covenant in connection with GMC's motion for summary judgment. As we also stated in *Careau, supra,*"absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery."(*Careau, supra,* 222 Cal.App.3d at p. 1377, 272 Cal.Rptr. 387.)

Here, Ampac did not seek a tort recovery for breach of the implied covenant, and thus had no reason (nor any legal basis) to state a separate cause of action for *tortious* breach of the implied covenant. It did, however, allege *facts,* in its contract cause of action, that GMC had behaved unreasonably and unfairly in enforcing the contract terms, and thus was entitled to raise that issue in opposition to GMC's summary judgment motion.

GMC's motion for summary judgment entirely failed to address Ampac's theory that GMC had breached the implied covenant. As noted above, GMC, as the moving party, was required to negate *all* theories of liability pleaded by Ampac. (*Juarez v. Boy Scouts of America, Inc., supra,* 81 Cal.App.4th at p. 397, 97 Cal.Rptr.2d 12.)To do so, it was required to make a prima facie showing of a complete defense to a given cause of action, or to show at least one essential element of Ampac's cause of action did not exist. (*Aguilar, supra,* 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

GMC attempted to show it had a complete defense to the contract cause of action by establishing that Ampac was not a party to the contract. As discussed above, that attempt was not successful. GMC also attempted to show one essential element of Ampac's contract cause of action was missing by establishing that Ampac could not point to any specific term of the written contracts that GMC breached. In doing so,

it focused entirely on the contracts' *express* written terms, and ignored the covenant of good faith implied in every contract. In other words, it entirely failed to establish that one perfectly real, albeit, implied, term of the contracts, the implied covenant, had not been breached, and thus failed to negate *all* theories of liability pleaded by Ampac. Therefore, it was not entitled to summary judgment as to the contract cause of action.

4. *Summary Judgment of Fraud Cause of Action*

[3] Plaintiffs contend that there were triable issues of material fact that precluded granting GMC's motion for summary judgment. GMC contends that, as to each of six different allegedly false representations, Plaintiffs failed to show "scienter" and falsity. Plaintiffs, in turn, contend that GMC's representation that their cause of action was based only on six misrepresentations was itself false.[FN7]

> FN7. The six statements on which GMC focuses are (1) everyone signs the Supply Agreement; (2) everyone will get the warehouse distributor price; (3) everyone will have a warehouse facility; (4) Ampac will get promotions and assistance from GMC; (5) GMC will take care of the "TPC has no warehouse" situation; and (6) TPC will be terminated if it does not obtain a warehouse.

Plaintiffs are correct in that the misrepresentations focused upon by GMC do not accurately represent the significant misrepresentations made by GMC, as alleged in the FAC. For example, the statements focused upon as the basis for summary judgment did not include that:

***10** (1) Before Plaintiffs decided to become an AC-Delco distributor, Gerry Wilson and Jim Obremski, GMC's representatives, told John Chang that all AC-Delco warehouse distributors *had to undertake local sales, which meant having a warehouse, purchasing AC-Delco products to keep in inventory, and incurring all the other expenses related to engaging in local sales.*In other words, GMC allegedly would not even enter into a standard WDSA with a distributor until it agreed to undertake these obligations.

(2) Wilson and Obremski told Ampac that all warehouse distributors must sign *and abide by* the standard WDSA, not just sign it.

(3) Pat Cody, GMC's regional manager, told John Chang that Wilson and Kos, GMC's representatives, spoke for Cody, and could handle any problems Ampac might have with GMC. However, at the same time Cody authorized Wilson and Kos to present the standard WDSA to Ampac for signature, he also approved GMC's contract with TPC, knowing that TPC had no warehouse facility, and would not have one, because GMC had forbidden TPC to engage in local sales. In other words, GMC knew that it did not require *all* distributors to undertake local sales, nor to have a warehouse, purchase AC-Delco products to keep in inventory, and incur all the other expenses related to engaging in local sales, such as purchasing a delivery vehicle and hiring a local salesperson.

(4) Despite repeated promises by GMC's representatives that they would resolve the problem with TPC being allowed to be an AC Delco distributor without undertaking the allegedly standard requirements, it continued to allow TPC to distribute AC-Delco parts without undertaking any of such requirements.

Rather than address *these* misrepresentations, GMC simply defends its motion for summary judgment by recasting Plaintiffs' claimed misrepresentations and then arguing that they cannot be proven. GMC then argues that each such alleged misrepresentation was, in fact, true: (1) everyone *did* sign the WDSA, because John Chang admitted that even TPC signed it; (2) everyone *did* get the warehouse distributor price, because John Chang admitted that this was true; (3) everyone *did* have to have a warehouse facility, because John Chang admitted that TPC had such a facility (however, as explained below, Chang did *not* admit such fact was true); (4) Ampac *did* get promotions and assistance from GMC, because the evidence showed that Ampac did get a variety of promotions and assistance from GMC; (5) GMC *did* take care of TPC's alleged lack of a warehouse, because John Chang admitted that TPC actually did have a warehouse facility (however, as explained below, Chang did *not* admit such fact was true); and (6) there was no need to terminate TPC, because it did have a warehouse, as John Chang admitted (except he did not).

As is readily apparent, even if everyone, including TPC, *signed* the standard WDSA, such fact is not material to the fraud cause of action, given Plaintiffs' allegations that they were told that everyone also had to *abide* by the local sales requirements and related overhead, when, in fact, TPC was not required to do so. And, even if everyone *did* receive the warehouse distributor price, this does not negate Plaintiffs' allegation that they were told that every distributor that signed the standard WDSA, in order to get the same beneficial warehouse distributor prices, was subject to the same local sales requirements' burdens, and that TPC was allowed to get the benefit of the pricing arrangement without undertaking the burden of local sales.

***11** As to the misrepresentations that (1) everyone was required to have a warehouse facility, and (2) GMC *would* take care of the TPC no-warehouse situation, there *was* a material factual dispute because the evidence did show that TPC did *not* have a warehouse *within the meaning of the WDSA requirements* imposed on others. Contrary to GMC's contentions, John Chang did *not* admit that TPC actually had *this kind of warehouse facility.*

The GMC evidence showed nothing more than that TPC had its AC-Delco parts delivered to a small section of one of two freight-forwarding companies' warehouses, and that each freight-forwarding company would then notify TPC's principal that the AC-Delco shipment had arrived. TPC's principal and his wife would go the freight-forwarding company and package the parts to be forwarded to TPC's overseas clients.

Certainly, the fact that these warehouse facilities were not owned by, leased by, nor under the control of, TPC, created a triable issue of material fact as to whether TPC "had" or "maintained" a warehouse facility within the meaning of the requirements imposed on all other signatories of the standard WSDA. The evidence *also* showed that the purpose of maintaining or having a warehouse facility was to be able to *stock* an *inventory* of AC-Delco parts, which would be available for *local* sales (using a local salesperson to drum up business) and *local* delivery (using the purchased delivery vehicle required of its distributors by GMC). This evidence, in turn, created a reasonable inference of material fact that TPC's use of the freight-forwarding warehouses as locations at which to store its parts until they could be shipped overseas did not constitute "having" or "maintaining" a warehouse in the sense such a facility was required of other warehouse distributors who signed GMC's standard WDSA.[FN8] And this same evidence shows that GMC's "undisputed material fact" that there was no need to terminate TPC as a warehouse distributor, because it *did* have or maintain a warehouse, was, in fact, disputed.

> FN8. Thus, GMC's evidence that TPC "used" a warehouse to "store" its parts before "shipping" them does not go to the alleged heart of the reason for maintaining a warehouse. A warehouse can be used to store parts before shipping them overseas. However, Plaintiffs alleged that the *reason* distributors were required to maintain warehouses of a size approved by GMC was so that distributors could "stock" an "inventory" of parts that would be available for *local* sale and *local* delivery. The freight-forwarding shippers' warehouses were merely used by TPC to store its parts before shipment to foreign markets.

As to GMC's "undisputed material fact" that Ampac *did* get promotions and assistance from GMC, such fact, too, is simply not material to the fraud cause of action pleaded by Plaintiffs. The gravamen of Plaintiffs' fraud cause of action is not that *they* did *not* get whatever benefits they earned under the standard WDSA, but rather that *TPC received such benefits without earning them.*So the "undisputed material fact" that Ampac received promotions and assistance is simply not material; what *would* be material is if Ampac and TPC *each* received only the promotions and assistance they had *earned* by complying with the same requirements imposed on all warehouse distributors. GMC did not establish that this was the case.

Thus, even using only the misrepresentations selected by GMC, the motion for summary judgment should not have been granted. In addition, the motion simply failed to address *all* of the *material* facts that formed the basis for Plaintiffs' fraud cause of action. GMC also, however, raises two additional bases upon which it contends its motion as to the fraud case of action should be upheld: (1) the alleged lack of evi-

dence of "scienter," and (2) the alleged lack of recoverable damages, given the WDSA's provision limiting GMC's liability for damages.

***12** As to the scienter issue, GMC contends that there is no evidence that Wilson knew that the statements attributed to him were false, those statements being that those listed in footnote 6, *post.*Plaintiffs dispute this, and contend there was substantial evidence Wilson knew or should have known that the statements were false.

However, we need not even reach the issue of whether there was evidence of scienter. As noted above, the statements attributed to Wilson do not, by themselves, constitute the fraud alleged by Plaintiffs. So, even if Wilson lacked scienter (i.e., he did not know such statements were false when he made them), such fact would not entitle GMC to summary judgment as to the fraud cause of action. Furthermore, as also noted above, the statements that GMC selectively chose to address were simply not *material* facts. For example, Wilson's lack of "scienter" when he made such statements does not make such statements material.

As to the alleged lack of damages, the WDSA contains Section 6, "Limitation of Liability." It provides that "[I]n no event will either party be liable to the other for special, incidental, or consequential damages, loses or expenses."GMC contends that the presence of this provision means that Plaintiffs cannot recover any damages for fraud, and hence the motion must be granted as to such cause of action regardless of the other problems noted above. However, as Plaintiffs point out, Civil Code section 1668 provides that contractual attempts to exempt a party from liability for its own fraud or intentional wrongdoing are against public policy (*Armendariz v. Foundation Health Psychcare* (2000) 24 Cal.4th 83, 100, 99 Cal.Rptr.2d 745, 6 P.3d 669), and such "[c]ontractual releases of future liability for fraud and other intentional wrongs are invariably invalidated."(*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 71, 70 Cal.Rptr.2d 85.)In other words, Section 6 does not preclude Plaintiffs from recovering damages for *fraud.*

Accordingly, the trial court erred by summarily adjudicating Plaintiffs' cause of action for fraud in favor of GMC, because GMS failed to negate all the material facts relevant to the misrepresentation element of Plaintiffs' fraud cause of action, and because GMC also failed to show, as a matter of law, that there was a complete defense to the fraud cause of action.

5. *Summary Judgment of Unfair Business Practices Cause of Action*

[4] Although Plaintiffs alleged several different theories of unfair business practices, based on different section of the Business and Professional Code, as well as a cause of action under the Cartwright Act. On appeal they have abandoned all such theories except for the one based on Business and Professions Code section 17045. That code section makes it an unlawful practice to secretly give one purchaser payments, rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or special services or privileges, that are not also extended to *all* purchasers purchasing upon like terms and conditions, when such favoritism injures the favored purchaser's competitors and tends to destroy competition.

***13** Thus, under section 17045, unlawful favoritism may consist of giving one purchaser a volume discount supposedly given to all-but without requiring the favored entity to actually purchase the requisite volume. (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc.* (1993) 16 Cal.App.4th 202, 214, 20 Cal.Rptr.2d 62.)This is an unlawful practice even if the favored competitor does not *know* it is receiving a secret, unearned discount, so long as the discount tends to destroy competition (*ibid.*), and even if it does not *intend* that competition be destroyed. (*Id.* at p. 215, 20 Cal.Rptr.2d 62.)

GMC contends that summary adjudication was properly granted as to this cause of action because (1) TPC *did* operate a warehouse (and thus was eligible for all the benefits it received); (2) TPC *did* earn the discounts it received; and (3) the market-by-market funds TPC received were equally available to all warehouse distributors, and were not the subject of any conspiracy between GMC and Ampac.[FN9]

FN9. GMC also implies that Plaintiffs' failure to establish any evidence of a *conspiracy* to violate section 17045 entitles GMC to summary judgment. However, an *agreement* to violate section 17045, in other words, a

> conspiracy, is not an element of that section, and, as previously noted, the competitor receiving favorable treatment need not even be *aware* it is being favored, let alone *agree* to such favoritism, for a violation to have occurred. (*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc., supra*, 16 Cal.App.4th at p. 214, 20 Cal.Rptr.2d 62.)

All these contentions may be disposed of by one fact: that Plaintiffs created a triable issue of material fact as to whether TPC actually "maintained a warehouse," in other words, one of a large enough size to *stock* an *inventory* for *local* distribution so as to create the need for such accoutrements as a local salesperson and local delivery vehicle. If, in fact, TPC was *not* required to comply with the warehouse-related burdens imposed upon other warehouse distributors, yet was still receiving the benefits, discounts, and market-by-market funds the other distributors were *earning* by assuming such burdens, then a factual basis for the claim that GMC was violating section 17045 exists.

Because GMC failed to establish that there were not triable issues of material fact as to Plaintiffs' cause of action for violation of section 17045, the trial court erred by summarily adjudicating this particular cause of action against Plaintiffs.

CONCLUSION

The trial court improperly granted the motion of GMC (joined in by TPC) for summary judgment against Ampac and the Principals as to their causes of action for breach of contract, fraud, and unfair business practices pursuant to Business & Professions Code section 17045.[FN10] We will therefore reverse and remand this matter for further proceedings. In view of this conclusion, we need not reach or discuss plaintiffs' claim that they were improperly denied a continuance in order to conduct further discovery. We do not anticipate that this issue will reoccur upon remand.

> FN10. As the trial court noted, Plaintiffs' cause of action for declaratory relief was derivative and, as to that count, the motion was also granted. Thus, our reversal will necessarily also apply to this count.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings not inconsistent with the views expressed herein. Ampac and the Principals are entitled to their costs on appeal.

We concur: KITCHING and ALDRICH, JJ.
Cal.App. 2 Dist.,2002.
Ampac JV Group, Inc. v. General Motors Corp.
Not Reported in Cal.Rptr.2d, 2002 WL 31623611 (Cal.App. 2 Dist.)

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