

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions**

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Bankruptcy No. 02 B 2474  
Date of Issuance: November 1, 2005  
Judge: Susan Pierson Sonderby

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
KMART CORPORATION, et al.,	)	Case No. 02 B 2474
	)	
Debtors.	)	Hon. Susan Pierson Sonderby

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed copies of the attached **FINDINGS OF FACT AND CONCLUSIONS OF LAW** and **ORDER** to the persons listed on the attached service list this 1st day of November 2005.

\_\_\_\_\_  
Vina-Gail R. Springer  
Secretary

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
KMART CORPORATION, et al.,	)	Case No. 02 B 02474
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Susan Pierson Sonderby

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes to be heard on the Objection of Kmart Corporation, *et al.*, to Claim No. 34123 filed by Angola Wire Products, Inc. (“Angola Wire”). An evidentiary hearing on the Objection was held and the court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable herein by Federal Bankruptcy Rule 7052. For the reasons stated herein, an order will be entered allowing the Angola Wire claim as an unsecured nonpriority claim in the amount of \$1,153,963.57.

**I. FINDINGS OF FACT**

**Procedural Background**

At the times pertinent hereto, Kmart Corporation (“Kmart”) was a Michigan corporation that maintained its principal place of business in Troy, Michigan. Angola Wire is an Indiana corporation, engaged in the business of fabricating merchandise display racks and other metal products used in the retail industry.

Kmart and thirty-seven of its affiliates filed separate voluntary petitions for reorganization under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (“Bankruptcy Code”) on January 22, 2002 (“Petition Date”). On July 26, 2002, Angola Wire filed proof of claim number 34123 against the Kmart estate, asserting an unsecured nonpriority claim in the amount of \$1,285,801.20. (the “Angola Wire Claim”).

On April 23, 2003, this court confirmed the First Amended Joint Plan of Reorganization of Kmart Corporation and its Affiliated Debtors and Debtors-in-Possession (the “Plan”). On February 2, 2004, Kmart filed the Reorganized Debtors’ Nineteenth Omnibus Objection to Claims (the “Objection), which included an objection to the Angola Wire Claim. An evidentiary hearing on the Objection was held and the parties thereafter submitted Proposed Findings of Fact and Conclusions of Law.

### **The Origin and Components of the Angola Wire Claim**

The fixtures manufactured by Angola Wire are composed of steel wire, rods, bars and sheet metal and are used by retailers such as Kmart to store and display items for sale to the retail customer. For approximately thirty years leading up to the Petition Date, Angola Wire consistently supplied Kmart with various types of metal display fixtures for installation in Kmart stores throughout the nation.

The fixtures were made pursuant to Kmart’s design specifications. The process began when personnel in Kmart’s merchandising departments identified a need for a certain type of display fixture and communicated that need to Kmart’s fixture purchasing department. Designers in the Kmart fixture purchasing department then composed and distributed sketches of the needed item to outside fabricators such as Angola Wire.

After sketches were distributed to Angola Wire, Kmart and Angola Wire together designed a prototype fixture. The prototype was reviewed, tested, and if satisfactory, approved.

After the approval of the prototype, the manufacture and delivery of the fixture followed a typical sequence, involving the preparation of certain documents. First, Kmart provided Angola Wire with forecasts of how many Kmart stores needed the particular fixture. Angola Wire then reviewed the forecasts and prepared and submitted a spreadsheet to Kmart estimating the number of fixtures required for each store.

After the store fixture requirements were established, Kmart sent Angola Wire a form standard pre-printed document drafted by Kmart and labeled “production commitment” (the “Production Commitment”). The parties used different forms of Production Commitments throughout their relationship. In the 1990's, they instituted the use of the form of the Production Commitment at issue here, which remained the same for each order, except for the price, quantity and description of the fixtures covered by the particular Production Commitment, as well as an “in-store date” by which the fixtures had to be produced by Angola Wire so as to be available to Kmart.

Two attachments were appended to and incorporated in the Production Commitment (at least with respect to the Production Commitments forming the basis of the Angola Wire Claim): a detailed listing of the fixtures covered by the Production Commitment and the reverse page of a Kmart form purchase order entitled “Terms and Conditions.” The inventory listing was in landscaped chart form describing various items with corresponding item numbers, *e.g.*, white wire baskets, photo album racks, and T-shirt bag racks. *See* Trial Exhibit (hereinafter, “Ex.”) 6. Adjacent to the listing of the items in rows are numerous informational columns. Half of the columns are titled “projected quantity requirements.” The remainder are captioned “production commitment.” Those later production commitment columns are broken down into price per unit, total price and the in-store date columns. Using the white wire baskets as an example, the chart indicates that Kmart projects that it will need a total of 426 white wire baskets on Ex. 6 by the in-store date. Angola Wire had 376 of those baskets on hand (from prior orders). Accordingly, in order to ensure that Kmart would have 426 wire baskets available by the in-store date, Angola Wire committed to produce 50 more of them at a unit price of \$2.39 for a total price of \$119.50.<sup>1</sup>

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When issuing Production Commitments to its fixture vendors, Kmart would authorize the vendor to produce quantities of items above the actual need to account for refurbishments, prospective expansions, broken items and replacements. As the inventory began to run out, Kmart would issue a new Production Commitment to maintain an inventory level cushion.

The Production Commitment was signed by a Kmart buyer and a manager of the department responsible for fixture purchasing or other person with the authority to sign the Production Commitment.

During the Summer of 2001, Kmart ceased relying on paper Production Commitments. Kmart began using e-mail correspondence to obtain commitments from its suppliers, including Angola Wire. One such electronic Production Commitment relating to the order of magnetic sign displays is involved in this dispute.<sup>2</sup>

Upon receipt of a Production Commitment, Angola signed and returned the Production Commitment to Kmart and commenced the production of the items indicated therein by the “in-store date” specified. Thereafter, Angola Wire held the manufactured fixtures at its facilities while awaiting Kmart’s shipping instructions.

Those instructions came in the form of a standard form Kmart purchase order, which referenced the matching Production Commitment and indicated to which store the goods were to be delivered by Angola Wire. Upon receipt of the “purchase order,” Angola Wire shipped the fixtures designated therein to the indicated Kmart store. Upon shipment of the goods, Angola Wire issued an invoice (net 30 days) to Kmart at the price listed in the Production Commitment.

Angola Wire would often have Kmart inventory at its facilities after the in-store date. As for this undepleted inventory, rather than directing shipment, Kmart requested Angola Wire to maintain that inventory as “active inventory” for Kmart’s future use after the in-store date. If Kmart decided to call for shipment of items of active inventory, an invoice was issued at the full list price.

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Kmart initially raised a statute of frauds argument with respect to the e-mail production commitment, which was later abandoned. Accordingly, the court will not distinguish between the e-mail and written Production Commitments.

If Kmart eventually decided not to direct shipment of the “active inventory,” those items would be considered by the parties as “discontinued when out” or “obsolete” inventory (hereinafter, “Obsolete Inventory”). Angola Wire disposed of Obsolete Inventory in a manner acceptable to Kmart, either by resale to third parties or scrapping. It should be noted, however, that some of the Obsolete Inventory made according to Kmart specifications was unusable by other retailers. For example, in its store aisles, Kmart used a 30-inch long steel structure called a gondola. Peg board or slat wall was slid into the gondola upon which as least some of the display fixtures that Angola Wire manufactured were affixed. Other retailers used a 48-inch gondola that would not accommodate a fixture fabricated for a 30-inch gondola, making such fixtures undesirable for other retailers.

Representatives of Angola Wire and Kmart worked closely together to monitor the manufacture, delivery and disposition of the fixture inventory covered by the Production Commitments. They met regularly on at least a monthly basis at Kmart headquarters to monitor their dealings and track the inventory. Angola Wire prepared and provided Kmart with an “Inventory Status Report,” which was generated by its inventory control system. *See e.g.*, Exs. 9-15. Those reports provided detailed lists of the amount and type of inventory being held by Angola Wire awaiting delivery instructions from Kmart. Once an item had been manufactured for Kmart, it would be listed on the Inventory Status Reports until Kmart paid for it in full and it was either shipped to a Kmart store, scrapped, or otherwise disposed of by Angola Wire. The Inventory Status Report attached to the Angola Wire Claim lists the inventory that was manufactured pursuant to Production Commitments, but not paid for by Kmart as of the Petition Date.

Angola Wire also met weekly with Kmart to discuss issues relating to production. At those meetings, Angola Wire provided Kmart with “Weekly Reader” reports listing open items and various issues. *See e.g.*, Exs. 16-34. The Weekly Reader would be updated with comments from the meeting and would be used at the following meeting.



While the disposition of any undepleted inventory was a major focus of discussion at the meetings throughout their dealings together, the payment of the list price was not. In fact, the evidence indicates that with only one exception in thirty plus years, neither party approached the other to revise the price amount listed in the Production Commitment, up or down.<sup>3</sup> Kmart always paid Angola Wire the price listed in the Production Commitment, regardless of whether the inventory was shipped by the in-store date, shipped after the in-store date, or obsoleted and scrapped. At the Petition Date, Angola Wire was holding \$1,112,085.79 in unshipped and unpaid inventory that was being held by Angola Wire either pursuant to a still-ongoing Production Commitment or as “active inventory” to fill future orders (the “Claimed Inventory”). When it became clear that Kmart would reject the outstanding Production Commitments, Angola Wire attempted to sell but ended up scrapping \$1,071,115 worth of the Claimed Inventory. The cost of delivering the scrapped inventory to the scrap dealer was greater than the amount received from the scrap dealer. Angola Wire incurred \$20,250 in storage costs associated with leasing extra space to hold the Claimed Inventory, while it attempted to resell it and prior to scrapping it.

The parties agree that at the Petition Date, Angola’s Claim was based on executory contracts within the meaning of section 365 of the Bankruptcy Code. The parties further stipulate that those contracts were rejected by Kmart pursuant to Article VII, § 8.1(c) of the Plan and consequently, Angola is entitled to a claim for damages resulting from the rejection.

The Angola Wire Claim in the total amount of \$1,153,963.57<sup>4</sup> has three components described as follows:

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<sup>3</sup>The only exception in which Angola Wire was not paid in full was when it agreed to scrap a few remaining items of an original run of an active part, the KM 3029 Sign Holder, as a *quid pro quo* for a much larger order of a modified version of the same item.

<sup>4</sup> This amount differs from the total amount asserted on the Angola Wire Claim (\$1,285,801.20) because certain amounts reflected in the proof of claim were paid after the Petition Date as reclamation claims. See explanation on Exhibit A to the Angola Wire Claim. Ex. 1.

1. \$1,112,085.79 in inventory purchased by Kmart pursuant to Production Commitments;
2. \$21,627.78 in unpaid shipped prepetition goods; and
3. \$20,250.00 in storage costs asserted as incidental damages.

Kmart stipulates that the second component of the Angola Wire Claim, \$21,627.78 in unpaid shipped prepetition goods, can be allowed as a general unsecured claim. Kmart disputes the remainder of the Angola Wire Claim.

## **II. CONCLUSIONS OF LAW**

### **Jurisdiction and Venue**

This court has jurisdiction over this matter which concerns the allowance of a claim asserted against the estate of a bankrupt debtor. 28 U.S.C. § 1334(b). This is a core proceeding. 28 U.S.C. § 157(2)(B). Venue is proper in this court. 28 U.S.C. § 1409(a).

### **Determination and Allowance of Claim**

Section 502(b) of the Bankruptcy Code provides that when an objection to a claim is made, the court shall determine the amount of the claim and allow the claim in that amount, subject to certain exceptions not applicable here. 11 U.S.C. § 502(b). A claim arising from the rejection of an executory contract is determined and allowed under section 502(b), “the same as if such claim had arisen before the date of the filing of the petition.” 11 U.S.C. § 502(g).

“Creditors’ entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor’s obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.” Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20, 120 S.Ct. 1951, 1955, 147 L.Ed.2d 13 (2000). The parties here agree that Michigan substantive law, particularly Michigan’s version of the Uniform Commercial Code, MICH. COMP. LAWS §§ 440.1101 *et seq.*, (the “UCC”), governs the determination of the amount of the Angola Wire Claim. The parties

further agree that they are both “merchants” within the meaning of the UCC.

To arrive at the allowable amount of the Angola Wire Claim, the court needs to determine the amount of Angola Wire’s damages for breach of the contracts, *i.e.*, the outstanding Production Commitments, under the UCC. The UCC provides for four alternative formulas to measure a seller’s damages: (1) the resale measure of damages (MICH. COMP. LAWS § 440.2706); (2) the difference between the contract price and market price (MICH. COMP. LAWS § 440.2708(1)); (3) lost-profit claims (MICH. COMP. LAWS § 440.2708(2)); or (4) the purchase price (MICH. COMP. LAWS § 440.2709). The UCC further provides that incidental damages are recoverable by the seller under any measure of damages. MICH. COMP. LAWS § 440.2710. Section 2-710 defines incidental damages as “any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.” Id.

As with all remedies under the UCC, the assessment of seller’s damages should be liberally administered to put the seller in as good a position as if the buyer had fully performed. MICH. COMP. LAWS § 440.1106(1). Moreover, as a general proposition, “the UCC is to be liberally construed and applied to promote its underlying purposes and policies.” Shurlow v. Bonthuis, 576 N.W.2d 159, 163 (1998).

In this matter, Angola Wire contends that the result is the same under any measure of damages; Angola Wire’s damages are equal to the price of the goods stated in the Production Commitments supplemented with incidental damages under section 2-710. Section 2-709(b), which sets out an action for a price, provides,

When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section [2-710], the price

...

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

MICH. COMP. LAWS § 440.2710.

Kmart does not contest the propriety of using the price method of assessing Angola Wire's damages. The court adopts that method as the evidence clearly indicates that Angola Wire made reasonable efforts to resell the inventory covered by the outstanding Production Commitments at a reasonable price, by among other things, contacting retailers such as Staples, Office Max, Colorbrite and PetSmart, fixture manufacturers and fixture liquidators. Moreover, at least with some of the inventory fabricated for use on Kmart's atypical gondolas, efforts for resale would be unavailing. The major dispute here concerns the *amount* of the recoverable price. The price that Angola Wire can recover as seller damages depends upon what the price term was in the parties' contract for the sale of goods. As a matter of general contract interpretation, when construing a contract it is the court's principle function to determine and enforce the intent of the parties. Wonderland Shopping Center Venture L.P. v. CDC Mort. Capital, Inc., 274 F.3d 1085, 1092 (6th Cir. 2001).

The words the parties use, however, often do not clearly indicate their intent and may be considered ambiguous. Under Michigan law whether a contract is ambiguous or not is a question of law. Port Huron Educ. Ass'n MEA/NEA v. Port Huron Area School Dist., 550 N.W.2d 228, 237 (1996). A contract is ambiguous if "its words may reasonably be understood in different ways." Raska v. Farm Bureau Ins. Co., 314 N.W.2d 440, 441 (1982). "[I]f the contract is unclear or open to multiple interpretations, then interpretation is a question of fact." Ruth v. Superior Consultant Holdings Corp., 2000 WL 1769576, \* 9 (W.D. Mich. Oct. 16, 2000)(citing UAW-GM v. KSL Recreation Corp., 228 Mich. 486, 491 (Mich. App. 1998)). Courts are allowed to go beyond the four corners of the document and consider extrinsic evidence when there is an "internal inconsistency" within a contract. Universal Underwriters Ins. Co. v. Kneeland, 628 N.W.2d 491,

496 (2001). So, in cases of ambiguity resulting from multiple interpretations, lack of clarity, or internal inconsistency, the court is allowed to consider parol or extrinsic evidence to glean the parties' intent.

When the disputed contract is one for the sale of goods, the UCC allows the court to consider the course of dealing, course of performance and the usage of trade even when that contract is unambiguous. Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 363 (3rd Cir. 1987), *cert. dismissed* 506 U.S. 1042 (1992)(decided under Michigan law); Michigan Bean Co. v. Senn, 287 N.W.2d 257, 261 (Mich. Ct. App. 1979).<sup>5</sup> The court, however, can only consider such evidence if it explains or supplements the contract terms. MICH. COMP. LAWS § 440.2202. Evidence that contradicts the terms of the unambiguous contract is out of bounds. Id. To sum up, course of dealing and usage of trade evidence can be utilized to clarify or explain an ambiguous sale contract term, explain an unambiguous sale contract term, or supply a term to an unambiguous sale contract.

In this matter, Kmart contends that the unambiguous terms of the Production Commitments provide that only when Kmart sent the purchase orders directing delivery of the fixtures and Angola Wire delivered those fixtures was Kmart liable for the full list price. In other words, Kmart had no obligation to pay anything for the manufactured items being held at Angola Wire's facilities on the Petition Date pursuant to an outstanding Production Commitment. Rather, the only obligation Kmart had at that point was to negotiate revised pricing, and had such a negotiation taken place,

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Course of dealing is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." MICH. COMP. LAWS § 440.1205(1). Usage of trade is "any practice or method of dealing having such regulatory of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." MICH. COMP. LAWS § 440.1205(2). "Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determining the meaning of the agreement." MICH. COMP. LAWS § 440.2208(1).

the price would have been set at \$561,000. Kmart argues that the thirty-year course of dealing of never negotiating a revised price and always paying list price regardless of the disposition of the inventory (such as those times when a purchase order directing shipment was not issued), cannot be considered because that course of dealing contradicts the express unambiguous language of the Production Commitments. Kmart further contends that any contradictory usage of trade evidence also cannot be considered.

The court disagrees. The express terms of the standard form Production Commitments drafted by Kmart and involved here all state, *inter alia*,

You [Angola Wire] are hereby authorized to produce the attached items at the listed unit price. We expect to utilize this fixture in new and/or existing Kmarts within a period not to exceed [number varies in each Production Commitment] months. All items must be available for a [variable], in-store date. If, for any reason you cannot meet this date, please advise this office [Kmart Resource Center Design and Construction Capital Purchasing] at once.

Should this commitment not be depleted within the stated time frame, disposition or revised pricing may be negotiated.

As with all Kmart purchase orders and commitments, the attached purchase order terms and conditions dated (1/96) will apply.

Ex. 6.

The “purchase order terms and conditions dated (1/96)” attached to the Production Commitments provide, *inter alia*,

Vendor’s [Angola Wire’s] commencement of or promise of shipment of the Merchandise shall constitute Vendor’s agreement that it shall deliver the Merchandise in accordance with terms and conditions of the applicable Order [which is defined in the preamble as “each Purchase Order issued to Vendor by Buyer”].

...

Vendor acknowledges and agrees that any sales forecasts, quantity purchase estimates or similar projections received from Buyer are not purchase commitments of Buyer, but rather represent estimates for planning purposes only, and that Buyer shall have no obligation to

purchase or otherwise compensate Vendor for any of Vendor's finished products, or unfinished raw materials, not covered by an Order.

Ex. 8.

Reading the Production Commitment, which attaches and incorporates the terms and conditions from Kmart's form purchase order, it is clear that the Production Commitment was the functional equivalent of a typical purchase order, that is, an offer. See Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 37 F.Supp.2d 985, 992 (E.D Mich. 1999); Gulf States Utilities Co. v. NEI Peebles Elec. Products, Inc., 819 F.Supp. 538, 549 (M.D. La. 1993)(*citing*, among others, Interstate Industries, Inc. v. Barclay, 540 F.2d 868, 871-72 (7th Cir. 1976)).

Kmart's transmittal of the Production Commitment constituted its offer to buy the items that Angola Wire committed to produce at the list price and have available by the in-store date. When Angola Wire signed and returned the Production Commitment as directed to do so by the Production Commitment, it accepted the offer thereby creating the contract, giving rise to obligations on Angola Wire to produce the items and on Kmart's part to pay. See MICH. COMP. LAWS § 440.2301 (one of the main obligations of a buyer in a contract for sale of goods is to "pay in accordance with the contract.").

The express Terms and Conditions incorporated into the Production Commitment provide as much, when it states that by signing and returning the Production Commitment, Angola Wire "promis[ed] . . . shipment of the Merchandise" in accordance with the terms of the Production Commitment. Further, that promise of shipment constituted Angola Wire's "agreement to deliver the Merchandise." Finally, the Production Commitment itself demonstrates its function as a typical Kmart purchase order, when it states that "[a]s with all Kmart purchase orders the attached purchase order terms and conditions . . . will apply." (emphasis supplied).

The Production Commitment was not a "sales forecast," "quantity purchase estimate," or

“similar projection” referred to in the Terms and Conditions. Accordingly, the disclaimer of Kmart’s obligation to purchase and compensate which applied to forecasts, estimates, and projections, did not apply to the Production Commitments.

The Production Commitments do not fully address what happened when Angola Wire completed the production of the items. For example, while it was clear that Angola Wire had to manufacture the items so as to have them available to Kmart by a specified in-store date, it was not expressed how and when Kmart would instruct Angola Wire to deliver the various listed items to Kmart. It was likewise not expressed as to when Angola Wire would be paid.

Under the UCC, the shipping and payment terms are supplied by the parties’ course of dealing. As noted above, Angola Wire shipped the items when Kmart sent a form purchase order, which in their transactions together, acted as a release or delivery instructions.

As for the payment process, Kmart was invoiced when the goods were shipped prior to the in-store date. After the in-store date, decisions as to the disposition of the undepleted inventory were made as a result of the parties’ review meetings where Inventory Status Reports and Weekly Readers were distributed. If Kmart decided to have the undepleted inventory shipped, Angola Wire sent an invoice upon shipment. The record is not as clear concerning the invoice practice when the decision was made to consider Active Inventory as obsolete. There were instances, however, concerning Obsolete Inventory when Kmart asked Angola Wire for an invoice, which is indicative that invoices were sent for Obsolete Inventory.

The price amount is the thornier issue. Unlike with delivery and payment terms, which are not explicitly addressed in the Production Commitment, there are express terms in the Production Commitment concerning the price amount. Consequently, the court must determine if those terms are unambiguous or not before it can proceed to the course of dealing or usage of trade. Tigg, 822 F.2d at 362 (“[T]he process of contract interpretation must take place before application of rules



that exclude evidence.”).

First, the Production Commitment gives Angola Wire the go-ahead and Angola Wire committed itself to manufacture the subject items “at the listed price” which was denoted on the attached inventory listing chart, *e.g.*, fifty golf club displayers at \$225.97 per unit for a total price of \$11,298.50. *See* Ex. 6. The face of the Production Commitment contains a total dollar amount figure adjacent to the signature line for the Kmart buyer, which matches the total price figure calculated in the attached inventory listing chart. The Production Commitment further provides that if the Production Commitment is not “depleted in the stated time frame,” revised pricing “may be” negotiated.

There are two reasonable readings of the contract *vis-a-vis* the purchase price. The Production Commitment could mean that Angola Wire would produce the items at the listed unit price and be paid the listed price totaled on the face of the Production Commitment, with a mere possibility that either party could seek to revise the price should the Production Commitment not be depleted. This did not necessarily mean that there would be such discussions or such a revised price. On the other hand, it is also reasonable to read that the parties’ had an expectation that the price of undepleted inventory would be negotiated.

The Production Commitments are reasonably susceptible to more than one meaning and thus ambiguous as to the price amount. *See Dilusso Bldg. Co., Inc. v. Concord Indus. Group*, 2003 WL 462425, \*1 (Mich. Ct. App. Feb. 21, 2003)(unpublished)<sup>6</sup>(affirmed trial court’s conclusion that contract providing that buyer “may exercise” an option by giving written notice by mail, while at the same time containing a provision that service was complete upon mailing or delivery was ambiguous as a matter of law because it could be read to require service by mail as the only way

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Rule 7.215 of Michigan Court Rules of 1985 provides that an unpublished opinion is not binding under the rule of *stare decisis*. There appear to be no prohibitions, however, against citing to unpublished opinions as persuasive.

to complete delivery or the contract could be read to allow completion of service upon mailing or some other type of delivery).

It can also be said that the Production Commitments lack clarity on or are internally inconsistent with respect to the price amount. The authorization to produce the goods at the listed prices referenced in the attached chart and totaled on the front of the Production Commitment is inconsistent with the possibility of a subsequent negotiation of the price.

Given the existence of possible multiple interpretations, lack of clarity, or internal inconsistency, the court can consider extrinsic evidence such as the parties' course of dealing and usage of trade. *See Benedict Mfg. v. Aeroquip Corp.*, 2004 WL 1532280, \* 2 (Mich. Ct. App. Jul. 8, 2004)(unpublished)(extrinsic evidence was properly admitted to prove the existence of an ambiguity concerning two apparently disparate quantity terms in a purchase order and to clarify that ambiguity). In this matter, the evidence of thirty years of consistent payment of full list price upon issuance of an invoice (with only one exception) is, to say the least, particularly persuasive of the parties' intent that Angola Wire be paid for all goods manufactured under a Production Commitment, regardless of their disposition.

The usage of trade evidence in the record is consistent with that course of dealing.<sup>7</sup> Michael Heroy, president of Angola Wire and an active participant in the relevant industry, testified that it was customary that "jobbers" that manufactured custom goods to specification, such as Angola Wire, expected to be paid in full for all goods it was authorized to manufacture. The court finds his un rebutted testimony credible. Kmart offered no plausible conflicting usage of trade evidence.

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Michigan law conditions use of usage of trade evidence on a showing that the parties knew or should have known of that usage. MICH. COMP. LAWS § 440.1205(3). Angola Wire has made such a showing. Its witness has been involved in the store fixture industry since 1975 and is a member of various trade organizations. Moreover, Kmart had numerous dealings with various members of the fixture industry who are members of the same trade organizations as Angola Wire.

Finally, even if the Production Commitments were not ambiguous, the course of dealing and usage of trade evidence in this matter can be considered because that evidence does not contradict an express term of the Production Commitment. For example, the Production Commitment could have definitively stated that the parties had to negotiate a revised price for undepleted inventory and absent such a negotiation, Kmart was not liable. A practice of never negotiating and always paying full price for all goods manufactured under the Production Commitment, regardless of ultimate disposition, would contradict such an express term. No such contradiction is present here.

Having determined that the parties' agreement was that Kmart pay full list price for the Claimed Inventory, the court concludes that Angola Wire may recover that price, \$1,112,085.79, as damages. The court also concludes that Angola Wire is entitled to recover the storage costs totaling \$20,250.00 incurred when it was required to rent space in a nearby building at \$1,125 per month for 18 months to store the Claimed Inventory while in the process of attempting to resell it. MICH. COMP. LAWS § 440.2710; S.C. Gray, Inc. v. Ford Motor Co., 286 N.W.2d 34, 43-44 (Mich. Ct. App. 1979).

### **III. CONCLUSION**

As previously noted, Kmart stipulated to \$21,627.78 of the Angola Wire Claim prior to trial, that amount will be added to the amount determined here. For all of the foregoing reasons, the court determines that the amount of the Angola Wire Claim is \$1,153,963.57. A separate order will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure made applicable herein by Rule 9021 of the Federal Rules of Bankruptcy Procedure, allowing claim number 34123 filed by Angola Wire Products, Inc. as an unsecured nonpriority claim in the amount of \$1,153,963.57.

Dated:

ENTERED:

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Hon. Susan Pierson Sonderby  
United States Bankruptcy Judge

